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Summary record of the 1496th meeting

Topic:
Most-favoured-nation clause

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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).

5. In view of those two facts, he believed that, in adopting articles 21 and 27 on first reading, the Commission had made a laudable effort and shown that it was capble of résolving the problems raised by the application of the most-favoured-nation clause to developing countries. Nevertheless, to meet the wishes of States, particularly of developing States, it should go a step further and take account of the possible impact of the expansion of economic and trade relations among developing countries on the application of the clause. That was a question of crucial importance, to which the Commission should devote a separate article.

6. The drafting comments made by States should be taken into account by the Drafting Committee when it reviewed the wording of article 21. In particular, consideration should be given to the observations made concerning the GSP, for example by the United States (A/CN.4/308 and Add.1 and Add.1/Corr.1, section A), which required further clarification.

7. His own opinion was that article 21 should be retained, but that it should be improved and adapted to the current economic situation; for despite its shortcomings, the GSP existed and must be taken into account. The impression must not, however, be given that it was the only means of safeguarding the interests of developing countries. Account must also be taken of the other problems that arose, and he doubted whether article 27 could resolve those problems and meet all the need of developing countries. The article was too general and he thought it would be necessary to find a solution better adopted to the needs of States and to the problems raised by the practical application of the most-favoured-nation clause. He therefore supported Mr. Njenga's proposal (A/CN.4/L.266),[4] which was based on the principle stated in article 21 of the Charter of Economic Rights and Duties of States. If the Drafting Committee accepted that proposal, however, it should draft article 21 *bis* in a manner more in keeping with the nature of the draft. The form the new article should take could be debated: should it be a positive article stating a rule, or an article providing for a safeguard or an exception? The Drafting Committee should study that question and propose to the Commission a solution calculated to satisfy the international community, for it was States that must take the final decision.

8. Besides the formula proposed by Mr. Njenga, the Commission had a choice among several other possibilities. Mr. Reuter had made two very interesting proposals (A/CN.4/L.264[5] and A/CN.4/L.265[6]) that deserved attention, although they might go beyond the scope of the discussion and the Commission might not be able to adopt them without first making a thorough study of the various problems they raised. Commodity agreements should certainly be considered, but it was not clear that they should be directly linked to the application of the most-favoured-nation clause. Perhaps that question could be dealt with in a more general formulation relating to differential or preferential treatment, since the agreements concerned were mainly between developing exporting countries and developed importing countries.

9. In any event, all those problems should be referred to in the commentary, which should be very detailed and provide answers to the questions raised during the discussion and to the problems posed by the changing world situation.

10. Mr. TSURUOKA was in favour of retaining article 21 in its existing form. It dealt with a special case of the application of the most-favoured-nation clause, which was worth mentioning in the draft articles because the GSP was quite widely used and was of some practical value. It was necessary to decide, however, whether the Commission should confine itself to referring only to the case of the GSP; for quite apart from its merits, article 21 raised the question of the place to be given, in the general structure of the draft, to special, if not exceptional, situations relating to the application of the most-favoured-nation clause.

11. It must first be recognized that the existence of such special situation was an undeniable fact of international practice. Those situations could be divided into two categories: those resulting from agreements between the parties to a treaty containing a most-favoured-nation clause, and those resulting from geographical conditions, in which the will of the parties played only a secondary role, as in the treatment extended to facilitate frontier traffic and the rights and facilities extended to land-locked States.

12. Whereas the special situations in the second category were rather limited in character, those in the first were very numerous, or even unlimited, at least in theory. For example, among the treaties concluded by Japan with certain foreign countries, there was one in which the parties had agreed that the most-favoured-nation clause relating to imports and exports of goods should not apply to the advantages granted in respect of national fisheries products. In another, the parties had agreed on various categories of exceptions, for instance, that the clause should not constitute an obstacle to the application of measures relating to imports of gold or nuclear materials or to trade in armaments. Another treaty provided for non-application of the clause to measures taken by the parties to fulfil their obligations for the maintenance of international peace and security and to protect their vital interests. A treaty could, of course, stipulate that one of the parties was not entitled to claim advantages that the other party had granted or would grant to developing countries under a specific agreement concluded for the purposes of economic development or technical assistance.

13. The list of situations of that kind was virtually unlimited. That being so, the question arose how such an infinite variety of situations was to be taken

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

[5] See 1495th meeting, para. 23.

[6] *Ibid.*, para. 22.

into account in the draft. It had been said that there were two possible methods. The first, which Mr. Reuter had called the "blow by blow" method, was to enumerate all the possible cases. The second was to regulate the situations in question by general provisions. He thought the first method would make the Commission's task too arduous, because the variety of cases was too great, and it might also lead the Commission inadvertently to omit cases that were important in certain respects.

14. How had the Commission taken account of special cases of the application of the most-favoured-nation clause? It had dealt with the second category of special situations—those in which the objective elements were dominant—in articles 22 and 23, relating to treatment extended to facilitate frontier traffic and to rights and facilities extended to a land-locked State. To the first category of situations it had devoted only article 21, relating to the GSP.

15. He thought that article 21 should be retained in its existing form, without any additional article, since the Commission had made a point of adopting article 26, which provided for the "freedom of the parties to agree to different provisions". It had thus found a very clever solution, for article 26 covered all possible cases in a general way, without any omissions. He was therefore in favour of retaining article 21, was adopted on first reading, since article 26 recognized the existence of special situations regarding the application of the most-favoured-nation clause and gave the parties wide freedom by allowing them to limit the scope of the clause or make it subject to any conditions they pleased.

16. Mr. Njenga's proposal (A/CN.4/L.266) had been motivated by the legitimate desire to protect the interests of developing countries and by fear that the most-favoured-nation clause might harm those countries' interests. He did not believe, however, that article 21 or any other provision of the draft could really harm the interests of developing countries, since article 26 enabled the contracting parties to adapt the most-favoured-nation clause as they wished, by treaty or by other means. When a State A, which considered itself to be a developing State, concluded a treaty with State B, which it considered to be a developed State, it could indeed, in the words of the text proposed by Mr. Njenga, "grant trade preferences to other developing countries in accordance with bilateral or regional arrangements, without being obliged to extend such preferences" to State B under the most-favoured-nation clause. There was nothing against that in the draft. An agreement of that kind would thus enable a developing State to achieve the purpose of Mr. Njenga's proposal.

17. He reserved his opinion with regard to Mr. Reuter's proposals (A/CN.4/L.264 and A/CN.4/L.265), which he considered very complex.

18. Sir Francis VALLAT considered article 27 as the point of departure for the articles now under discussion. The Commission had fully acknowledged the principle that consideration must be given to the needs of developing countries. No one would wish to deny that principle and, as far as he was concerned, article 27 could be referred to the Drafting Committee without further delay.

19. As for article 21, it had been considered at length on first reading and had been drafted with great care. From the point of view of substance, it too merited full support. It had to be recognized, however, that both articles fell within the sphere of the progressive development of international law. Moreover, the Commission was now dealing with treade, finance and economics and he suspected that, like him, some members felt a little out of their depth. It was sometimes difficult to understand the implications for States of the various proposals that had been made, for things were not always what they seemed. For example, a uniform system of customs duties might well conceal serious discrimination as a result of the way in which the system was administered. Consequently, he approached the problems now before the Commission with a sense of humility and considerable misgiving. As could be seen from the commentary, the GSP was a comparatively new phenomenon and not altogether stable in itself. A number of statements by members had reflected a feeling of uncertainty and even insufficiency in respect of the system, which indicated the need to proceed with caution. Indeed, by the time the articles came into force, the GSP might well have proved unsatisfactory and have disappeared.

20. The proposed article 21 *bis* (A/CN.4/L.266) went even further than article 21 into the sphere of the progressive development of the law. The arguments advanced by Mr. Njenga had been very impressive, but he could not agree with the idea that the establishment of EEC had led to higher protective customs barriers. In the main, the customs barriers of the individual member countries would have been higher than they were currently under the unified system of EEC, which operated a scheme of generalized preferences and followed a policy of liberalization of trade. In principle, he was prepared to accept the underlying idea of the proposed article 21 *bis*. The Commission was in a position in which it could only do its best where questions of policy were concerned and perform its function by making it clear that it was submitting to governments what it considered to be the best draft for a particular situation. Ultimately, it was for governments themselves to decide whether the policy of the draft was acceptable.

21. Nevertheless, the wording of article 21 *bis* raised some difficulties, since the terms used assumed a process of self-selection that almost ran counter to the principles of international co-operation and international law. After all, there was no clear-cut distinction between developed and developing countries and it was not easy to be absolutely sure that, for all or for certain purposes, a particular State was developed or developing. For instance, some States that generally regarded themselves as developing countries might be classified as developed countries if pet-

roleum production were taken as the relevant criterion. Again, many so-called developed countries had their own problems and were facing economic decline. The existence of such countries had also to be acknowledged. A very serius problem arose when the undefined concept of "developed" and "developing" was combined with the process of self-selection, for that led to a sliding scale that was not worthy of the standards of drafting adopted by the Commission.

22. The very sound and sensible proposals made by Mr. Reuter (A/CN.4/L.264 and A/CN.4/L.265), which avoided introducing the process of self-selection and had the merit of being based on established documents, namely, the Charter of Economic Rights and Duties of States and existing commodity agreements, might meet the situation even better than did the somewhat minuscule article 21, which was not really very effective. Article 21 *ter* was comparatively straightforward, but some problems of drafting arose in regard to article A. However, the Commission had never been daunted by the difficulty of transforming a valuable idea into a viable draft and very serious consideration should be given to those proposals.

23. Lastly, Mr. Francis had pointed to the fundamental truth that trade was a matter of co-operation. In the long run, trade that flowed only one way led to an imbalance in payments and to a situation in which the channels of trade became blocked and eventually broke down. Trade must of necessity be reciprocal. Consequently the Commission would not further its objectives if, in the process of providing for the needs of developing countries, it also created problems for developed countries. Both sides of the world needed each other, especially in trade. Unfortunately the Commission was inclined, at that juncture, to take a one-sided view of a two-sided problem. A genuinely balanced approach was needed to the whole question of qualifications or exceptions in relation to the most-favoured-nation clause.

24. Mr. QUENTIN-BAXTER said that he was extremely grateful for the Special Rapporteur's lengthy introduction of article 21, which reflected the great importance all members attached to the topic under disucssion, and for statements such as that made by Mr. Njenga (1499th meeting), which had reminded the Commission of the political and economic circumstances to which the draft must relate.

25. The subject posed great difficulties because it contained many diverse elements. Most members felt that the most-favoured-nation clause was so much a world of its own, had so many implications and was so compressed as a standard form of clause in a treaty, that it badly needed explanation, and that the average practioner of international law would gain much from a short set of articles that would serve as a guide to the nature of the clause. However, if the clause itself was ripe for codification, its sphere of application certainly was not. The truth of the matter was that, even if the Commission were able, at a given point in time, to produce an accurate description of the world of bilateral and multilateral trade negotiations, that world was constantly changing—a fact of the utmost importance, which had to be borne in mind at every stage in the examination of the draft. The Commission was concerned to explain a clause that involved much of a tacit nature and had a lengthy history of State practice; it was not describing the modern environment in which the clause must float or sink.

26. It was also worth remembering that, in the last resort, almost all the rules enunciated in the draft were presumptions. There had been a tendency to draw a distinction between two groups of articles: articles 13 to 20, which had been regarded somewhat as rules of interpretation and, on the first reading of the draft, could have been called "properties of the clause"; and articles 21 to 27, which dealt with exclusions. However, both those groups of articles simply contained presumptions that did not limit the freedom of States to contract. In the first group it was presumed, rightly or wrongly, that no exception was implied. For example, if natural treatment were not specifically mentioned, the most-favoured-nation clause gave entitlement to national treatment. The second group contained a negative presumption, namely, that even if frontier traffic, for example, were not specifically mentioned, the intention was that frontier traffic should form an exception. Such rules were useful for those who, in the future, whould have to draw up treaties containing a most-favoured-nation clause, in whatever modified form. The clause was still a basic element in modern multilateral trade law and even in the philosphy of GATT.

27. Article 21 in its existing formulation reflected the awareness that, in the contemporary world, multilateral trade negotiations were of a protean character and that the clause was expected not to dominate, but to give way to developments in that sphere. Much the same was stated in article 27, which he regarded as a kind of invitation. In other words, after describing the properties of the clause, the draft went on to affirm that in the modern world the clause existed in the sphere of trade with a different set of values and that it was for the international community to establish the relevant rules. Such a provision might be considered rather offhand, but great care should be taken not to step beyond the central purpose of the draft, which was to describe a clause that the parties to a treaty were free to modify. One reason for caution was that an accurate description, at a particular point in time, of a world experiencing such rapid change, might impair the developments that were taking place. Moreover, the Commission was on the very edge of its competence. Yet another risk was that, in making substantive statements about the realities of the world of multilateral trade negotiations, the Commission might be subjecting those statements to the limitations of the articles of the draft, all of which were dominated by the proposition that States were free to contract as they chose. On the other hand, no State, if it valued the principles of international co-operation, had the right to conclude a bilateral agreement in which it set aside the develop-

ing principles of the world of multilateral negotiations and of the United Nations family of organizations. But again, the Commission could not state the opposite and claim that it had found a new rule of *jus cogens* that limited freedom of contract.

28. The only course was to make it clear that the Commission was not deceived about the proper place of the clause in the modern world. Like the secretariat of GATT, it believed that the concept of the most-favoured-nation clause would continue to form a part of the theory to which the world subscribed in developing forms of trade negotiation. The Commission should also accept without definition the terms "developed country" and "developing country". No country was more troubled than New Zealand to find itself classed as a developed country, since it was acutely aware of the fact that its economy was based almost entirely on primary products and was heavily dependent upon international trade in such products. Perhaps matters would change for, as Sir Francis Vallat had pointed out, economic situations, like political situations, waxed and waned. The only certainty about the future was that changes would take place.

29. He fully appreciated the importance of reflecting the draft the concepts embodied in the proposed article 21 *bis* (A/CN.4/L.266) but, for the sake of the cause so close to Mr. Njenga's heart, the article should not be anchored too closely to something as fragile as the use or disuse of the most-favoured-nation clause. It should be drafted in a way that allowed it to tie in with the set of presumptions and rules on exclusions set out in the draft. Moreover, account must be taken of the extremely interesting proposals made by Mr. Reuter.

30. It was entirely appropriate for the Commission to give pride of place to the question of developing countries and to acknowledge the very important developments in the sphere of multilateral trade negotiations. If they formed an exception, the exception was quite different in quality from any other of a more narrow or localized character.

31. Mr. SCHWEBEL said that the substance of article 21 *bis* proposed by Mr. Njenga (A/CN.4/L.266) was close to that of article 21 of the Charter of Economic Rights and Duties of States, which read:

> Developing countries should endeavour to promote the expansion of their mutual trade and to this end may, in accordance with the existing and evolving provisions and procedures of international agreements where applicable, grant trade preferences to other developing countries without being obliged to extend such preferences to developed countries, provided these arrangements do not constitute an impediment to general trade liberalization and expansion.

Unlike certain other provisions of the Charter, that article had commanded wide support in the General Assembly and it would be preferable if Mr. Njenga's proposal were brought even more closely into line with its wording.

32. He found a good deal of merit in the substance of the proposals made by Mr. Reuter, who had strongly urged the Commission to abide by the provisions on the most-favoured-nation clause contained in the Charter of Economic Rights and Duties of States; however, the phrasing of the proposals raised some difficulties.

33. Mr. Šahović had alluded to the comments by the United States on article 21 (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. A), and the Charter of Economic Rights and Duties of States as also relevant in clarifying the thrust of those comments. The United States Government had sought to point out that the GSP was now subject to certain safeguards that were absent from article 21 in its existing formulation and should be incorporated in the text. From the articles of the Charter of Economic Rights and Duties of States relating to the most-favoured-nation clause, which were reproduced in paragraph (12) of the commentary to article 21, it could be seen that, under article 18, developed countries should enlarge the system of generalized non-reciprocal and non-discriminatory tariff preferences to developing countries in conformity with the relevant agreed conclusions and decisions adopted on the subject "in the framework of the competent international organizations"—a clear reference to the GATT waiver provisions. Article 26 of the Charter referred to "generalized non-discriminatory and non-reciprocal preferences in favour of developing countries, on the basis of mutual advantage, equitable benefits and the exchange of most-favoured-nation treatment". The provisions of articles 18, 21 and 26 of the Charter had been very carefully drafted, and full account and advantage should be taken of them in the draft articles now before the Commission.

34. At the time, he wished to make it clear that he did not support the Charter of Economic Rights and Duties of States as a whole; nor, in his opinion, should the Commission. It was a recommendatory resolution of the General Assembly, which had met with a number of negative votes, and with a great many such votes on certain articles. It was in no sense sacred; it was not a codification of existing international law and could not be viewed as a progressive development of international law. In some respects, it might even be regarded as regressive. It certainly contained some objectionable provisions, and the sponsors themselves had recognized that initial attempts to make it an element of the codification and progressive development of international law had had to be abandoned. In short, for the purposes of the draft articles under consideration, it was appropriate and desirable to look to the pertinent provisions of the Charter of Economic Rights and Duties of States for guidance, but the Commission should avoid any broader embrace than was necessary of that controversial document.

35. Mr. RIPHAGEN shared the general view that article 21 was inadequate.

36. He found considerable merit in the EEC proposal that the words "within a generalized system of preferences" should be replaced by the words "under a preferential régime" (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 6). The latter formula

was more general and would thus cover the "other differential measures" that article 18 of the Charter of Economic Rights and Duties of States urged developed countries to adopt. He could not agree that such a change would fundamentally alter the nature of the rule, for although generalized system of preferences" had come to be a term of art in international trade, it clearly denoted a system of tariff preferences.

37. He agreed that consideration should be given to adding, at the end of article 21, the clause in the first sentence of article 18 of the Charter of Economic Rights and Duties of States, which read: "consistent with the relevant agreed conclusions and relevant decisions as adopted on this subject, in the framework of the competent international organizations". That would reflect the view expressed by GATT in its comments, to the effect that the difficulties in interpreting several of the terms used in the article could best be overcome "in an institutional framework for continuous consultation and negotiation" (*ibid.*, sect. C, 3, para. 7).

38. He also agreed that the substance of Mr. Njenga's proposal (A/CN.4/L.266) should be included within the framework of the draft articles. However, the Drafting Committee should examine the proposal with a view to bringing its wording into line with that of article 21 of the Charter of Economic Rights and Duties of States, from which the proposal derived.

39. Account should likewise be taken of Mr. Reuter's proposal that commodity agreements would be regarded as an exception to most-favoured-nation treatment (A/CB/L.265). Such agreements were obviously confined to the parties concerned and could not be invoked by a beneficiary State under a most-favoured-nation clause.

40. Lastly, he was very much in favour of the new article A proposed by Mr. Reuter (A/CN.4/L.264), which would place the exception covered by article 21 in a wider institutional framework. He trusted that the Drafting Committee would give full consideration to that proposal for, if accepted, it would bring the draft articles much closer into line with existing international law on trade and commerce.

41. Mr. VEROSTA thought a provision such as article 21 was necessary. Article 21 *bis* proposed by Mr. Njenga (A/CN.4/L.266) seemed acceptable, but the text should be in conformity with the provisions of the Charter of Economic Rights and Duties of States. As for the general article proposed by Mr. Reuter (A/CN.4/L.264), it was justified in many respects. Article 21 was the first of several articles dealing with exceptions to the operation of the most-favoured-nation clause, and the proposed new article had the merit of being more general than the most general of those articles. The Drafting Committtee should nevertheless try to assign to each of the provisions its proper place, so that they would be presented in logical order.

42. Among the exceptions to the application of the most-favoured-nation clause, there was one that had been recognized ever since the existence of that clause, but was not mentioned in the draft: the exception for customs unions. Besides modern associations of States, such as EEC, there had been real customs unions since the beginning of the nineteenth century. The Drafting Committee should therefore introduce an exception for such unions in the draft, possibly in article 15. Developing countries should not be prevented from forming customs unions in the certain knowledge that they would not have to suffer from the operation of the most-favoured-nation clause.

43. The CHAIRMAN, speaking as a member of the Commission, said that article 21 had been regarded as one of the most important by the General Assembly, where it had been well received.

44. The Commission could not disregard the special situation of developing countries in the face of the realities of modern trade relations; privileged treatment for those countries, with a view to ensuring that the operation of the most-favoured-nation clause did not result in unfair competition, was now a general feature of relations between States. However, it was not for the Commission to study the nature and results of the generalized system of non-reciprocal and non-discriminatory preferences that had been unanimously approved at the second session of UNCTAD, in 1968. That system was certainly far from attaining its objectives. It had rightly been criticized for not covering agricultural products, which were the main export of developing countries, particularly of the least developed among them. The system also incorporated a series of safeguard mechanisms and temporal restricitons that further limited the dimensions of the results achieved. The Commission's task, however, was to ensure that the progress made, albeit modest, was respected and preserved in the draft articles. In that connexion, paragraph 5 of the Tokyo Declaration,[7] which was the basis of the current multilateral trade negotiations conducted in the framework of GATT, had introduced a new principle for securing additional advangages for developing countries, namely, that of differential and more favourable treatment. That new trend should find expression in the draft. The concept of differential treatment was wider than that of preferential treatment and could be applied to a vast range of matters relating to economic co-operation between developed and developing countries.

45. A proposal to reword draft article 21 had been before the Sixth Committee of the General Assembly,[8] but the consensus of opinion had been in favour of retaining the existing text, while leaving the way open for fresh efforts by the international community to favour the special situation of developing

[7] Declaration of Ministers approved at Tokyo on 14 September 1973 (GATT, *Basic Instruments and Selected Documents, Twentieth Supplement* (Sales No. GATT/1974-1) p. 19).

[8] See *Official Records of the General Assembly, Thirty-first Session*, agenda item 106, doc. A/31/370, para. 67.

countries. Article 27 (The relationship of the present articles to new rules of international law in favour of developing countries) was a very useful saving clause to that end. In his view, therefore, the limited results of the GSP should be protected from the operation of the most-favoured-nation clause and the way left open for new rules of international law in favour of developing countries.

46. With regard to the proposasls before the Commission, he agreed that a provision on the line proposed by Mr. Njenga (A/CN.4/L.266) should be included in the draft. If it were accepted that the most-favoured-nation clause should not apply to agreements between developed and developing countries, then for the same reasons agreements between two developing countries should also be excluded from the application of the clause. Mr. Njenga's proposal could, however, be simplified by the deletion of the words "in accordance with bilateral or regional arrangements". Those words were not strictly necessary, and in any event arrangements other than bilateral or regional arrangements might be involved. He also considered that the second sentence of the proposal should be deleted, as the wording was somewhat vague. Who would decide whether the arrangements in question constituted "an impediment to general trade liberalization and expansion", and what exactly was meant by "general trade liberalization and expansion"? With those changes, the proposal would still serve its purpose, but would be more concise.

47. As to Mr. Reuter's proposal to exclude treatment extended under commodity agreements (A/CN.4/L.265), he was not sure whether a general exception of that kind was necessary. Further study was perhaps required to determine whether most-favoured-nation clauses were used in commodity agreements to an extent that warranted the inclusion of such an exception in the draft articles. There was, of course, always the possibility of a negotiated exception.

48. He also had some doubts about Mr. Reuter's proposal to exclude treatment extended in accordance with the Charter of Economic Rights and Duties of States (A/CN.4/L.264). In particular, he wondered whether the draft articles, which might be the subject of a future convention, should refer in that context to that charter which, as a resolution of the General Assembly, was not mandatory. At the same time, he recognized the value of Mr. Reuter's proposals and suggested that they be referred to the Drafting Committee, together with article 21 itself and all the other proposals and comments made during the discussion.

49. Mr. USHAKOV (Special Rapporteur) said that, since he could not review all the comments made during the discussion of article 21, he would refer to only a few of the main points raised.

50. His reply to the question whether the Commission should deal with all the recognized exceptions to the operation of the most-favoured-nation clause was in the affirmative. The Commission was called upon both to codify, by confirming existing rules, and to carry on the progressive developments of international law, by stating the rules that emerged from the new trends. On the other hand, it should not deal with all the exceptions that might be found in treaties or in most-favoured-nation clauses. States were free to agree on any other exceptions, but those would apply only in their relations among themselves. The exceptions that should be mentioned in the draft were those that were recognized by the international community and that applied even in the absence of any express stipulation. Those referred to in articles 21 to 23 belonged to the latter class of exceptions. The exception for a generalized system of preferences, dealt with in article 21, was not based on customary internatioal law, but it was recognized widely enough to be considere necessary. As the Commission had stressed in paragraph (13) of the commentary to article 21, there appeared to be general agreement in principle, expressed within United Nations organs, that States should adopt a generalized system of preferences. It was on the basis of that general agreement that the Commission had formulated the rule stated in article 21, which was a provision embodying progressive development of international law.

51. The exceptions provided for in articles 21 to 23 were exceptions *ratione personae,* since they applied to certain States that were excluded from the application of the most-favoured-nation clause. It was important to specify clearly which States those were. For the purposes of article 21, they were States to which a developed granting State did not accord the benefit of a generalized system of preferences; for the purposes of article 22, they were States other than contiguous States; for the purposes of article 23, they were States other than land-locked States.

52. Considered from a different viewpoint, articles 21 to 23 contained exceptions *ratione materiae,* since each article related to a particular sphere. Article 21 related to the GSP, and in particular to customs duties. However, the system might be expanded. The Commission was not called upon to criticize it or to point to its shortcomings; nevertheless, it must take note of the fact that States had agreed on a certain practice. On the other hand, the Commission could not, for the time being, refer to differential treatment, which was not yet generally applied. If such treatment became general, article 27 of the draft would come into play.

53. Since articles 21 to 23 embodied exceptions for developing countries, and since the general article proposed by Mr. Reuter (A/CN.4/L.264) was much wider in scope, he would refrain from commenting on that proposal for the time being.

54. In referring to the Charter of Economic Rights and Duties of States, several governments and international organizations had expressed the view that any preferences or advantages granted by developing countries to one another should be excluded from the operation of the most-favoured-nation clause. Specific proposals to that effect had been submitted by ECWA (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. B) and subsequently by Mr. Njenga

(A/CN.4/L.266). The latter text, however, was not entirely satisfactory. On the one hand, it made no mention of the granting State and the beneficiary State; on the other hand, it could not be affirmed, as in the text, that developing countries "may grant trade preferences". Those countries could themselves decide whether or not they were in a position to grant such preferences, it being understood that general international law did not prevent them from doing so. Moreover, it was not appropriate to specify that such preferences were granted "in accordance with bilateral or regional arrangements", since the granting State could accord them in any way it wished, for example, by a unilateral decision or under a provision of its internal law. It would be better to draft article 21 *bis* the following lines:

A developed beneficiary State is not entitled under a most-favoured-nation clause to any preferential trade treatment extended by a developing granting State to a developing third State.

55. Thus stated, the rule should be acceptable to all States, provided, however, that it were made clear what was meant by a "developing third State" in the context of trade. Some countries could be regarded as developing from the political point of view but as developed from the point of view of trade. Unless it could be specified which countries were developing countries in the context of trade, the proposed article might raise a number of difficulties.

56. Mr. ROMANOV (Secretary to the Commission) said that, in accordance with the request made by the Commission at its 1494th meeting, Mr. H. Stordel, Deputy Director of the Manufactures Division of UNCTAD, had agreed to address the Commission the following morning, 9 June 1978, on issues of direct relevance to the Commission's work on the most-favoured-nation clause.

The meeting rose at 1.05 p.m.

1497th MEETING

Friday, 9 June 1978, at 10.05 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, 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. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

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, A/CN.4/L.264-266)

[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] (*concluded*)

1. The CHAIRMAN invited Mr. Stordel, Deputy Director of the Manufactures Division of UNCTAD, to address the Commission.

2. Mr. STORDEL (UNCTAD secretariat) said that the question of most-favoured-nation treatment, and its relationship to the preferential treatment of developing countries, had been of major concern to UNCTAD since its inception. General Principle Eight of recommendation A.I.1, adopted at the first session of the Conference, provided *inter alia* that international trade should be conducted to mutual advantage on the basis of most-favoured-nation treatment. It also provided that developed countries should grant concessions to all developing countries, and should extend to the latter all the concessions they granted to one another; in so doing, they should not require any concessions from developing countries in return. New preferential concessions, both tariff and non-tariff, should be extended to developing countries as a whole and should not be extended to developed countries. Developing countries should not be required to extend to developed countries preferential treatment in operation among themselves.[2]

3. Although most-favoured-nation treatment aimed at equality of treatment, it was, paradoxically, preferences that provided a means of enabling developing countries to come closer to real equality of treatment. The most-favoured-nation principle did not in fact take account of inequalities in economic structure and levels of development in the world; equal treatment of countries that were economically unequal was equality only in the formal sense, and actually amounted to inequality. Thus preferential reductions on imports from developing countries brought those countries closer to achieving equality of treatment with producers in the national or multinational markets by taking account of their lower level of development and correcting a situation in which their exports were placed at a disadvantage compared with those of developed countries.

4. The breakthrough in the introduction of generalized preferences for products originating in developing countries had been achieved with resolution 21 (II), adopted at the second session of UNCTAD. That resolution provided that the objectives of the generalized non-reciprocal, non-discriminatory system of preferences in favour of developing countries should be: (*a*) to increase their export earnings;

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

[2] *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No. 64.II.B.11), p. 20.