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Summary record of the 1388th meeting

Topic:
Most-favoured-nation clause

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developing countries in matters other than international trade.[11] It was true that the developing countries required help in matters other than trade: they needed cheap credits or soft loans, outright money grants, technical assistance and know-how. Those matters, however, did not lend themselves to the operation of the most-favoured-nation clause and there was no occasion to establish any exception for them on the lines of article 21. He had not seen the most-favoured-nation clause in any agreement on matters other than trade which would lend themselves to such an exception. Establishment treaties often contained most-favoured-nation clauses, but the developing countries were not particularly interested in their nationals being given easier conditions of establishment, or the right to practise certain professions in the developed countries. Another example was that of consular conventions, which often contained a most-favoured-nation clause. The developing countries were not in any way interested in a preferential treatment in that respect; they were quite satisfied with the level of consular facilities, privileges and immunities granted to all countries.

57. As far as he knew, there had not been any desire expressed by developing countries, either in international organizations or elsewhere, for preferential treatment in matters other than international trade. There was perhaps one field in which such a desire was conceivable, namely that of shipping: developing countries might well wish to have special advantages for their merchant fleets, over and above those which were obtained by other countries. It should be noted, however, that if such preferential treatment was extended to the shipping of developing countries, its benefit might really go to multinational companies using the flags of these countries as flags of convenience.

58. A similar situation could arise in regard to international trade itself. It was only where a foreign trade monopoly operated under strict State supervision—as in socialist countries—that the benefit of the preferential treatment was certain to go to the developing country itself and not to outside interests which had set up companies under its laws.

59. The point raised by Mr. Pinto had been answered by Mr. Kearney;[12] it could be suitably dealt with in the commentaries to articles 5 and 15.

60. He would refer to article 21 again when he introduced, at the next meeting, section 4 of chapter II of his report, "Most-favoured-nation clauses in relation to trade among developing countries".

61. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 21 to the Drafting Committee for consideration in the light of the suggestions made during the discussion.

It was so agreed.[13]

The meeting rose at 1 p.m.

[11] See para. 8 above.

[12] See para. 28 above.

[13] For consideration of the text proposed by the Drafting Committee, see 1404th meeting, paras. 9-11.

1388th MEETING

Friday, 11 June 1976, at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Most-favoured-nation clause (*continued*) (A/CN.4/293 and Add.1, A/CN.4/L.242)

[Item 4 of the agenda]

PROVISIONS IN FAVOUR OF DEVELOPING STATES: MOST-FAVOURED-NATION CLAUSES IN RELATION TO TRADE AMONG DEVELOPING COUNTRIES

1. The CHAIRMAN invited the Special Rapporteur to introduce section 4 of chapter II of his seventh report (A/CN.4/293 and Add.1).

2. Mr. USTOR (Special Rapporteur) reminded the Commission that in discussing article 21, he had concluded that in the present state of economic relations in the world it was only in the sphere of trade that the draft articles could establish special rights for developing countries in the form of exceptions to the operation of the most-favoured-nation clause.[1] He now wished to put forward some thoughts on further provisions to assist developing countries which might be considered at a later stage. The Commission would have to consider, in particular, whether a rule could be framed establishing an exception to the operation of the most-favoured-nation clause in regard to advantages granted by developing countries to each other, a question which had been raised by the representative of Yugoslavia in the Sixth Committee of the General Assembly.[2]

3. As explained in his report, he had found a considerable number of instruments, resolutions and declarations which expressed the wish that developed countries should help to promote co-operation among developing countries and, to that end, waive the benefit of the most-favoured-nation clause in regard to favours accorded by one developing country to another. An important example was the "Concerted declaration on trade expansion, economic co-operation and regional integration among developing countries" adopted at the second session of UNCTAD in 1968, which contained "declarations of support" by the developed market-economy countries and the developed socialist countries.[3] In GATT, it had been established that, in certain very strictly defined circumstances, the developed countries could be asked to waive their most-favoured-nation rights with regard to

[1] See 1387th meeting, para. 56.

[2] See A/CN.4/293 and Add.1, para. 108.

[3] *Ibid.*, para. 114.

preferential treatment granted by one developing country to another. A consensus was thus gradually developing in favour of an exception to the operation of the most-favoured-nation clause in the case of advantages granted by developing countries to each other.

4. There were, however, two main obstacles to the acceptance of a rule on those lines. The first was the absence of any precise definition of the terms "developing country" and "developed country". The second, and more important one, was that, unlike the situation regarding article 21, no consensus on such an exception had developed in international organizations, owing to the great difficulties it involved.

5. In addition to the various decisions mentioned in his report, he wished to draw attention to resolution 3362 (S-VII) of the General Assembly, part VI of which dealt with co-operation among developing countries and called for further studies on that subject to be carried out both by the United Nations and by such bodies as UNCTAD and UNIDO. Those further studies might ultimately provide a basis for the suggested exception but the Commission could not adopt a rule on it in the absence of clear support from the international economic community, such as the rule in article 21 had attracted.

6. In his report he had put forward tentative wording for the exception stipulating that:

> A developed beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a granting developing State to a third developing State for the purpose of promoting the expansion of their mutual trade.[4]

That wording, however, was only intended to give a rough indication of the kind of provision that might be adopted, and of the safeguards required; it could certainly not be accepted at present as the expression of a legal rule.

7. An example of the kind of situation the Commission had to consider was provided by Brazil, a developing country with a large market in which other developing countries competed with their exports. If Brazil granted some exceptionally favourable treatment to an export from Mali, for example, it might well be said that a developed country should not be allowed to claim that treatment in order to compete with Mali in the Brazilian market. But the rule should not exclude competition between Mali and other developing countries for the Brazilian market. The position was different in the case of a developing country like Yugoslavia, which exported industrial products to Brazil and obtained tariff concessions on the ground that Yugoslavia was a developing country. He did not believe there was a common understanding in the international community that Hungary, which was a developed country. should not be allowed to invoke the most-favoured-nation clause in order to obtain from Brazil similar benefits for the same industrial products.

8. Problems of that kind could be settled within the framework of the institutionalized system established in GATT, which enabled the countries concerned to bargain for the exchange of reciprocal facilities. For the time being, however, a rule on the lines he had indicated could not be included in the draft articles because, unlike the rule embodied in article 21, there was no unanimous understanding in favour of it in the international community. All the relevant documents showed that there was only a desire that, where possible, developed countries should waive their most-favoured-nation rights in the interests of co-operation among developing countries.

9. Trade between developing countries themselves was only a very small fraction of world trade, so that the matter was not of the highest importance to the developing countries. Their main concern was to expand their exports to the large markets of the developed countries, so that they could build up their infant industries.

10. His conclusion was, therefore, that the Commission should state in its report that it had examined the matter, as proposed in the Sixth Committee, but that it was not in a position to draft a rule similar to that in article 21 because, in contradistinction to the situation dealt with in that article, it could not rely on general agreement among States. General Assembly resolution 3362 (S-VII) showed that the question was under study, and if a common understanding on it was reached at a later stage in the international organizations concerned, the Commission would be in a position to propose a text erecting that understanding into a binding legal rule.

11. Mr. TABIBI said he believed that the issue of co-operation among the developing countries themselves was just as important as that of co-operation between developed and developing countries. Experience in the United Nations had shown that great efforts were needed to solve the problems created by the needs of the developing world, especially in view of the population explosion. All the evidence showed that the flow of assistance from the developed countries to the developing countries was extremely slow by comparison with the needs of the developing world, which was faced with formidable problems of starvation, disease and lack of housing. At the fourth session of UNCTAD, held at Nairobi, there had been prolonged discussion concerning aid amounting to $5 billion, which would have represented only a drop in a big ocean; even that amount, however, had not been obtained.

12. It was thus quite understandable that, in the Sixth Committee, the representative of Yugoslavia should have raised the question under discussion. At the many meetings held by the non-aligned States, increasing importance was now being attached to economic problems, because of the realization that even the peace and security of the world depended on their solution. Since the flow of assistance from the developed countries was extremely slow, other ways would have to be found to help the developing countries, and one way was through co-operation among the developing countries themselves. It should be borne in mind that those countries were at different stages of development: Brazil, Yugoslavia and India, for example, had reached what economists called the "take-off" stage, and co-operation between them and other developing countries which were still a long way

[4] *Ibid.*, para. 121.

from that stage, could provide a remedy for the ills from which the latter group of countries suffered.

13. The Special Rapporteur had mentioned the desire of the developing countries to secure markets for their products in the developed countries, but the fact remained that in some cases the markets of other developing countries were of great importance. For example, Afghanistan, his own country, had for centuries carried on a prosperous trade in fresh and dried fruit with the Indian sub-continent; that trade accounted for approximately one third of its foreign exchange earnings. If no restrictions were placed on Afghanistan's reports, the traditional trade would continue. Countries which had previously been united and were accustomed to consuming each other's food products had a similar interest in maintaining traditional patterns of trade.

14. It was not only in the text adopted at the second session of UNCTAD, in 1968, but also in the pronouncements of experts from both developed and developing countries, that the need to devise means of promoting co-operation among the developing countries themselves had been emphasized. Co-operation among the Caribbean countries, which were following on a smaller scale the example of EEC, owed much to the advice of IMF experts, including a leading French expert whose advice was now being sought by Asian countries anxious to establish co-operation among themselves.

15. There were many ways in which the developing countries could fruitfully co-operate among themselves. One was to establish a clearing union through which countries of the third world could settle their trade balances in their own currencies instead of using the United States dollar or the pound sterling as the unit of account. The present practice of settling accounts in Western currencies led to the appreciation of those currencies and the depreciation of the currencies of the third world countries. At the fourth session of UNCTAD, the developing countries had been asking for aid at a time when the wealth derived from oil was being deposited in Western banks. It was estimated that two or three oil-producing countries of the third world could accumulate some $10 billion a year between them. The Western banks were actually lending that money to other developing countries at high rates of interest. If the developing countries were to use their own currencies in their reciprocal transactions, and if those which had surplus funds were to lend them to the others, there would be no need to beg for assistance, and the development of the third world would be speeded up.

16. The need to promote co-operation among developing countries and to give additional momentum to trade between them had been stressed in the Kabul Declaration of December 1970,[5] and the same ideas had since found expression in General Assembly resolution 3362 (S-VII), adopted in September 1975.

17. He proposed that the Commission's report should contain not only the elements indicated by the Special Rapporteur, but also the text tentatively put forward in paragraph 121 of his seventh report, without committing the Commission to that draft. The purpose would be to obtain the views of the Sixth Committee on that text, so that the Commission could, at a later stage and in the light of those views, reach a decision on a question which, as he saw it, was more important than that dealt with in article 21.

18. Mr. PINTO expressed his deep appreciation of the Special Rapporteur's efforts to take account of the vital problems of the developing countries in his search for new provisions to complete the draft within the limits of the topic of the most-favoured-nation clause. The formula which the Special Rapporteur had put forward, as a possible exception clause for benefits granted by one developing country to another, seemed to him to constitute the best approach for the next logical step to be taken.

19. He believed it was quite feasible to adopt that text at the present time and had not been at all convinced of the contrary, either by the obstacles mentioned by the Special Rapporteur in his seventh report (A/CN.4/293 and Add.1, paras. 122-126) or by the example given by him at the present meeting. He could, however, accept the suggestion that the text in question should merely be included in the Commission's report to the General Assembly, so as to obtain the views of the Sixth Committee.

20. He agreed with Mr. Tabibi about the great importance of trade between the developing countries. He understood that roughly half the exports of his own country (Sri Lanka) went to such countries as Pakistan and the Arab States. He did not believe it was accurate to describe the developing countries as constantly trying to break into the markets of the developed countries. Their essential aim was to increase co-operative self-reliance among themselves.

21. He wished to revert for a moment to article 21, which established an exception to the most-favoured-nation clause where the granting State was a developed country and the third State a developing country. He did not know whether the point had been raised during the earlier discussions, but he thought that, logically, the provisions of article 21 should be limited to cases in which the beneficiary State was itself a developed country. He could accept the article if it were amended to read: "A developed beneficiary State is not entitled under a most-favoured-nation clause ...".

22. The purpose of article 21 should be to establish an exception for favours granted by one developing State to another and all developing States should be able to take advantage of that exception. Only a developed beneficiary State should be excluded from the benefit of favours granted under a generalized system of preferences. Equality should be maintained among developing countries in regard to the promotion of trade. Developed countries should not be encouraged to give special

[5] Kabul Declaration on Asian Economic Co-operation and Development, adopted at the Meeting of the Council of Ministers for Asian Economic Co-operation (Fourth Session). For text, see ECAFE, *Regional Economic Co-operation in Asia and the Far East: Report of the Meeting of the Council of Ministers for Asian Economic Co-operation (Fourth Session)* (United Nations publication, Sales No. E.71.II.F.21), appendix II.

treatment to selected developing countries. That situation arose in practice, but it should not be erected into a rule.

23. He had been greatly impressed by the remarks made by the Chairman, when, speaking as a member of the Commission, he had stressed that the Commission should rely not only on the practice of States, but also on considerations of theoretical validity and practical attainability.[6] Those two sets of considerations should be the principal criteria to be borne in mind by the Commission in its work on codification and progressive development.

24. Mr. USTOR (Special Rapporteur) replying to Mr. Pinto, said that the opening words "A beneficiary State" had been used intentionally in article 21, in order to avoid making any distinction between developed and developing beneficiary States. The generalized system of preferences was based on the idea of self-selection; that idea might not attract much sympathy, but it was the basis of a compromise reached in UNCTAD. Donor countries wished to give certain preferences to many developing countries, but not to all those countries; they should therefore be permitted to make exceptions on political or economic grounds in the granting of special favours within the generalized system of preferences.

25. There was thus some built-in element of discrimination, but that element had been agreed upon as part of the system. Benefits thus accrued only to specified recipients and other developing countries would not be entitled to receive those same benefits under most-favoured-nation clauses they might have with donor countries. The element in question was not his idea; it was based on the existing system.

26. Reference had been made during the discussion to the export of agricultural products by developing countries. In point of fact, however, the interest of developing countries in co-operation among themselves and in exceptions to the most-favoured-nation clause related mainly to industrial products. Lower tariffs in the developed countries and preferential treatment in the developing countries would expand the market for those industrial products. As to the export of such products as fruit, it did not present any problem for the developing countries, because those products were usually allowed to enter free of duty.

27. He had mentioned in his report the possibility of some relevant new development at the fourth session of UNCTAD (A/CN.4/293 and Add.1, para. 131). He could now inform the Commission that enquiries made by the Secretariat had shown that no resolution on the question under discussion had been adopted at that session.

28. Mr. USHAKOV said he fully agreed with the Special Rapporteur's conclusion as to the impossibility of introducing a general rule concerning economic relations between developing countries. It was not a matter of establishing primary rules for trade between developing countries, since it was for those countries themselves to adopt rules concerning their mutual relations; it was only a matter of a possible exception to the operation of the most-favoured-nation clause.

29. The exception provided for in article 21 excluded from the operation of the clause one particular system, namely, the generalized system of preferences, and if such a system was established between developing countries, it would be possible to exclude it from the operation of the clause. But at present there was no such system between the developing countries. Hence the legal rule proposed by the Special Rapporteur in paragraph 121 of his report was absolutely impossible. In his opinion, that rule amounted to discrimination against the developing countries; for if one developing State granted preferential treatment to another developing State, such treatment amounted to discrimination, not only against developed States, but also against all the other developing States which were excluded from it. Among those other developing States; only beneficiaries of the most-favoured-nation clause would be able to obtain the same preferences, while the developing States which did not benefit from the clause would be at a disadvantage compared with the State which enjoyed preferential treatment. Thus the preferences granted by one developing State to another would benefit a single developing State at the expense of the others.

30. A strictly bilateral system of preferences would therefore be against the interests of the developing countries. But the whole purpose of the system of preferences was to benefit all developing States without discrimination. It was for the developing States to establish a generalized system of preferences among themselves to promote their mutual development. Such a system could be set up at the regional or the subregional level, but it must apply to all developing countries without discrimination. If a system of that kind came to be established, it could be excluded from the operation of the most-favoured-nation clause. But such a system did not yet exist. Hence it was impossible, for the time being, to formulate an exception to the operation of the most-favoured-nation clause in respect of it.

31. Mr. TABIBI said he wished to explain that, in his earlier statement,[7] he had referred to agricultural products exclusively in the context of co-operation between the developing countries. He did not disagree with the view of Mr. Ushakov that a generalized system of preferences should be established by the developing States themselves in order to make it universally acceptable. The Commission should suggest in its report that a broader understanding of the problem could be reached through a debate in the Sixth Committee, in which most of the countries of the third world would be represented.

32. Mr. HAMBRO endorsed Mr. Tabibi's suggestion that the Commission should expressly invite comments from the Sixth Committee. He appreciated Mr. Pinto's call for a more expeditious approach, although the limitations imposed by the task of progressive development of international law should not be forgotten. Moreover, the Commission was now considering the most-favoured-

[6] See 1387th meeting, para. 42.

[7] See para. 13 above.

nation clause; unlike UNCTAD, it was not dealing with the problems of international trade in general. In view of the Commission's terms of reference, he was not convinced of the soundness of the principle of establishing a rule which would make a definite and permanent distinction between law for the developing countries and law for other countries. It was essential at all times to preserve the unity of international law.

33. He fully supported the Special Rapporteur's appeal for co-operation among the developing States; but it would be in the interests of those States to work towards regional integration, which meant that Customs unions and free-trade agreements would be of greater importance to them in the future. Consequently, he failed to understand why his modest proposal to include some kind of general reference to Customs unions and free-trade areas had met with a nearly unanimous hostile reaction.

34. Mr. REUTER said that the reason why the problem of the developing countries was constantly being raised was that those countries often had the impression that they were not being taken seriously, and that the problem really did arise in almost every context. He well understood that attitude and would accept any solution to which the developing countries could agree. Moreover, all the members of the Commission had agreed that a reservation concerning Customs unions and free-trade areas should be introduced into the draft for the benefit of the developing countries; it was in regard to such a reservation in favour of the developed countries that many members of the Commission had raised objections. Similarly, all the members had welcomed article 21 relating to the generalized system of preferences. He was not sure, however, that the exceptions the Commission was prepared to accept in favour of developing States were sufficient. It was obvious that the generalized system of preferences was based on a commendable idea, but that it was not enough. The Commission was not called upon to decide what constituted discrimination in that sphere, or to what extent discrimination could be allowed.

35. In connexion with Customs unions and free-trade areas, he drew attention to the currency problem, which was fundamental for the developing countries. Customs duties lost all significance when quantitative restrictions were imposed. The problem of prices was also of fundamental importance to the developing countries. But the Commission did not have time, and was probably not competent, to examine those matters seriously. It might be better for the Drafting Committee to discuss them a little.

36. Personally, he would be in favour of a special article, drafted in the form of a saving clause, stipulating that none of the provisions of the draft articles on the most-favoured-nation clause would be an obstacle to more specific general measures in favour of the developing countries. With regard to the description of such general measures, Mr. Ushakov had emphasized the word "system". One could certainly not speak of "rules", since the generalized system of preferences was really only a recommendation. In using the word "system", Mr. Ushakov seemed to have in mind a set of general provisions having at least the value of directives or recommendations formulated by competent bodies. A general expression of that kind would have the advantage of indicating that exceptions relating to Customs unions, free-trade areas and the generalized system of preferences were not sufficient, and that the Commission did not rule out other measures in favour of the developing countries. If the Commission used an expression such as "general measures", the specific meaning of which would be clear from the summary records of the present session, the General Assembly and UNCTAD would understand that the Commission was aware of certain very important matters which it could not pass over in silence.

37. Mr. ŠAHOVIĆ stressed that the question under consideration was a new one which the Commission had not considered at its previous session and which arose from non-legal matters. Since it was not possible to cure the economic crisis at the world level, it was natural that developing countries were combining their efforts at the political and economic levels. The Commission should take that into account in its study of other questions, too.

38. The Special Rapporteur's suggestion that a special provision be drafted was an excellent one. It was clear from his presentation that there was some consensus, but that practice had not developed to the point at which there were any real rules accepted by the international community. That being so, the Commission should have recourse to the method of progressive development of international law.

39. He agreed with Mr. Tabibi and Mr. Reuter on how the study of the question should be pursued.

40. Mr. MARTÍNEZ MORENO said that there were universally accepted norms for distinguishing between developed and developing countries, in particular the criterion of *per capita* income. It was true that some developing countries, like Brazil, exported capital goods, but certain regions of those countries were extremely backward. Hence *per capita* income was an important criterion in determining whether a State constituted a developing country. According to recent statistics, *per capita* income in several developed countries stood at over $7,000 compared with a figure of less than $100 in some newly-independent States. In view of that enormous difference, it was only just to try to formulate rules that would establish more equitable economic relations.

41. He considered the tentative formulation contained in paragraph 121 of the report to be entirely justified. The developing countries could establish a system of preferences, but they had often been urged to participate in GATT, so that they would not organize such a system. For example, the Central American countries had been denied certain tariff preferences unless they became contracting parties to GATT. It had been decided, by a regional resolution, not to do so. Nicaragua, already a Contracting Party at that time, had remained within GATT, and had subsequently experienced some difficulty in securing approval for its entry into the Central American Common Market.

42. The generalized system of preferences was certainly inadequate. However, the Commission was not in a position to establish a comprehensive rule and he therefore supported Mr. Reuter's suggestion. The Drafting

Committee should endeavour, within the context of international law and of the most-favoured-nation clause, to produce a formulation that would make for more equitable international trade relations.

43. Mr. PINTO said it had been suggested that an exception could be established only if a system in favour of developing countries was involved. In his opinion, the generalized system of preferences could not rightly be called a "system" and, indeed, he did not see why a system should be required for the exception to apply. One system did exist, namely the preferential treatment extended by several ESCAP countries under the Bangkok Agreement [8]—treatment which related not only to raw materials and primary products, but also to manufactures. It was perhaps only the first of many such systems. But even so, it was unnecessary to mention a system in the draft.

44. The best course would be to insert a provision of principle regarding an exception in favour of the developing countries. That provision should take account of the following points: (1) the favours must be favours granted to a developing country as such, in order to promote its economic development; (2) there must be no discrimination between developing countries in receiving those favours under the most-favoured-nation clause; and (3) a developed State must not benefit under the clause to obtain those favours. His objection to article 21 was simply that it was confined to "a generalized system of preferences" a vague term for an arrangement which depended upon the will of the granting State and which could not be truly described as a system.

45. Mr. RAMANGASOAVINA said that he could agree to submission to the Sixth Committee either of the formula proposed by the Special Rapporteur or of a broader formula, such as Mr. Reuter had proposed.

46. He paid a tribute to the objectivity of the Special Rapporteur, who had taken into account the trends which had emerged in the General Assembly, GATT and UNCTAD. In the interests of objectivity, however, the Special Rapporteur had pointed out certain obstacles. From the terminological point of view, use of the expression "developing country (State)" should not raise any difficulty, since it had already been used in article 21. The word "system" was rather vague, as Mr. Pinto had pointed out. Lastly, the absence of any clear practice did not appear to be a serious obstacle, since a trend was appearing and UNCTAD itself had unanimously advocated regional integration among developing countries.

47. Any provision which the Commission might draft on the model of the text proposed by the Special Rapporteur (A/CN.4/293 and Add.1, para. 121) would really be no more than a supplement to article 21. If all the market-economy countries and socialist countries were willing to help the developing countries by a generalized system of preferences, they should all support the expansion of trade between developing countries. Personally, he did not see how a provision of the type proposed by the Special Rapporteur could involve discrimination against some developing countries, since the treatment was the same for all countries, even though their levels of development were not the same. The granting of certain kinds of treatment between developing States could, moreover, lead to a generalized system of preferences between them.

48. Mr. QUENTIN-BAXTER said that Mr. Reuter's suggestion merited careful consideration, for it might be the best course to take at the present juncture. The Commission was none the less confronted with a drafting problem, namely, the problem of dealing with exceptions and of specifying that the draft enunciated general rules, if not residual rules, under which the parties to a treaty enjoyed full contractual freedom.

49. One way of assessing the difference between the Special Rapporteur's formulation and the text of article 21 was to bear in mind the condition tentatively incorporated in article 16: "Unless the treaty otherwise provides or it is otherwise agreed".[9] Article 21 posed no problem in that respect, since it referred to a system which had the authority to adopt its own rules and to govern its own situation. If the same conditions were attached to the Special Rapporteur's formulation, however, it would be counter-productive—it would merely be an invitation to States to derogate from the principle being established, which was not the Commission's intention. The force of a rule like the one under consideration must be derived from something external to the present work and the Commission would do well to point to that fact in its report.

50. Mr. KEARNEY said that the problem was extremely complex and the best approach might be that suggested by Mr. Reuter. An exception to the rules on the most-favoured-nation clause was in some sense negative, for it meant that the clause would apply only in certain cases. It was difficult to make exceptions and then proceed effectively to establish positive rules on such matters as discrimination, which entailed the introduction of exceptions to those exceptions.

51. Mr. SETTE CÂMARA said he fully appreciated the difficulties encountered by the Special Rapporteur in proposing a concrete rule, within the framework of the most-favoured-nation clause, to deal with the problem of special benefits granted by a developed State to a developing third State. Unfortunately, the rule could not be set within a specific context, like that provided for article 21 by the generalized system of preferences. Nevertheless, the spirit underlying article 21 could serve as a guide in the present instance. A formulation on the lines of that contained in paragraph 121 of the report would certainly elicit the opinions of Governments; and Mr. Reuter's suggestion, if adopted, might provoke a fruitful debate in the Sixth Committee.

52. It should be emphasized that trade between the developing countries was not as unimportant as the

[8] First Agreement on Trade Negotiations among Developing Countries of the Economic and Social Commission for Asia and the Pacific, signed at Bangkok on 31 July 1975.

[9] For the text of article 16, see *Yearbook... 1975*, vol. II, p. 121, document A/10010/Rev.1, chap. IV, sect. B.

Special Rapporteur appeared to suggest. Although it represented only a very small fraction of the world figure, it was growing precisely because of the deterioration in the terms of trade with the industrialized countries. Brazil, for example, had greatly increased its exports of manufactures to other developing countries. They now accounted for a considerable percentage of its exports and would doubtless continue to do so in the future.

53. The best course would be to seek the views of the Sixth Committee by inserting an appropriate statement in the report.

54. Mr. BILGE said that he, too, was in favour of an exception or a saving clause in favour of developing countries. All the indications were that such a provision was necessary, but opinions differed on its wording. Unlike the Special Rapporteur, who seemed to think that associations of developing countries could hinder the expansion of international trade, he believed that they should serve the interests not only of their members, but also of other States. An example was provided by EEC. Associations of developing countries should create new trade and new demand for capital goods.

55. The first solution he would recommend would be to include in the draft an exception in favour of developing countries which joined together by way of economic integration. The second would be to draft a general formula, such as that proposed by the Special Rapporteur, and to add anything which seemed necessary in the light of the views expressed in the Sixth Committee. The third would be to draft a saving clause on the lines proposed by Mr. Reuter. The fourth would be to accept a general exception, as proposed by Mr. Hambro. It was to be feared, however, that such correction of a past injustice might one day bring about injustice to the developed countries.

56. The difficulties to which the Special Rapporteur had drawn attention in his report should not prove insurmountable. In particular, the term "developing countries" had often been used before and should not give rise to any controversy. While it was true that the Commission ought not to go into economic questions, it could not entirely ignore reality.

57. Mr. YASSEEN said that the internationalization of the campaign for development was relatively recent and had taken shape mainly through the work of UNCTAD. At first, it had been thought that assistance from the developed countries was necessary to combat underdevelopment. Several remedies had been proposed, including the establishment of a generalized system of non-discriminatory and non-reciprocal preferences. That system had not worked very well, however, as UNCTAD had noted more than once. Subsequently, it had been thought that developing States themselves could do something to improve their situation and they had been advised to co-operate among themselves. That co-operation had produced some results, as Mr. Sette Câmara had pointed out.

58. In the draft articles, the Commission had taken account of the generalized system of preferences applicable to the relations between developed and developing countries. It could not remain silent on co-operation between developing countries, which had been strongly recommended by international bodies such as UNCTAD. After making an exception for the generalized system of preferences, the Commission should make one for co-operation between developing countries, since that co-operation could produce much more effective results than the generalized system of preferences, which was tainted.

59. As to the procedure to be followed, the Commission could submit to the General Assembly either the text proposed by the Special Rapporteur or that proposed by Mr. Reuter, which had the advantage of referring to all possible measures in support of the campaign against underdevelopment.

60. The CHAIRMAN, speaking as a member of the Commission, said he agreed with those members who wished the problem to be brought to the attention of the Sixth Committee. While he would have preferred the formulation contained in the Special Rapporteur's report, he was none the less ready to accept Mr. Reuter's suggestion. Mr. Sette Câmara had rightly pointed out that the spirit underlying article 21 should guide the Commission in dealing with the present complex problems. The Special Rapporteur was not in favour of including an article parallel to article 21, but with commendable objectivity he had furnished an extremely rich commentary as a basis for the Commission's exchange of views.

61. It should not be forgotten that some rules were of a transitional nature. He had in mind Chapter XI of the Charter: with very few exceptions, the former Non-Self-Governing Territories had now attained political independence. It was also to be hoped that the developing countries would soon reach what might be termed a minimum of economic equality with the industrialized countries. Nevertheless, it was necessary to bear in mind Mr. Hambro's comment that it was essential at all times to preserve the unity of international law.

62. Mr. USTOR (Special Rapporteur) said he was very appreciative of the discussion that had taken place. Nevertheless, the realities of international trade had to be taken into account. The Contracting Parties to GATT were committed to granting most-favoured-nation treatment to each other, and the Commission should not adopt rules which were contrary to those of GATT or which had not been adopted by economic bodies such as UNCTAD. He was entirely in favour of measures to assist the developing countries, but the adoption of rules for which there was no basis in the economic life of the international community would not enhance the prestige of the Commission.

63. He did not in any way contest the right of States to enter into Customs unions. Moreover, Mr. Reuter's suggestion to some extent represented less than what had already been adopted in article 21, despite the shortcomings of that article.

64. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer the Special Rapporteur's tentative formulation

(A/CN.4/293 and Add.1, para. 121), and Mr. Reuter's suggestion [10] to the Drafting Committee, for consideration in the light of the discussion.

It was so agreed.

The meeting rose at 1.10 p.m.

[10] See para. 36 above.

1389th MEETING

Monday, 14 June 1976, at 3.10 p.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Most-favoured-nation clause (*continued*) (A/CN.4/293 and Add.1, A/CN.4/L.242)

[Item 4 of the agenda]

SETTLEMENT OF DISPUTES

1. The CHAIRMAN invited the Special Rapporteur to introduce the paragraph of his report relating to settlement of disputes (A/CN.4/293 and Add.1, para. 132).

2. Mr. USTOR (Special Rapporteur) said that, in the first sentence of paragraph 132 of his report, he had mentioned the obvious fact that questions connected with the application of most-favoured-nation clauses might lead to international disputes. He now wished to withdraw the second sentence of that paragraph, because the set of draft articles was considered to be autonomous and not very closely connected with the Vienna Convention on the Law of Treaties. He thought the Commission should not adopt special measures for the settlement of disputes concerning most-favoured-nation clauses, because the general rules of international law and, more particularly, Article 33 of the United Nations Charter would be applicable. Moreover, it was not the Commission's practice to include provisions on the settlement of disputes in its drafts.

3. Mr. KEARNEY said he agreed with the Special Rapporteur that the second sentence of paragraph 132 of the report was inappropriate. On the other hand, the Commission had sometimes included provisions on the settlement of disputes in the draft conventions that it had prepared.

4. The logical consequence of the statement contained in the first sentence of the paragraph would be that the Commission should concern itself with disputes that might arise regarding the application of the draft articles. Article 65 of the Vienna Convention on the Law of Treaties [1] established the procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty; but the type of dispute which commonly arose in connexion with a treaty containing a most-favoured-nation clause—in other words, a commercial treaty that was of great importance to the two parties to the dispute—did not usually result in termination or suspension of the treaty. Even where a State considered that one of its nationals had been wronged and that the other State was not interpreting the treaty correctly, it would not, generally speaking, wish to see the treaty suspended or terminated. Consequently, the system adopted in the Vienna Convention was not the best one to apply in disputes relating to a most-favoured-nation clause.

5. Another aspect of disputes involving considerable economic advantages or disadvantages was that they were usually dealt with by courts or tribunals of one or other of the parties and, if the dispute was sufficiently serious, dealt with almost invariably by courts or tribunals at a very high level. Great difficulties arose, and high-level political decisions were usually required if a State sought to differ with the decision reached by its own supreme court or high-level tribunal on the interpretation of the clause in dispute because of international considerations—when the disagreement would injure the interests of an internal economic group. Cases of that type could best be handled by international judicial settlement because, in a situation where, in the interests of settling a dispute, the decision of a State's own supreme court or tribunal was not followed, an adverse ruling by an international tribunal provided the most reasonable grounds for that State to make the necessary changes in its interpretation, its internal legislation or its administrative regulations.

6. For that reason, a provision should be included in the draft specifying that, failing settlement by any other means, a party to a dispute arising out of a most-favoured-nation clause involving the interpretation or application of the draft had the right to refer the matter to the International Court of Justice. He was fully aware of the objections that could be raised, but he believed that that was by far the best means of settlement available and that the Commission should adopt it for disputes arising out of a set of articles on the most-favoured-nation clause.

7. Mr. USHAKOV said he thought that there was a misunderstanding about the first sentence of paragraph 132, which referred to international disputes arising out of the application of most-favoured-nation clauses. The Commission was not called upon to deal, in its draft articles, with disputes arising out of the application of particular most-favoured-nation clauses; it was only concerned with disputes which might result from the application of certain general rules relating to the most-favoured-nation clause.

8. It was necessary to distinguish between two types of possible disputes; those which might arise in connexion

[1] For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.