Document:-
A/CN.4/SR.1499

Summary record of the 1499th meeting

Topic:
Most-favoured-nation clause

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

of economic unions. It would be difficult to define a customs union precisely and to distinguish advantages accorded within such a union from those extended outside it. The difficulties increased when a customs union became an economic union, which might in turn become a political union. There was nothing to prevent such developments, but they should not harm a beneficiary State that remained outside the union.

43. Lastly, he empnasized the importance of articles 25 and 26 in that connexion. The purpose of those provisions was to avoid hindering the development of unions of States, without prejudice to the obligations assumed by the granting State towards the beneficiary State, in accordance with the great principle *pacta sunt servanda.*

44. Mr. CALLE Y CALLE said that the subject of Sir Francis Vallat's proposed new article 23 *bis* was a controversial one that had given rise to differences of opinion in the Commission and in the Sixth Committee of the General Assembly.

45. Many States that participated in customs unions and integration schemes were reluctant to accept the general idea underlying article 15 (Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement), namely, that the source of the treatment extended to a third State in no way affected the automatic and unrestricted application of the most-favoured-nation clause.

46. International organizations did not support that idea either. The GATT secretariat, for instance, after noting in its comments that the draft did not refer to customs unions, free-trade areas or similar groupings, had stated that it assumed that the Commission, in its further work, would take account of the developments that had taken place in that connexion (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 3). In other words, it considered that the Commission should not disregard an international reality—a need felt by countries, particularly developing countries, that were seeking to promote their development through customs unions and integration schemes.

47. On the other hand, it had been said that State practice in fact excepted customs unions and integration schemes from the application of the clause, because it was an obstacle to their satisfactory operation. The weight of doctrine was clearly in favour of such an exception. As far back as 1936, the Institute of International Law had referred to customs unions as a necessary exception,[12] and in 1969 it had stated in unequivocal terms that a beneficiary State should not be able to invoke the clause to claim treatment identical with that granted to one another by States participating in a regional integration scheme.[13] One of the alternative articles relating to customs unions and free-trade areas proposed by the late Mr. Hambro[14] had been on those lines.

48. Furthermore, EEC, in its comments, had expressed the view that the exception in question was a customary rule, but had added that, if no such exception existed, it would have to be established (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 10). The Commission thus had to decide whether to establish such an exception by embodying it in the draft.

49. He agreed that a more balanced approach was needed in the commentary to article 15, which suggested that it was impossible to cover or provide for the kind of situation in question. After all, it was States that would conclude agreements containing the clause, and it was when they did so that the scope of the provisions agreed upon would be decided. That was particularly true because the convention would apply to all future treaties containng the clause.

50. In his view, therefore, the Commission should give the closest consideration to the proposed article 23 *bis,* which would meet a real need and satisfy the aspirations of States as expressed in the Sixth Committee of the General Assembly and reflected in their written comments. The article would also dispel some of the concern expressed by members of the Commission.

The meeting rose at 6.15 p.m.

[12] *Yearbook... 1969,* vol. II, p. 180, doc. A/CN.4/213, annex II, resolution, para. 7.

[13] *Annuaire de l'Institut de droit international,* 1969, Basel, vol. 53, t. II, p. 379.

[14] See *Yearbook... 1976,* vol. II (Part One), p. 135, doc. A/CN.4/L.242.

1499th MEETING

Tuesday, 13 June 1978, at 9.35 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Bedjaoui, 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. 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, A/CN.4/L.264-266)

[Item 1 of the agenda]

PROPOSED NEW ARTICLES (*continued*)

ARTICLE 23 *bis* (The most-favoured-nation clause in relation to treatment extended by one member of a customs union to another member)[1] (*continued*).

[1] For text, see 1498th meeting, para. 18.

1. Mr. SUCHARITKUL said that with Sir Francis Vallat's proposed new article 23 *bis* the Commission had arrived at a crossroad. Whichever path it chose, however, customs unions, which had been in existence for 150 years, were a fact and would remain so, whether the proposed new article were adopted or not.

2. He had been favourably impressed by Mr. Njenga's proposal for a new article 21 *bis*,[2] as amended in accordance with the Chairman's proposal,[3] but considered that it was still not sufficiently comprehensive, as it covered trade matters only and did not extend to other forms of economic co-operation.

3. Customs unions and other forms of economic integration reflected a sophisticated level of economic development to which it was difficult for the countries of Asia, Africa and Latin America, many of which had only recently attained independence, to attain. Consequently, he considered it necessary, while preserving the most-favoured-nation clause, that the special position of developing countries should be catered for. He therefore suggested that some such wording as "or an association of States for regional economic co-operation" should be added after the words "customs union" in the title and in the text of the proposed new article 23 *bis*.

4. Mr. QUENTIN-BAXTER said that the issues raised by Sir Francis Vallat's proposal and those relating to the scope of the articles, although essentially different, were similar in two superficial respects, which nevertheless gave cause for concern. Both involved customs unions, free-trade areas and other similar associations of States, and both were redolent of the atmosphere of the wars of religion, where questions of high principle had not been dealt with in a spirit of pure reason but had become instead a means of exacting an oath of allegiance. The Commission was in effect being asked to pronounce for or against customs unions, and the latent anxiety of the minds of most members was that the draft would be put to the torch by whichever side its answer displeased.

5. The differences between the issues involved in the scope of treatment and those involved in the subject under consideration were very real. In the former case, the Commission was entitled to state in the commentary that it could conceive of no reason why the draft should not have the same value for treaties to which a union was a party as it had for treaties between States. While there was no problem at the practical level, however, there was a very real one theoretically, for the Commission's standards of codification would be prejudiced if it were to burden a set of articles on a very limited topic with a major doctrinal development that had to be considered elsewhere.

6. Sir Francis Vallat's proposal, on the other hand, came fairly and squarely within the scope of the subject before the Commission. It had been peatedly stated that the Commission was dealing almost exclusively with a series of presumptions. In efffect, it was establishing a check-list to alert the lawyers of the future to the possible implications of any agreements they might conclude that contained the most-favoured-nation clause. On that simple test, it was clear that customs unions were so much a part of contemporary life that, should the Commission disregard them, it would lay itself open to a charge of unreality and cause doubt to be cast on the integrity of the draft as a whole.

7. But it was one thing to say that the question of customs unions should be dealt with in the context of a check-list and an entirely different matter to say that it should be treated as an exception in the absolute sense. The argument advanced by one side was that customs unions were a reality and must therefore be mentioned. On the other side, it was contended that in effect a statutory interference with a private contract was being created. The question that required a little more thought, therefore, was whether the Commission was going further than it ought by shifting the balance between the parties to treaties. His own view was that the Commission would be very ill-advised to endeavour to draw any comparison between that issue and article 21,[4] which dealt with the GSP and with relations between developed and developing States. The latter related to a matter of such prominence in current multilateral developments that it could confidently be said that nobody using a most-favoured-nation clause in any context directly involving trade or economic issues could fail to be aware that it must be read subject to those developments.

8. The argument could even be said to extend to definitions, in which connexion he did not think that an analogy could be drawn between the definition of a customs union on the one hand and the definition of developed and developing States on the other. The latter terms were in the nature of a floating currency, used within a particular context, and any attempt on the Commission's part to peg that currency would cause justifiable resentment and result in rejection. An analogy between the proposed new article and articles 22 and 23, however, relating respectively to frontier traffic and land-locked States, was entirely reasonable. Indeed, the discussion on draft article 22 indicated that its dimensions might be somewhat broader than had been apparent on the first reading of the commentary. The difference between customs unions and frontier traffic was largely to be viewed in terms of the interest and controversy those issues aroused; within the context of presumptions regarding the meaning of the most-favoured-nation clause, it would suffice to draw attention to the matter and to describe it fairly carefully in the commentary.

9. He agreed that there was no need to include in the proposed new article a second paragraph along

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

[3] See 1496th meeting, para. 46.

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

the lines of paragraph 2 of articles 22 and 23, but he thought some slight change was required in Sir Francis Vallat's proposal. The words "other than a member of a customs union" paralleled the phraseology of paragraph 1 of articles 22 and 23, but in the latter case they provided a link with paragraph 2, and that was the justification for their inclusion. When dealing with frontier traffic and land-locked countries, it was perhaps reasonable to think in terms of exceptions to exceptions. The most-favoured-nation clause might not work between unequal parties, for example between land-locked States and other States, but it might have some application as between land-locked States themselves. That idea could not, however, be translated to the customs union issue. To provide that a beneficiary State other than a member of a customs union was not entitled under a most-favoured-nation clause to certain treatment implied that a beneficiary State that was a member of a customs union was entitled to such treatment. That of course was nonsense. If the treatment was valid, it was because both parties were members of a customs union and not because of the operation of the most-favoured-nation clause. Consequently, although it was a minor point, he would not be able to consider the proposed new article without the deletion of the words "other than a member of a customs union".

10. The proposition, then, was that States or other international persons, when contracting in the matter of most-favoured-nation clauses, would be presumed to embody a classic exception in favour of customs unions or free-trade areas. Testing the reasonableness of that presumption by taking article 16, relating to national treatment, as a point of comparison, it would be seen that the two articles were comparable to the extent that they both reflected the idea that the beneficiary was treated not merely as the most privileged kind of alien but in precisely the same way as the citizens of the country concerned. Yet the effect of article 16 was that parties concluding most-favoured-nation clauses laid themselves open to national treatment being invoked in terms of the most-favoured-nation clause, whereas they did not do so if they were members of a customs union. There were, however, cases where it was plainly the intention of the parties to exclude national treatment. Consequently, it was essential to envisage all the circumstances in which the articles might apply and, in particular, to strengthen the commentary by providing a warning that, as far as existing treaties were concerned, it should not be assumed that it was the intention of the parties to accept the presumption in the manner in which it had been framed by the Commission. That might dispel some of the concern felt on the point.

11. There remained a residual area of some importance. New agreements should not cause the Commission concern provided there was a clear rule in the articles that an exception was implied for customs unions. However, the parties might never have adverted to the possibility that one or other of them, for the purposes with which the most-favoured-nation clause dealt, would join a customs union, free-trade area or other similar association. If that was a real hypothesis, as he believed, then he would ask whether it was reasonable to provide that right was on the side of the State that jointed the customs union. In his view, the presumption was if anything the opposite, and the party changing its position had the primary obligation to negotiate with a view to arriving at a reasonable solution.

12. In the light of those facts, he considered that it should be possible to include in the draft articles a provision lying somewhere between the two main positions on the issue and perhaps not couched in such positive and unqualified terms as Sir Francis Vallat's proposal.

13. Mr. REUTER said that the Commission was faced with two serious questions: what image should it form of the economic world of the future, and how should it interpret its task? On the latter point, it could either prepare extremely detailed texts or confine itself to drafting general provisions that would merely express hopes.

14. The Commission undoubtedly faced a problem concerning the law of treaties, and more particularly the interpretation of treaties. Experience showed that the expression "most-favoured-nation treatment" no longer had the same meaning as in the past. The aim, therefore, was to propose a rule of interpretation that would be valid for the future. Yet it was a fact that the rules the Commission was establishing for the future would also apply to the present and the past. That was proved by the fact that the International Court of Justice had based its advisory opinion on the continued presence of South Africa in Namibia[5] on article 60 of the Vienna Convention on the Law of Treaties,[6] which in principle applied only to treaties concluded after its entry into force, and its judgment in the fisheries jurisdiction case[7] on the *rebus sic stantibus* principle embodied in article 62 of that Convention. In the case under discussion, therefore, the issue concerned both the past and the future.

15. The proposal was that a most-favoured-nation clause couched in general terms should be considered as embodying only a limited number of exceptions. The advocates of that approach maintained that the Commission should refrain from drafting detailed and complicated provisions. In that connexion, a distinction must be made between a case in which it was possible to choose between a simple or a complicated formulation of one and the same rule and a case in which two different rules had to be formulated. It was one thing to say that a most-favoured-

[5] Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), Advisory Opinion, *ICJ Reports 1971*, p. 16.

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

[7] Fisheries jurisdiction (United Kingdom *v.* Iceland), Merits, Judgment: *ICJ Reports 1974*, p. 3.

nation clause couched in general terms was considered to embody only two or three exceptions and another to say that different interpretations might be placed on the will of States contracting such a clause. In the latter case, the criterion governing the choice was not simplicity but conformity with the circumstances of the modern world.

16. The Special Rapporteur had invoked the argument of simplicity in support of the view that exceptions to the application of the clause should be limited; he had emphasized that it would be difficult to give a definition of the term "developing country". However, what that expression embodied was only too clear. In article 7, paragraph 2 (*b*), of the Lomé Convention,[8] 53 developing countries and nine other countries used the expression "developing country" without defining it. According to that provision, most-favoured-nation treatment was not applicable in respect of trade or economic relations among African, Caribbean and Pacific States or between one or more of those States and other developing countries. The expression "commodity agreement" appeared in many texts, particularly in the Charter of Economic Rights and Duties of States.[9] Nor did the expression "customs union" require definition.

17. It seemed that in the future, whether or not the Commission expressly so provided, no State would accept a most-favoured-nation clause without reserving the right not to apply it should its application conflict with the needs of the contemporary world. For instance, in paragraph 1 of article 2 of the trade agreement recently concluded between EEC and China,[10] the Contracting Parties accorded each other most-favoured-nation treatment in a number of clearly defined areas, but in paragraph 2 of that article they stipulated that paragraph 1 did not apply in the case of:

(*a*) advantages accorded by either Contracting Party to States which together with it are members of a customs union or free-trade area;

(*b*) advantages accorded by either Contracting Party to neighbouring countries for the purpose of facilitating border trade;

(*c*) measures which either Contracting Party may take in order to meet its obligations under international commodity agreements.

Article 3, paragraph 3, of the Lomé Convention contained a similar provision on commodities. It would be advisable, therefore, for the Commission to make express provision for the point so that third world countries would not see a non-existent trap in the most-favoured-nation clause.

18. The Commission had two courses before it if it presumed that States concluding a most-favoured-nation clause intended to subordinate its application to the future needs of the international community: it could either accept the article 21 *bis* proposed by Mr. Njenga with regard to the trade preferences that developing countries granted each other, along with the article 23 *bis* proposed by Sir Francis Vallat, as amended to meet the suggestions of Mr. Sucharitkul, in which case there would be no reason for him to withdraw his proposed article 21 *ter* on commodity agreements (A/CN.4/L.265);[11] or it could draft a general provision such as his proposed article A (A/CN.4/L.264),[12] which provided a solution to the problem of customs unions and free-trade areas. Although slightly inconsistent, the needs of the contemporary world and those of the future world were fairly clear. It was necessary that small Powers, and principally developing countries, should be able to join together in groupings which, whatever their form, always implied a certain degree of permanence. But the international community also needed universal rules and an international economic order, which could now be seen to be taking shape on the horizon. Of course, the Charter of Economic Rights and Duties of States was not yet fully accepted and the EEC Council of Ministers had stated that it did not constitute law. Yet it existed, was unique of its kind and constituted a significant promise for the future of mankind. If offered a solution to the discrepancy between a world order and regional orders, a discrepancy that must be removed in the interest of the former. He had tried to reflect those ideas in his draft article A. He hoped that at least some trace of them would remain in the Commisson's work.

19. With regard to his proposed draft article 21 *ter* on commodity agreements, he visualized the case of a State concluding a most-favoured-nation clause but omitting to enter a reservation on commodities. If the United Nations subsequently drew up a commodities agreement, that State would not want to become a party to it for fear that the beneficiary State might invoke provisions that could not be reconciled with the commitments of the granting State, for example provisions on reserved markets or quotas. In an economic world that was moving towards unity, it was not feasible to prevent States that concluded a most-favoured-nation clause from stipulating an exception that would operate if the international community drew up an agreement that was in the general interest of States. The article should be seen not as an attack on the most-favoured-nation clause but as an attempt to reconcile it with the needs of the modern world.

20. Personally, he was prepared to accept either an adequate list of exceptions or a general provision such as his proposed article A. The main point was that it should not be assumed that States concluding a most-favoured-nation clause in the future would disregard the fundamental rules needed by the international community.

21. Mr. BEDJAOUI thought that one of the major exceptions to the application of the clause must lie in

[8] *Official Journal of the European Communities*, Luxembourg, 30 January 1976, vol. 19, No. L 25 p. 12.

[9] General Assembly resolution 3281 (XXIX).

[10] *Official Journal of the European Communities*, Luxembourg, 11 May 1978, vol. 21, No. L 123, p. 2.

[11] See 1495th meeting, para. 22.

[12] *Ibid.*, para. 23.

the status to be reserved for developing countries. From that standpoint, article 21 was very useful, although it did not go far enough. The Drafting Committee should take due account of proposals such as those of Mr. Njenga and Mr. Reuter.

22. The problem of applying the most-favoured-nation clause in face of the desire of developing countries to obtain special and more favourable treatment was to be seen in an historical context. The multilateral trade negotiations in progress in GATT on the basis of the Tokyo Declaration[13] provided developing countries with an opportunity to insist on the need for methods whereby differential measures could be applied to them under conditions that would guarantee them special and favourable treatment. Such measures must be applicable to the full range of trade relations between developing and developed countries, so as to provide a new and more solid structure for world trade. The developing countries had proposed that the Trade Negotiations Committee should undertake a major reform of the General Agreement, and in December 1976 the Committee had set up a "Framework" Group to consider questions relating to the international framework of world trade. Since 1977 the Group had been examining five points, one of which was the legal framework for differential and more favourable treatment for developing countries in relation to the provisions of the General Agreement, and in particular to the most-favoured-nation clause. Those five points were very important, because the existing framework of the General Agreement was inadequate to meet the trade needs of developig countries. The Group's conclusions should be taken into consideration in the articles before the Commission, particularly in article 21 *et seq.*

23. Wider use of the most-favoured-nation clause would lead to a gradual reduction in the gap between the right arising under the most-favoured-nation clause and those arising under the GSP, and thus to the disappearance of the meagre advantages that developing countries derived from that system. The GSP should not therefore be regarded as an accessory to a general trade framework of which the most-favoured-nation clause was the instrument. By placing third States on an equal footing in respect of domestic legislation, article 10 ran counter to various resolutions adopted at Columbo in 1976 by the Fifth Conference of Heads of State or Government of the non-aligned countries, as well as to various resolutions adopted by the United Nations, in the framework of the Charter of Economic Rights and Duties of States, on co-operation among developing countries. That was why he attached great importance to Mr. Njenga's proposal, a proposal that was moreover in keeping with the work of UNCTAD, which had laid the foundations for a preferential system in trade among developing countries.

24. It was true that the rights of developing countries were reserved in article 27; that was an essential provision, as was demonstrated in particular by the work of the fourth session of UNCTAD, the resolutions adopted by the non-aligned countries in Colombo, the initial conclusions reached at the Conference on Internationl Economic Co-operation and the progress made in the multilateral trade negotiations in Geneva. But those developments also showed the need for a broader review of article 21, with maximum account being taken of the proposal put forward in response to the concerns of the international community.

25. In short, the Commission should not only take into consideration the conclusions arrived at in the "Framework" Group in regard to the most-favoured-nation clause, but should also look beyond the GSP, which constituted a particular framework within a general system based on reciprocity, to the specific problems and new realities represented by the system of preferences or collective self-help being pursued among developing countries. From that standpoint, although article 27 reserved the future rights of developing countries in a general way, it could create a dangerous void. That was an additional reason for strengthening article 21 in favour of developing countries.

26. Mr. EL-ERIAN said that, as was indicated in the commentary to article 15, it had been generally agreed in the Commission, during the discussion on the matter in 1975 and 1976, that there was no customary rule establishing an implicit exception to the application of the most-favoured-nation clause in the case of customs unions and similar associations of States. He shared that view. The matter had already been discussed in the League of Nations. Thus the International Conference for the Abolition of Import and Export Prohibitions and Restrictions, held at Geneva in 1927 to establish a convention, had considered whether States not parties to that instrument might, by virtue of bilateral agreements based on the most-favoured-nation clause, claim the benefit of any advantages mutually conceded by the States parties, and had urged that the conclusion of plurilateral conventions would be hidnered if countries, while not acceding to such agreements, might still, without giving any counter-engagements, avail themselves of the engagements undertaken by the signatory States to such conventions. In other words, countries had been advised to endeavour to adjust their obligations under the new conventions to their other obligations. That had applied in the case of the Treaty of Rome[14] establishing EEC; the parties had been advised to renounce their previous obligations or to find a way of resolving any difficulties that might arise. If it were decided, in the absence of a customary rule providing for an amplied exception, to formulate a provision on the matter, such a provision would be *de lege ferenda* and not of *jus cogens.*

27. Bearing in mind the terms of article 26, on the freedom of the parties to agree to different provi-

[13] See 1496th meeting, foot-note 7.

[14] United Nations, *Treaty Series*, vol. 298, p. 11.

sions, and of article 25, on the non-retroactivity of the articles, there were two possible ways of regulating the situation after the convention had been concluded: provision could be incorporated in the clause itself or in the treaty containing the clause, in which case there would be no problem, or alternatively there could be a residual rule in favour of an implied exception. That meant that the scope of the draft articles would be very limited.

28. He would concede that it was difficult to define customs unions with any accuracy, but the difficulty was not insurmountable. Moreover, the integrity of the Commission's work did not permit it to avoid the problem and to cast the burden on States. It had made that mistake in 1956 in failing to agree on the extent of territorial waters; the adverse consequences of that omission were common knowledge. At the time, however, the Commission had not been working on a consensus basis.

29. Lastly, the fact that the Commission had decided earlier to leave certain problems aside should not debar it from reconsidering them with a view to making the draft more complete. He trusted that the Drafting Committee would produce a generally acceptable formula.

30. Mr. ŠAHOVIĆ agreed with those who had emphasized the importance of the problem of customs unions, but thought that its importance should not be exaggerated; the Commission was not dealing with the issue for the first time and had already succeeded in defining a good many of its aspects. The problem was indeed a real one, whose importance was emphasized by the political pressures exerted by certain groups of States. The Commission should adopt a clearer position on the subject so that States would be enabled to express their views more precisely. The various reports of special rapporteurs and the Commission's commentaries showed that there was still hesitation on the matter. The Commission should continue to maintain a degree of equilibrium among the various interests involved. That did not mean that it should not adopt a position on the issue, but that it should take into account the overall realities of the situation and the dimensions of the various problems, as well as the possible consequences of an article such as article 23 *bis*. The same importance could not be attached to all problems and all exceptions. For instance, the problems posed by customs unions, which article 23 *bis* attempted to settle, were not as important as those posed by the situation of developing countries, to which the Commission had devoted article 21 and to which it would probably devote other articles, such as article 21 *bis*.

31. He thought it unnecessary to devote an article to the problems posed by customs unions, because such problems had thus far been settled by State practice. The question now was how much importance to attach, in the draft articles, to the solution represented by that practice. Was it necessary to devote one or more articles to them, raising the exception concerning customs unions to the rank of a universal rule of law, be it a positive rule, a rule of interpretation or merely a proviso? Was it essential to attach such importance to the situation of customs unions and other regional economic organisations? He did not think so.

32. It was true that the subject currently received considerable attention, and he was grateful to Mr. Reuter for having taken account of that tendency in the modern world and of the problems encountered in seeking to define the new international economic order. However, the problem was how to deal with the situation of customs unions from the standpoint of the new international economic order; from that angle, he did not believe it necessary to insist on the concept of customs unions. Although the concept existed, and must therefore be taken into account, there were also many new forms of regional and subregional intergovernmental organization through which States were endeavouring to settle their economic problems. Consequently, the questions concerning the exception formulated in article 23 *bis* did not arise in the case of customs unions alone; much wider issues were involved, as was shown in the comments of governments and internatioal organizations. It was not possible, therefore, to deal with problems concerning customs unions without taking account of their influence on universal problems; while recognizing the prevailing trend in favour of restricted groupings among States, it was important to keep constantly in mind the principle of universality on which any element of the new international economic order must be based.

33. Article 21 *bis* (A/CN.4/L.266) posed the problem in much more balanced terms than article 23 *bis*; while emphasizing the particular situation of developing countries and the need to respect their interests, it indicated in the second sentence that account must also be taken of the universal interests of the international community by not allowing arrangements among developing countries to constitute "an impediment to general trade liberalization and expansion".

34. Article 23 *bis* should therefore be amended to emphasize the need to take account of the interests of States other than members of customs unions. While recognizing that "States have the right, in agreement with the parties concerned, to participate in subregional, regionl and interregional co-operation in the pursuit of their ecoomic and social development", article 12 of the Charter of Economic Rights and Duties of States stipulated that

> all States engaged in such co-operation have the duty to ensure that the policies of those groupings to which they belong correspond to the provisions of the present Charter and are outward-looking, consistent with their international obligations and with the needs of international economic co-operation, and have full regard for the legitimate interests of third countries, especially developing countries.

It must not be forgotten that, in their existing form, customs unions frequently hampered normal economic relations and the development of fruitful economic co-operation among all States.

35. In practice, the problems of trade and economic co-operation, and especially the problems posed by the

application of the most-favoured-nation clause in the case of customs unions, were resolved by negotiation, which regulated relations between members of customs unions and third States. It was therefore unnecessary for the draft to include an article such as article 23 *bis*. However, if the Commission decided to insert such an exception in the draft, it must formulate it more flexibly, taking into account not only the interests of States members of customs unions but also those of third States, since the clause must conserve its real purpose, which was to enable all States to develop their economic co-operation.

36. Mr. JAGOTA said that, if the Commission established a rule to which there were too many exceptions, the rule itself might remain an empty shell. On the other hand, if the draft failed to take account of the legitimate interests of all countries, it would not have the requisite durability. However, if the draft were to include articles like article 21, on the GSP, and article 21 *bis*, which protected the fair and legitimate interests of developing countries, it would be only fitting to accommodate the ideas expressed in article 23 *bis* as well; they should be inserted as a proviso within due limits. In that way, the draft would form an equitable and well-balanced set of articles on the most-favoured-nation clause.

37. Earlier in the discussion, the view had been expressed that, because the draft related to most-favoured-nation clauses contained in treaties between States, it would be going too far to extend the notion of "State" to include international organizations like EEC. The proposed article 23 *bis* would help to fill the gap and fell within the scope of the draft, for it concerned relations between the granting State, the third State and the beneficiary State, even though it was an exception entailing advantages and benefits granted by one State to another when both were member of a customs union. However, articles 23 *bis* in its existing form would not apply to the members of EEC, for the States concerned must have treaty-making capacity to accept conventional obligations concerning most-favoured-nation treatment; the economic integration achieved by EEC was such that EEC was a unit consituting a single customs territory, and all its trade agreements and trade policy decisions were made by the organization itself and not by its members. There were of course other customs or similar unions that had not yet reached the same stage of integration as EEC, and they would be covered by article 23 *bis*.

38. The Special Rapporteur had pointed out that the most-favoured-nation clause was not a rule of customary international law and that, consequently, any exceptions to it could not be based on international custom. The fact remained, however, that the Commission was now developing the law on the topic and it was appropriate that the draft should include legitimate exceptions to the operation of the clause. Many treaties offered examples of the type of exception now under discussion. The matter was fairly common and could therefore be regulated. Article XXIV of the General Agreement on Tariffs and Trade[15] defined the concepts of a customs union and a free-trade area and took account of the possibly harmful effects of a customs union by providing for prior approval by the Contracting Parties to GATT to determine whether a customs union that would constitute an exception to the system would in fact promote international trade rather than raise barriers to it. When considering article 23 *bis*, the Drafting Committee should bear in mind the concerns reflected in article XXIV of the General Agreement and ensure that most-favoured-nation treatment under existing treaties was protected when a party or parties to those treaties later entered into a customs union.

39. In addiiton, in conformity with the language employed in article XXIV, paragraph 4, of the General Agreement, a statement should be inserted in article 23 *bis* to the effect that the purpose of a customs union or free-trade area must be to facilitate trade among the constituent territories and not to raise barriers to the trade of other States with such territories.

He agreed with Mr. Šahović regarding the kind of wording to be used, which might indeed be taken from article 12 of the Charter of Economic Rights and Duties of States.

41. Finally, the term "customs union" would have to be elaborated on, although not necessarily defined, in order to indicate that the members of an association of that type had treaty-making capacity to enter into most-favoured-nation commitments; otherwise, the expression "customs union" would be interpreted in a restrictive manner, at it was in the General Agreement. Consequently, the term would have to include similar organizations, such as free-trade areas, whose purpose was to grant particular benefits to their members but whose members, since they did not form single customs territories, retained the necessary treaty-making capacity. If the Drafting Committee were to take account of those considerations, the exception could be included in the draft without further need of the safeguards contained in the General Agreement, for it should be remembered that the provisions of articles 25 and 26 of the draft would be applicable as well.

42. Mr. DÍAZ GONZÁLEZ said that the lengthy discussion had clearly brought out the various approaches to the important topic of the most-favoured-nation clause and, in particular, to the scope of the clause. Countries belonging to customs unions or to organizations designed to secure economic integration had rightly expressed their concern in that connexion, as had certain economic associations, such as the Board of the Cartagena Agreement.

43. The scope of the clause had changed and would continue to change, more especially in regard to the international economic relations that were closely bound up with the development of the nations now forming the international community. After the Sec-

[15] See 1492nd meeting, foot-note 10.

ond World War, the structure of the international community had changed radically, with the emergence of many new States, which now represented the majority of its members. Moreover, those States participated in the organizations responsible for regulating international relations and co-operation and were developing the law that was to govern the new international society. It was therefore logical that they should seek the best way to defend and protect their interests within the new international economic order. The new international law must reflect the concern of all States to ensure the effective protection of their interests. Codification of the law could only mean co-ordination of the past with the present, as a bridge to the future. In other words, it entailed the progressive development of international law, which was a prime objective of the Commission under its terms of reference. The proposals now under discussion were simply proof of the need to seek a realistic formula. They would certainly contribute to the preparation of a viable set of articles acceptable to most States.

44. The comments he had made in connexion with article 15,[16] were relevant to the current discussion. He therefore supported the proposal made by Sir Francis Vallat, since article 23 *bis* introduced, although perhaps timidly, an element that would meet the aim the Commission had set itself: to facilitate the codification of the clause and to adapt it to its new sphere of application. Obviously, the Drafting Committee might make it more comprehensive, in the light of the proposal made by Mr. Njenga and Mr. Reuter, which would not fail to command his support.

45. Mr. CASTAÑEDA said it was evident from the discussion that, in view of the many differences in State practice, it was not possible to speak in the case under consideration of an exception that was a principle of general international law. Indeed, if a dispute were to arise under existing conditions, the most-favoured-nation clause would probably prevail; as the Special Rapporteur had pointed out, the subject involved treaty obligations of great importance and any derogation therefrom would be warranted only on the strongest of grounds, namely, the existence of a higher law. Fortunately, however, the task of the Commission was not to act as a court of justice and hand down a decision on a particular dispute, but to legislate for the future.

46. From that standpoint, the Commission should adopt the most fundamental criteria and go straight to the heart of the matter. It was almost axiomatic that the contemporary world required that associations of States be formed for the purpose of economic integration. With the exception of a small number of very large and highly populated countries, the States in the modern world were too small and had too few resources to function alone. The Commission must necessarily take that into account. At the same time, the treatment that the members of a customs union or similar kind of grouping extended to one another represented discrimination against non-member States. The only conclusion to be drawn, as the Special Rapporteur had pointed out, was that customs unions or other types of economic associations were incompatible with the operation of the most-favoured-nation clause. Accordingly, in gauging the value of the proposal of Sir Francis Vallat, it was necessary to determine whether that proposal met the needs of the international community. In his opinion, anything that favoured the establishment of customs unions or the like was in keeping with those needs. The Commission should look favourably on the trend towards the establishment of customs unions, which should form exceptions to the application of the most-favoured-nation clause.

47. Opinions were divided as to whether customs unions were helpful or prejudicial to developing countries. Paragraph (33) of the commentary to article 15 quoted the assertion by UNCTAD that the difficulties faced by developing countries in exporting had been heightened with the formation of regional groupings among developed countries. It was nevertheless true, as pointed out in paragraph (2) of the commentary to article 27, that the establishment of schemes of preferences among developing countries had been acknowledged as one of the arrangements best suited to contributing to trade among themselves. There was a clear impression that, in the long run, economic associations among developing States were of great help in furthering trade and forms of co-operation among those countries.

48. He therefore supported the proposed article 23 *bis*, but thought that it should not be confined to customs unions. Admittedly, it would be extremely difficult to determine the exact scope of the provision, but the difficulty was not so great as to prevent enunciation of the rule. An imperfect rule was better than no rule at all, for in the absence of a rule it might be asserted that no rule existed, in which case the principle of the operation of the most-favoured-nation clause would prevail.

49. Commodity agreements would unquestionably become a major factor in the establishment of forms of aid and co-operation among certain States, and Mr. Reuter's proposal on that subject (A/CN.4/L.265) should certainly be adopted. It had to be recognized that, in a heterogeneous world, the number of exceptions to the clause was bound to increase, since the exceptions responded to changing needs. Similarly, article 21 *bis*, proposed by Mr. Njenga (A/CN.4/L.266), reflected the new efforts being made by developing countries to improve their situation. Having failed to secure substantial financial and technological aid from developed countries, developing nations had been studying more closely the possibility of collective self-reliance; article 21 of the Charter of Economic Rights and Duties of States specifically stated that developing countries should endeavour to promote the expansion of their mutual trade. However, the move by developing countries to

[16] See 1491st meeting, para. 7.

aid one another would be frustrated if, in the schemes they adopted, they were obliged to grant most-favoured-nation treatment to developed countries. Mr. Njenga's proposal was therefore of the utmost importance, although consideration might be given to linking it with article 27. For whereas article 21 dealt with arrangements between developed and developing countries and the establishment of a generalized system of preferences, article 27, dealing with new rules of international law in favour of developing countries, could apply to arrangements agreed upon among those countries.

50. Mr. VEROSTA said that there always had been and always would be customs unions, for States were sovereign and free to conclude international treaties, and neither developed nor developing States could be denied the right to form such unions.

51. The situation under public international law regarding exceptions to the most-favoured-nation clause had been defined by the Institute of International Law at its Brussels session, in 1936. Paragraph 7 of the resolution adopted by the Institute at that session provided:

> The most-favoured-nation clause does not confer the right:
>
> to the treatment which is or may hereafter be granted by either contracting country to an adjacent third State to facilitate the frontier traffic;
>
> to the treatment resulting from a customs union which has been or many hereafter be concluded...[17]

The same idea had been expressed at the Institute's session in Edinburgh, in 1969. Paragraph 2 (*b*) of the resolution adopted at that session, relating essentially to the operation of the most-favoured-nation clause in the case of multilateral treaties, provided:

> States to which the clause is applied should not be able to invoke it in order to claim a treatment identical with that which States participating in an integrated regional system concede to one another.[18]

Needless to say, an integrated regional system included customs unions and free-trade areas.

52. For that reason, and for the reasons he had already mentioned in the discussion, he supported article 23 *bis* proposed by Sir Francis Vallat. He hoped that the Drafting Committee would modify and expand its wording, particularly in the light of the suggestions made by Mr. Sucharitkul.

53. Mr. RIPHAGEN said that the Commission must take two facts into account. First, 20 articles of the draft described the classic unconditional most-favoured-nation clause, which operated automatically and conferred only formal equality; consequently, the draft must include all the various exceptions to the clause. Secondly, it could be seen from State practice that a granting State that was a member of a customs union or the like had never extended to a non-member State the treatment granted to a member State. Indeed, the Special Rapporteur had recognized that it was impossible for a granting State to extend exactly the same treatment. An obvious exception was therefore the one contained in Sir Francis Vallat's proposal.

54. Yet the matter did not rest there, for if the beneficiary State was not entitled to the same treatment as that received by members of the customs union, it was none the less entitled to protection of its interests. It was for precisely that reason that special rules were laid down in article XXIV of the General Agreement on Tariffs and Trade and in articles 12 and 18 of the Charter of Economic Rights and Duties of States. He fully agreed with the comments made by Mr. Jagota, Mr. Quentin-Baxter and Mr. Šahović, and considered that the Drafting Committee should include in the wording of Sir Francis Vallat's proposal a formulation designed to protect the interests of a beneficiary State that was not a member of the customs union.

55. The CHAIRMAN, speaking as a member of the Commission, thought that any benefit granted under a biltaral or multilateral treaty could be invoked by the beneficiary State in order to claim most-favoured-nation treatment, whether the treaty was open or restricted. The fact that treaty benefits were often expressly excluded from most-favoured-nation treatment was another argument in support of the view that, unless the exclusions were expressly stipulated, the benefits in question could generally be claimed by any beneficiary of most-favoured-nation treatment. Moreover, the usual procedure of negotiating waivers of such treatment confirmed the existence of the general principle. The same argument applied to customs unions and similar associations of States. A free-trade area, an interim régime leading to the formation of a customs union or free-trade area, or any other similar association or grouping of States, was not an exception to the general rule unless the granting and the beneficiary States so agreed.

56. The exhaustive examination of the customs union issue by the previous Special Rapporteur, Mr. Ustor,[19] left no room for doubt. Clauses expressly excluding most-favoured-nation treatment were so common that one writer, R. C. Snyder, stated that in treaties concluded between the First and Second World Wars he had found no fewer than 280 clauses containing exceptions for customs unions. That practice subsisted, and if States found it necessary to include in treaties an express clause of exclusion it was because there was no general rule of international law establishing the exception as a presumption. The very number of express clauses, far from proving the existence of a general rule of customary international law that excluded such benefits, was evidence that the exception in question was simply a conventional exception and nothing more.

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[17] *Annuaire de l'Institut de droit international, 1936*, Brussels, vol. II. p. 291. Text reproduced in *Yearbook... 1969*, vol. II, p. 181, cod. A/CN.4/213, annex II.

[18] *Annuaire de l'Institut de droit international, 1969*, Basel, vol. 53, t. II, p. 379.

[19] *Yearbook... 1975*, vol. II, pp. 7 *et seq.*, doc. A/CN.4/286, paras. 9-63.

57. Moreover, situations resulting from the application of article XXIV of the General Agreeemnt on Tariffs and Trade did not support the conclusion that an implied exception existed. Indeed, it had to be borne in mind that the cornerstone of the General Agreement was an unconditional most-favoured-nation clause. Consequently, the somewhat complex provisions of article XXIV were simply another express clause establishing a specific exception that reconciled the commitments entered into under the General Agreement with commitments under other treaties. As Mr. Ustor had emphasized at the time, article 234 of the Treaty of Rome maintained existing treaty rights and obligations pending negotiations for the removal of any incompatibility between such rights and obligations and those resulting from the Treaty, as would also occur in the case of an exception to the application of most-favoured-nation clauses.

58. It should also be emphasized that, during the 20 years of EEC's existence, the member States of that powerful economic entity had succeeded perfectly in respecting the traditional practice of including exceptions in treaties whenever necessary. For all those reasons, the thought that the Commission should not attempt to formulate a rule establishing a general exception for customs unions and similar associations of State. Nevertheless, he recognized that the proposed article 23 *bis* was an improvement on the text proposed by EEC (A/CN.4/308 and Add.1 and Add.1/Corr.1, sect. C, 6, para. 11), and he would not oppose the idea of referring it to the Drafting Committee. The proposals made by Mr. Reuter were also of the utmost importance. He hoped the Drafting Committee would produce a text acceptable to everyone.

59. Mr. USHAKOV (Special Rapporteur) said that, although the Commission had already decided that the draft should not include exceptions like the one proposed by Sir Francis Vallat in his article 23 *bis*, some questions still had to be cleared up.

60. To begin with, one might well ask, as had Mr. Castañeda, whether the proposed article served the interests of developing countries. He did not think so, for it excluded all beneficiary States, including developing States, from the benefit of the treatment extended by the granting State within a customs union. In that respect, it conflicted with article 21 *bis* proposed by Mr. Njenga (A/CN.4/L.266), a text that also covered customs unions and other similar associations of States but excluded only developed States from the benefit of the treatment that developing States granted to one another in such economic associations. In stating that developing countries might "grant trade preferences to other developing countries in accordance with bilateral or regional arrangements, without being obliged to extend such preferences to developed countries on the basis of the most-favoured-nation clause", article 21 *bis* protected the interests of developing countries against those of developed countries. Article 23 *bis*, on the other hand, protected the interests of all members of a customs union, whether developing or developed States, against the interests of any beneficiary State—even a developing State—that was not a member of the union. Under Sir Francis Vallat's proposal, a developing beneficiary State that was not a member of a customs union would not be entitled by virtue of a most-favoured-nation clause to the treatment extended by a developed granting State to a developed third State within a customs union. That was contrary to the purpose of the draft articles, which was to protect the interests of developing countries against those of developed countries.

61. Another question that arose was how a most-favoured-nation clause that did not contain an express exception of customs unions was to be interpreted. In such a case, was it to be understood that there was an implicit exception and that the treatment extended within a customs union was automatically excluded from the application of the clause? He did not think so; in the absence of any express stipulation in the clause, it must be deemed that no exception existed. Tht was also the conclusion reached by the previous Special Rapporteur, Mr. Ustor, in his sixth report.[20]

The meeting rose at 1 p.m.

[20] *Ibid.*

1500th MEETING

Wednesday, 14 June 1978, at 10.10 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Bedjaoui, 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, 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, A/CN.4/L.264-266)

[Item 1 of the agenda]

PROPOSED NEW ARTICLES (*concluded*)

ARTICLE 23 *bis* (The most-favoured-nation clause in relation to treatment extended by one member of a customs union to another member)[1] (*concluded*)

1. Mr. USHAKOV (Special Rapporteur) said that the rule proposed by Sir Francis Vallat in article 23 *bis* was in effect a complete reversal of the practice of States. Until now, if States parties to a

[1] For text, see 1498th meeting, para. 18.