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Summary record of the 1495th meeting

Topic:
Most-favoured-nation clause

Extract from the Yearbook of the International Law Commission:-
1978, vol. I

tives had held that it should be retained as it stood, since it represented the most that could be done for the developing countries. That view was shared by the Special Rapporteur, who had concluded in his report, after considering various proposals for the addition of new provisions, that it would not be advisable to change the terms of the article (A/CN.4/309 and Add.1 and 2, para. 281). Other representatives had held that article 21 should not be confined to trade matters, but should be extended to cover all systems of preferential treatment. They had maintained that there was a wide range of subjects for international co-operation, including financial assistance and the transfer of technology, that could be covered by an article of wider scope. In that connexion it had been observed that, logically, the order of the exceptions to the application of the clause should be changed so as to proceed from the general to the particular. The latter exceptions would cover such matters as frontier traffic, facilities accorded to land-locked States and generalized systems of preferences which, despite the word "generalized", were limited to particular spheres.

30. In addition, proposals had been submitted by EEC (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 6) and ECWA (*ibid.*, sect. B). In its comment, ECWA had suggested that it might be advisable either to make the draft article more general, with no specific reference to the GSP, or to expand it to include other forms of preferential treatment for developing countries. It had also pointed out that the article neglected to mention preferences granted among developing countries.

31. Article 21 of the Charter of Economic Rights and Duties of States made it quite clear that an exception should be made for trade preferences granted by developing countries to other developing countries, and also provided that, in those cases, developing countries should not be obliged to extend such preferences to developed countries.

32. In the light of those considerations, he hoped the Commission would consider enlarging the scope of the article, even though the underlying idea was sound. It was also necessary to take account of the views expressed in the Sixth Committee of the General Assembly regarding the need to include further exceptions in favour of developing countries. Mr. Njenga had already made a proposal in that sense, and the Special Rapporteur had himself said that new articles relating to developing countries could be introduced, in addition to articles 21 and 27.

33. Mr. TABIBI said it would be very helpful if the Secretary-General of UNCTAD or, failing him, the UNCTAD official responsible for preferences, were invited to attend the Commission's meeting on that question and make a statement, with special reference to the important events that had occurred since 1975. He suggested that the secretariat of the Commission should get in touch with UNCTAD to see whether that was possible.

34. Mr. FRANCIS trusted that Mr. Tabibi's suggestion would be without prejudice to his own earlier suggestion[16] that UNCTAD should be invited to submit written comments on the draft articles on the most-favoured-nation clause. It was a delicate matter, on which the General Assembly, as well as the Commission, would like to have UNCTAD's reaction.

35. The CHAIRMAN said that the Secretary to the Commission would approach the Secretary-General of UNCTAD on the matter.

The meeting rose at 1 p.m.

[16] See 1484th meeting, para. 30.

1495th MEETING

Wednesday, 7 June 1978, at 10.05 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

The most-favoured-nation clause (*continued*) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2)

[Item 1 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 21 (The most-favoured-nation clause in relation to treatment under a generalized system of preferences)[1] (*continued*)

1. Mr. SCHWEBEL said that, while there was obvious merit in the objectives of the GSP, it was not certain whether those objectives would be attained in practice, especially as the effect of such preferences was diluted by other derogations from the most-favoured-nation clause.

2. There were a number of questions to be answered. For example, of what significance were generalized preferences for the State trading economies, where all imports were brought in by a State agency? And, in other economics, whom did they benefit? Were the commodities covered by preferences available to consumers in developed countries at lower prices, or were the profits siphoned off by middlemen? Did the system not tend to favour the most developed of the developing countries? And, in the developed countries, did it not place an unfair

[1] For text, see 1494th meeting, para. 1.

burden of adjustment on migrant workers rather than on the economy as a whole? The reaction of the labour movement to generalized preferences, in the United States at any rate, had certainly not been wholly positive. There was the further question of the benefits of such a system for developing countries. Had wages actually increased in the industries concerned? Had the increased revenues remained in the countries concerned and been productively invested? There was also the fact that, as most-favoured-nation treatment was applied and expanded and as tariffs and trade barriers were lifted, so the value of generalized preferences was diminished *pro tanto*. Thus, in a sense, there was a clash between those preferences and the proper objective of the world economy as a whole, which was to liberalize trade.

3. Nevertheless, he believed that there was a case for including a provision on the GSP in the draft articles. Article 21, however, had its deficiencies. One of its effects would be to except from most-favoured-nation clauses general preferences granted to developing countries regardless whether those preferences fell within a waiver or exception such as the current GATT waiver, and thus to deny to a non-beneficiary of generalized preferences any basis for questioning, on most-favoured-nation grounds, the effects of the extension of preferential tariffs to a developing country. That was a major departure from the existing régime: the GATT waiver procedure afforded some measure of protection to third States that were beneficiaries under the most-favoured-nation clause and, in particular, provided that any Contracting Party which considered that a benefit accruing to it under the General Agreement had been impaired could bring the matter before the Contracting Parties for review and notification. Article 21 provided no such protection. Moreover, the legal basis for differential and more favourable treatment for developing countries was currently the subject of multilateral trade negotiations.

4. For those reasons, he believed that article 21 required further examination and that consideration should be given to including in it a provision for some mechanism to determine the applicability of generalized preferences in a given case.

5. Mr. FRANCIS said that article 21 represented a turning point in the progressive development of international law. It was therefore to be contrasted with the preceding articles, which were in the nature of a classical statement of the law on the application of the most-favoured-nation clause.

6. Any defects in the substance of the article should not be attributed to the Commission, for many of the issues involved fell outside its purview. He had in mind, for example, the phasing out of special or vertical preferences, the 10-year period during which the GSP would apply, and the objectives of the system, which were to improve export earnings, to promote industrialization and to further economic growth—objectives that, in his view, were now much farther from attainment than when the GSP had been introduced. Those objectives were nevertheless part and parcel of the new international economic order. Consequently it was for GATT, the UNCTAD Special Committee on Preferences and the General Assembly to determine the extent to which the system should or should not be made permanent or quasi-permanent until such time as developing countries were on comparable terms, in the competitive sense, with the developed world.

7. Moreover, it was clear from the second sentence of article 26 of the Charter of Economic Rights and Duties of States[2] that the General Assembly considered that the system of generalized preferences should now be viewed in an entirely different light. That, indeed, was the rationale behind Mr. Njenga's proposal (A/CN.4/L.266),[3] which had his full support. That proposal took account of the realities of the modern world as they affected developing countries, and of the need for a partnership effort by the developed and the developing world to bring about a more equitable state of affairs. In his view, the Commission had a duty to respond to that situation and to go a step further with a view to securing the unanimous approval of the General Assembly.

8. With regard to procedure, in view of the limited time at the Commission's disposal, he would suggest that the Commission consider article 21 and the proposed new article 21 *bis* in conjunction with article 27 (The relationship of the present articles to new rules of international law in favour of developing countries),[4] since much of what was embodied in Mr. Njenga's proposal was dealt with in the commentary to article 27.

9. The CHAIRMAN said that any member so wishing could, of course, also refer to article 27 in his comments.

10. Mr. DADZIE said that article 21 dealt with a matter that had long engaged the attention of the international community, namely, the flagrant imbalance between developed and developing countries, and that the rule it laid down would no doubt be welcomed by developing countries. The article did not, however, provide the whole answer. In particular, it did not meet the three objectives of the GSP laid down in paragraph 1 of UNCTAD resolution 21 (II).[5] At best, therefore, it could be regarded as only a move in the right direction.

11. Althought a number of members of the Sixth Committee of the General Assembly had supported article 21 in so far as it conformed with the international community's efforts to relieve the imbalance between developed and developing countries, they had not been clear as to how generalized the system would have to be in order to qualify for the exception provided for under the article. Many had considered

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[2] General Assembly resolution 3281 (XXIX).

[3] See 1494th meeting, para. 25.

[4] See 1483rd meeting, foot-note 1.

[5] See *Yearbook... 1976*, vol. II (Part Two), p. 58, doc. A/31/10, chap. II, sect. C, art. 21, para. (3) of the commentary.

that the article should be expanded or that an additional article should be formulated to except from the operation of the most-favoured-nation clause any preferences granted by the developing countries to one another.

12. The shortcomings of the various proposals submitted with that object, to which the Special Rapporteur had drawn attention, seemed to have been remedied in Mr. Njenga's proposal, save possibly the question of defining a developing State. That, however, was the least of the Commission's worries. The absence of a definition would not raise any real difficulty in practice: not for a moment could it be suggested that, under Mr. Njenga's proposal, a developing country could extend preferences to a developed country. The wheels of progress should not be halted by such academic uncertainties. The Sixth Committee of the General Assembly was awaiting a solution along the lines of Mr. Njenga's proposal; that proposal would not only serve to demonstrate the Commission's close interest in the position of developing countries, but it would also make a positive contribution to the solution of their economic problems. He therefore recommended that the Commission should refer article 21, together with Mr. Njenga's proposal, to the Drafting Committee.

13. Mr. TABIBI said that the idea of a generalized system of non-reciprocal and non-discriminatory preferences had been introduced with a view to alleviating poverty and reducing the gap between rich and poor countries. It was one of many schemes devised to support the economies of the weaker nations and to exclude the operation of the most-favoured-nation clause. To subject developed and developing countries to the same rules in matters of trade would result in implicit discrimination against the weaker members of the international community.

14. Two-thirds of that community lived in Asia, Africa and Latin America, which had contributed much to the great cultures, civilizations and religions of the world, and indeed to the brotherhood of mankind. Yet their peoples subsisted in destitution, afflicted by hunger all ill-health. The economic problems of the world were on the increase and the survival of the human race was in jeopardy. The population explosion threatened to strain the earth's resources to breaking point. The super-Powers seemed unable to halt or contain the escalating arms race, the cost of which had risen in two decades from $200 billion to $400 billion annually. A mere fraction of that sum would go a long way towards curing the ills of the developing world.

15. By contrast, the affluent countries were enjoying unprecedented prosperity, the only concern of their peoples being to improve their already high standard of living. In other countries, however, millions of young people were unemployed and had to look on while members of their own families suffered the often fatal effects of ill-health and under-nourishment.

16. It was to resolve such problems that the first session of UNCTAD had been convened, and attended with such high hopes by the representatives of the third world. All had trusted that the principle of general non-reciprocal and non-discriminatory preferences would resolve the problems of the developing world, so that it could bid farewell to poverty, hunger and underdevelopment. The representatives of the major Powers, who had resisted the scheme initially, had yielded on realizing that it had the backing of theentire third world. At the second session of UNCTAD, the principle of preferential treatment for exports of manufactured and semi-manufactured goods had been accepted in resolution 21 (II), and the Special Committee on Preferences had been established. Expectations for the scheme had not, however, been realized; for political and other reasons the scheme had not worked as expected and in some cases had even proved detrimental to a developing third State. That had been so, for example, in 1963, when EEC had granted preferences to a number of African countries. In any event, what the countries of the third world wanted was preferences for their primary commodities, whereas what they had been offered was preferences for their manufactured and semi-manufactured products.

17. The scheme had nevertheless served some purpose. The Soviet Union had been the first country to introduce a unilateral system of duty-free imports from developing countries, covering all products. Subsequently Australia, Hungary and the United States had also introduced preferential schemes. The scheme announced by EEC in 1971 had been mainly concerned with manufactured and semi-manufactured products. In its resolution 3362 (S-VII) on development and international economic co-operation, adopted at its seventh special session, held in September 1975, the General Assembly had recommended (section I, paragraph 8) that the generalized scheme should not be terminated at the end of the 10-year period originally envisaged. That in itself was a sign of its usefulness in a limited sphere.

18. The third world countries had come to recognize the need for co-operation and were now offering each other preferences on regional, subregional and bilateral bases. Admittedly, the trade involved amounted to only a small fraction of world trade, but it was none the less extremely important for certain countries. For example, one-third of Afghanistan's foreign trade—exports of dried and fresh fruit—was with the subcontinent of India. That trade had been carried on for thousands of years and it was essential that it should continue without restriction. It was with that end in view that the Kabul Declaration,[6] adopted in December 1970 at the meeting of the Council of Ministers for Asian Economic Co-operation, at which he had presided the Drafting Committee, had called for regional co-operation on preferences.

19. In the light of all those considerations, he strongly supported Mr. Njenga's proposal, and pro-

[6] Kabul Declaration on Asian Economic Co-operation and Development (E/CN.11/961).

posed that it be referred to the Drafting Committee together with article 21. He opposed the adoption of any definition of "developed countries" or "developing countries" because of the many elements involved and the differences that existed within both groups. The United Nations had its own criteria and the matter should therefore be allowed to rest.

20. Mr. REUTER pointed out that, as a member of the Commission acting in his individual capacity, the views he expressed were not those of the French Government and still less of EEC. Personally, he attached the greatest importance to the Charter of Economic Rights and Duties of States.

21. Articles 21 and 21 *bis* were acceptable, subject to drafting amendments; in particular, express reference should be included to the Charter of Economic Rights and Duties of States. He fully endorsed the value judgements made in respect of the GSP. That system was a joke, which had finally benefited only six or seven States. EEC was certainly not equal to its task; however, it was doing much more than its members would do individually and more than certain great Powers were doing.

22. Although rather belatedly, he wished to express some doubts about the Commission's method of work. Articles 21 and 21 *bis* stated widely accepted principles. No one decided that the GSP justified an exception to the application of the most-favoured-nation clause and that developing countries could conclude preferential agreements among themselves that might not be invoked by States beneficiaries of a most-favoured-nation clause. In adopting articles of that kind, the Commission seemed to be following the "blow by blow" method of considering one exception after another. It was open to question whether, by so doing, it would be able to cover all existing exceptions. However, if the Commission persevered in that path, he would submit a draft article reading as follows (A/CN.4/L.265):

"*Article 21* ter. *The most-favoured-nation clause and treatment extended under commodity agreements*

"A beneficiary State is not entitled under a most-favoured-nation clause to the treatment extended by a granting State under an agreement open to all member States of the international community, concluded under the auspices of the United Naions or an organization of a universal character belonging to the United Nations family and the object of which is the economic régime of a commodity, if the grant of the benefit of the most-favoured-nation clause is contrary to the object and purpose of such an agreement."

That article would be followed by others, one of which dealing with customs unions and free-trade zones.

23. By thus proceeding "blow by blow", the Commission gave the impression that it was not looking to the future. True, article 27, which provided that the articles of the draft were without prejudice to the establishment of new rules of international law in favour of developing countries, concerned the future, but in reality it contained only illusory promises. It would be better to drop that provision and draft a more specific text. To that end, he thought the Commission could take the Charter of Economic Rights and Duties of States as a basis and recognize the principles embodied in that instrument as applied to the effects of the most-favoured-nation clause. He proposed the following text (A/CN.4/L.264):

"*Article A. The most-favoured-nation clause and treatment extended in accordance with the Charter of Economic Rights and Duties of States*

"A beneficiary State is not entitled under a most-favoured-nation clause to the treatment extended by a granting State under an agreement in conformity with the Charter of Economic Rights and Duties of States if the grant of the benefit of the most-favoured-nation clause is contrary to the object and purpose of such an agreement and

"(*a*) if the agreement is open to all member States of the international community and is concluded under the auspices of the United Nations or an organizatio of a universal character belonging to the United Nations family; or

"(*b*) if the conformity of the agreement with the principles of the Charter of Economic Rights and Duties of States is subject to review by an organ of the United Nations or an organization of a universal character belonging to the United Nations family."

24. The purpose of that article was to make an exception to the application of the most-favoured-nation clause under certain specific conditions, namely, if the grant of the benefit of the clause was contrary to the object and purpose of an agreement concluded in conformity with the Charter of Economic Rights and Duties of States. What came to mind first were commodity agreements, which might contain quantitative clauses concluded in a spirit of universality. It was clear that a third State could not claim the benefit of a most-favoured-nation clause to obtain a right accorded in the specific context of such an agreement. It should be noted that agreements of that kind concerned not only developed but also developing countries. Moreover, several articles of the Charter of Economic Rights and Duties of States attached much importance to them. Other categories of agreements, such as those relating to co-operation and technology, could raise the same kind of problems as commodity agreements. In all cases, the interests of the international community should take precedence over individual interests.

25. The article he proposed contained two alternative safeguards. The agreement in question must be open to all States members of the international community and must have been concluded under the auspices of the United Nations or an organization of a universal character belonging to the United Nations family. Failing that, the conformity of the agreement

with the principles of the Charter of Economic Rights and Duties of States must be subject to review by an organ of the United Nations or an organization of a universal character belonging to the United Nations family. With regard to the latter condition, he stressed that, as the Special Rapporteur had rightly pointed out, there was currently no definition of a "developing country". Just as, under the GSP, the preference-granting States could determine which countries were entitled to preferences, so developing countries that granted each other mutual advantages must be free to decide which countries they regarded as developing countries. Some States were regarded as developing countries by certain organizations, but not by others. It was because of the consequent danger of anarchy that he had provided for a review procedure. As he believed in the good faith and the usefulness of international organizations, he relied on review by an organ of the United Nations or an organization of a universal character belonging to the United Nations family.

26. Mr. SUCHARITKUL shared the views expressed by the Special Rapporteur when he had introduced article 21 at the previous meeting.

27. With regard to article 27, he agreed with Mr. Reuter that it was useless in its existing form. The Commission must draft more positive provisions.

28. Although it was true, as Mr. Njenga had pointed out at the previous meetig, that the exception to the GSP was neither satisfactory nor adequate in every case, since the application of the system tended to be arbitrary and to eliminate all chance of negotiation, that exception was nevertheless a minimum requirement and therefore indispensable. In view of the explanations given by the Special Rapporteur, therefore, he endorsed the content of article 21.

29. Article 21 *bis* proposed by Mr. Njenga (A/CN.4/L.266) met a need. If slightly amended, it could also cover the case of ASEAN. In addition, the words "bilateral or regional arrangements" should be replaced by the words "bilateral or regional co-operation agreements", in order to avoid any possible confusion with the entirely different type of regional arrangements referred to in Articles 52, 53 and 54 of the Charter of the United Nations.

30. Although there was certainly no legal basis as vet for the distinction between developed and developing States, there were a number of criteria for placing a State in one category or the other. For example, financial criteria could be adopted, such as *per capita* national income, as used by IMF and IBRD. By means of such criteria, various stages of development could be distinguished, and a State could pass from one category to another; Spain, for example, had recently been treated as a developed country at the Conference on International Economic Co-operation (known as the North-South Conference). Other useful criteria included literacy, health conditions, birth rate and life expectancy. It was not for the Commission, however, to decide in which category States belonged, but for the sovereign States themselves. What was important was to enable developing countries to develop, avoiding the operation of the most-favoured-nation clause if necessary, in accordance with the spirit of article 27.

31. Mr. JAGOTA said that, as all members were aware, a movement was now on foot in the United Nations to refashion and develop international law in the sphere of international economic relations. Under its Statute, the Commission's object was not only to codify but also to promote the progressive development of international law. That was a fact he hoped the Commission would take into account when considering all the questions before it; it was one that he had tried to keep in mid in his comments on the draft articles in 1976, when he had represented the Government of his country in the Sixth Committee. In dealing with the most-favoured-nation clause in the context of the law of treaties and of the rights and obligations of third States, the Commission had indeed adopted a very wise and progressive approach. It had taken modern world trends into consideration and, in codifying the traditional law relating to the clause, it had also drawn attention to the application of that law in the development of international economic relations. Article 21, the proposed article 21 *bis* and article 27 were of the utmost importance and should be examined with all necessary care and impartiality.

32. The Special Rapporteur had traced developments since 1964, but the question arose why one particular article should relate exclusively to trade when the most-favoured-nation clause had been given much wider scope for the purposes of the draft as a whole. The difficulty was that the subject was being dealt with in the context of State practice as well as of the work of specialized bodies. Consequently, if article 21 were to deal with the clause solely in the context of trade—although that was not specifically stated in the text of the article—it was to be hoped that all the members would familiarize themselves with the work done by UNCTAD and GATT, and more particularly by the GATT "Framework" Group.

33. Great changes had taken place in the fundamental conception of the GSP. Originally, the system had been conceived of as an autonomous and selective scheme of preferences granted by developed to developing countries. But the system was temporary, it was not legally binding, it had been established for a period of only 10 years, and its operation even required a waiver in respect of existing international obligations under the General Agreement on Tariffs and Trade. The GATT "Framework" Group was trying to make it a permanent system that did not constitute a derogation from the operation of the clause. In other words, the system would constitute a recognized exception that did not require an express waiver in each practical case of application.

34. Again, it had been emphasized that the system should be non-reciprocal and non-discriminatory, so that the autonomy of the parties in applying the system did not signify a right to determine what was a developing country, in other words, a right to discri-

minate. Such a right could not be invoked simply by asserting that it was impossible to define the term "developing country". Otherwise, the choice made by the granting State would be arbitrary: it would be based on many considerations, political as well as economic, and justification would always be found for discriminating among developing countries. The autonomy of developed countries should lie not in the selection of the beneficiaries, but in the selection of the levels of the preferences; once commodities or products of interest to developing countries as a whole had been placed on the list of preferences, developed countries should not differentiate either among the products or among the countries to which the preferences were to be granted.

35. If the words "generalized system of preferences" were to be understood as referring solely to trade, that point was not immediately apparent from the formulation of article 21, and it should be made clear either in the commentary or in any other manner deemed appropriate by the Drafting Committee. The wording took account of the concern that the system should not be bound by any time-limit and that it should be regarded as a recognized exception to the operation of the most-favoured-nation clause. On the other hand, the phrase "a generalized system of preferences established by that granting State" raised difficulties, since it failed to allow for the element of non-discrimination and to limit the discretion of the granting State. It would be advisable for the Drafting Committee to consider inserting the word "non-discriminatory" before the words "generalized system". Similarly, the opening words of the article should be recast to read "a developed beneficiary State...".

36. As to the question raised by the Special Rapporteur regarding the words "generalized system of preferences", practical suggestions had been made in the Sixth Committee, and he supported the idea of using a broader form of words, such as "a differential and more favourable treatment". It should be emphasized that the absence of a definition of a developing country should not lead to arbitrary decisions and discrimination by developed States. Even in the absence of such a definition, article 21 could be interpreted and applied in the spirit in which it had been drafted, as could article 21 *bis*, which he endorsed for the reasons so ably put forward by Mr. Njenga. The proposed article was entirely in keeping with recent developments in State practice and international law in the modern world.

37. The Drafting Committee might also consider whether the exception to the operation of the clause made for trade preferences granted by developing countries to one another should also apply in the case of bilateral arrangements. In his view, such an approach might create difficulties in regard to the proper conception of most-favoured-nation treatment and lead to considerable diversity and confusion in the law on that subject. It would be preferable for the exception to be embodied in regional or even global arrangements, the word "global" meaning that any region of the world could participate. In each case, however, the parties would be developing countries, not developed countries.

38. Lastly, more time was needed to reflect on the important proposal made by Mr. Reuter on the question of method and on the exception he had proposed for commodity agreements (A/CN.4/L.265). Obviously, very many exceptions would have to be enumerated and, if the exception Mr. Reuter had in mind were not one of general application, it could probably be covered by the provisions of article 26.

39. Mr. EL-ERIAN said that the Commission was engaged in one of its most important debates. In its great tradition of thoroughness, it was discussing an article that raised a number of basic issues of legal theory and of methodology. The differences of opinion expressed by the members did not lie in ideology or in politics, but in a healthy difference of approach. Although the Commission was a subsidiary organ of the General Assembly and could therefore settle matters by majority vote, it had always sought to reach its conclusions by consensus.

40. It had been suggested that the Commission might in fact contribute to the fragmentation of the general régime of international law by drawing up a particular set of rules for a certain category of States only. The Commission was obviously committed to a universally applicable law of nations, although the task was becoming increasingly difficult because the community of nations no longer consisted of a small and homogeneous group of States. As a result of independence movements, the number of States in the world had more than quadrupled, and the current challenge was to preserve the general régime of international law and, at the same time, to take full account of the fact that a new international community had emerged.

41. The solid ground of positive international law constituted the point of departure for the Commission's work, but it should also be remembered that another object of that work was to promote the progressive development of international law. For example, with regard to the draft articles on State responsibility, it had been maintained by some that the resolutions of the General Assembly referred to in the commentary to article 19 (International crimes and international delicts),[1] did not constitute positive international law; however, the Special Rapporteur on that topic had cited those resolutions as an indication of the direction in which international law was or should be moving. The subject-matter of international law was not simply the political rights and duties of States; it now covered such matters as economic development, the creation of economic and social conditions conducive to international peace and security, and the sovereign equality of States, in other words, the principles and purposes of the international

[1] *Yearbook... 1976*, vol. II (Part Two), pp. 96 *et seq.*, doc. A/31/10, chap. III, sect. B, 2, art. 19, paras. (25) *et seq.* of the commentary.

order that the United Nations had been trying to establish since its foundation.

42. Many years had passed since the work done on the draft declaration on the rights and duties of States, which had been concerned solely with political considerations. The world community now spoke of the economic rights and duties of States, of solidarity and of co-operation. As pointed out in the Special Rapporteur's report (A/CN.4/309 and Add.1 and 2, para. 255), a number of representatives in the Sixth Committee had supported article 21 in its existing form as corresponding to the efforts of the international community to relieve the flagrant imbalance between developed and developing countries.

43. In that connexion, he wished to pay a tribute to the Special Rapporteur for his comprehensive and entirely objective presentation of the article and of the comments on it by States and international organizations, and for his readiness to consider any suggestions that might meet the views expressed in the Sixth Committee.

44. The choice now was whether or not to expand article 21 to mention other forms of preferential treatment for developing countries, particularly preferences granted by developing countries to one another. An attempt to widen the scope of article 21 would certainly meet with difficulties. It had been pointed out that there was no definition of a "developing country", and admittedly a clear-cut distinction could not be drawn in every case between "developed" and "developig" countries. Nevertheless, the concept existed and the Commission should not shy away from sanctioning it because it had not yet been fully defined or was not yet based on firm criteria. Many countries had entered reservations concerning the provisions of the Charter of Economic Rights and Duties of States, but no one had challenged the new international legal and economic order. The draft must take account of such fundamental changes, and for that reason he fully supported article 21 *bis*, proposed by Mr. Njenga.

45. Naturally, more time was needed to study the proposal put forward by Mr. Reuter (A/CN.4/L.264) and he would comment on it at a later stage in the discussion.

The meeting rose at 1 p.m.

1496th MEETING

Thursday, 8 June 1978, at 10.05 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

The most-favoured-nation clause (*continued*) (A/CN.4/308 and Add.1 and Add.1/Corr.1, A/CN.4/309 and Add.1 and 2)

[Item 1 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 21 (The most-favoured-nation clause in relation to treatment under a generalized system of preferences[1] (*continued*)

1. Mr. ŠAHOVIĆ said that the discussion had highlighted the problems raised by articles 21 and 27[2] and shown that it was necessary to adopt the application of the most-favoured-nation clause to the needs of developing countries. In his opinion, the Commission was dealing with three categories of problems: those raised by State and organizations in their written and oral comments, those resulting from general political, economic and legal developments since the adoption of the draft articles on first reading, and the drafting problems raised by articles 21 and 27.

2. With regard to the first category of problems, most States had approved, in principle, the formation of articles 21 and 27 and the general approach to them adopted by the Commission. However, they had generally stressed the need to resolve the problems arising from the trend towards a more systematic organization of economic co-operation and, in particular, of trade co-operation among developing States. That, in his view, was the main task assigned to the Commission by States.

3. With regard to the general developments that had taken place since the consideration of the draft as first reading, various comments had strongly emphasized the shortcomings of the GSP, which had been criticized for not offering permanent guarantees to developing countries. Attempts had been made to remedy those shortcomings by seeking other means of meeting the needs of developing countries; in particular, negotiations had been conducted within the framework of GATT with a view to establishing a new differential system of preferences. In that connexion, he thought Mr. Reuter had been right in stressing, at the previous meeting, the importance of international commodity agreements. He was aware that reservations existed concerning the legal value of the Charter of Economic Rights and Duties of States,[3] but he believed that, since the Commission was now engaged in progressive development, it was within the legal framework of that charter that it should seek solutions acceptable to all categories of States.

4. Real progress towards the establishment of a new international economic order had so far been meagre. That was a consequence of the world economic situation, which was reflected in contemporary international law.

[1] For text, see 1494th meeting, para. 1.

[2] See 1483rd meeting, foot-note 1.

[3] General Assembly resolution 3281 (XXIX).