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SUMMARY RECORD OF THE 16th MEETING

Chairman: Mr. ROSSIDES (Cyprus)

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AGENDA ITEM 106: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS TWENTY-EIGHTH SESSION (continued)

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The meeting was called to order at 3.20 p.m.

AGENDA ITEM 106: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS TWENTY-EIGHTH SESSION (A/31/10) (continued)

1. Mr. DUBOIS (European Economic Community), speaking at the invitation of the Chairman, said that some aspects of the draft articles on the most-favoured-nation clause did not fully reflect the requirements and concerns of bodies such as the European Economic Community, which were at an advanced stage of regional integration and to which the clause was particularly important.

2. He recalled that the European Communities formed a customs union with a common customs tariff. Within the Community, not only had customs duties and other obstacles to trade been reduced or eliminated, but an active process of integration was taking place within the framework of Community institutions, with a view to harmonizing economic and social conditions. Member States had transferred to the Community various powers which they had previously exercised and in particular, their powers relating to common trade policy. Consequently, the Community was the sole competent authority for matters concerning the application of the most-favoured-nation clause.

3. Moreover, the Community had always considered itself bound by the obligations arising under the General Agreement on Tariffs and Trade (GATT) and had participated, as a contracting party, in various major multinational negotiations under that Agreement. The Community concluded preferential and non-preferential trade agreements with many States or groups of States and, since 1971, had applied a system of generalized preferences for the benefit of developing countries. It granted most-favoured-nation treatment to countries with centrally planned economies on an autonomous basis.

4. With regard to the draft articles on the most-favoured-nation clause (A/31/10, chap. II C) the Community believed that they did not take sufficient account of the increasing trend towards the formation of regionally integrated zones, of which the Community itself constituted an example.

5. The Community had specific reservations with regard to article 15 which, as drafted, might be interpreted to mean that the most-favoured-nation clause would imply the extension to third countries of the advantages enjoyed by the member States of a customs union, or in other words that the members of the Community, or of any similar regional organization, should grant to States outside the Community the same treatment they accorded to those within it. Such an interpretation would fail to recognize the extent to which the European Community was integrated and overlook the special features of a customs union.

6. Article 15 as drafted failed to take into consideration the fact that the members of the Community had vested in the Community all their powers relating to trade policy and retained, individually, only the necessary means to implement bilateral agreements in that field. Having neither a customs tariff nor customs

regulations of their own, they could not grant customs or trade facilities not accorded under the common system. Consequently, there was a basic incompatibility between relations within the Community on the one hand, and the application of the most-favoured-nation clause to commercial transactions on the other.

7. The Community and its member States had always considered that was a customary rule of international law whereby those States which formed customs unions or free-trade zones could ensure that the most-favoured-nation clause would not grant to third countries the concessions inherent in membership of such customs unions or zones. Membership in the Community was the result of a process of negotiation in which the States which acquired the advantages of membership agreed to accept the corresponding obligations, which were wider in scope than the obligations usually pertaining to a customs union. One such obligation was acceptance of the Community legal system which was applicable to member States, under the supervision of the Court of Justice of the European communities. In that connexion it was noteworthy that there was no custom in international law whereby a State benefiting from the most-favoured-nation clause could enjoy the full range of advantages which the members of a customs union granted each other.

8. States wishing to establish a customs or similar union often resorted to the "customs union" exception with respect to the normal application of the most-favoured-nation clause. The most obvious example in current practice was article XXIV of the General Agreement on Tariffs and Trade. A number of other customs union agreements, many of them with developing countries, had been drawn up so as to make an exception as with respect to the clause.

9. For those reasons, the Community hoped that the draft would be amended to make it quite clear that the article did not extend to customs unions and free-trade zones.

10. With regard to preferences for developing countries, the Community granted them most-favoured-nation status as well as preferences. In that connexion, the Community shared the concern of the International Law Commission regarding the particular interests of developing countries in their relations with the industrialized nations. Preferential treatment was granted by the Community mainly by means of agreements based on article 238 of the Treaty establishing the European Economic Community. In such agreements the Community generally granted conditions more favourable than those applied under a most-favoured-nation clause, while in return, the partner States applied the clause to the Community. An example of the application of the clause to special preferences was provided by the Lomé Convention of 28 February 1975 between 46 African, Caribbean and Pacific countries (ACP countries) and the European Community and its member States. The Convention provided that imports from ACP countries would be exempt from Community customs dues or similar charges, with the proviso that the treatment thus granted should not be more favourable than that which the members of the Community granted to each other. The ACP countries were not required to accord the same advantages to the Community, but merely to grant treatment not less favourable than most-favoured-nation status. The Community agreed not to invoke the clause in respect of

(Mr. Dubois)

relations either between ACP members themselves or with other developing countries. Within the framework of UNCTAD the Community applied a system of tariff concessions on exports of finished and semi-finished goods from a large group of developing countries, the Group of 77. The system did not constitute a legal obligation for the Community and was theoretically of a temporary nature, but it did meet a concern which had been felt since the Second World War in the United Nations, and particularly in UNCTAD.

11. The Community also had objections to article 21. As currently worded the text implied that a generalized system of preferences was a matter for individual States, whereas, in fact, the member States of the Community no longer had the power to grant such preferences of their own accord. In view of the Community's role in applying generalized preferences and in view also of the advantages which they conferred, it would be as well if the draft took account of the realities of the Community. In fact, that general observation might be applied to the draft articles as a whole.

12. On the subject of relations between countries with different social and economic systems he noted that the special nature of centrally planned economies diminished the effectiveness of most-favoured-nation treatment unless the conditions of such treatment were clearly specified. In view of the de facto differences in the conditions of trade resulting from the disparate nature of the different economic systems the equivalent reciprocity of the advantages derived should be evaluated in terms of concrete and comparable results, for example, an increase in the volume and composition of trade between countries with different economic systems which would satisfy both trading partners. Thus, in the Final Act of the Conference on Security and Co-operation in Europe, the preamble to the section dealing with co-operation in the field of economics, of science and technology and of the environment it was recognized that such co-operation could be developed "on the basis of equality and mutual satisfaction of the partners and of reciprocity permitting, as a whole, an equitable distribution of advantages and obligations of comparable scale, with respect for bilateral and multilateral agreements". Paragraph 1 of the same section stated that "trade represents an essential sector of their co-operation and ... the provisions contained in the above preamble apply in particular to this sector". That meant that the rule of reciprocity appearing in the preamble applied to trade between market and centrally planned economies. The paragraph also stated that the participants were resolved to promote, on the basis of the modalities of their economic co-operation, the expansion of their mutual trade in goods and services, and to ensure conditions favourable to such development. It was in that context that the signatories had recognized the beneficial effects which the application of most-favoured-nation treatment could have on the development of trade.

13. In general, bilateral agreements between members of the Community and States with centrally planned economies made provision for most-favoured-nation treatment, making an exception in the case of customs unions and free-trade zones. Most of those agreements accorded most-favoured-nation treatment unconditionally, while clearly delimiting its scope, which covered import duties, various taxes and dues, and customs formalities.

14. As of 1 January 1975 the members of the Community were no longer empowered to undertake trade negotiations with centrally planned economies. Consequently, in subsequent agreements negotiated with countries having that type of economy, members could no longer include clauses relating to trade, including the most-favoured-nation clause.

15. The Community was anxious to ensure equivalent reciprocity in trade between parties, and therefore in view of the expiry of the trade agreements between Community members and States with centrally planned economies at the end of 1974, the Community authorities had informed the latter that they were ready to enter into negotiations regarding the mutual granting of most-favoured-nation treatment in tariff matters.

16. Following the accession to the General Agreement on Tariffs and Trade of a number of Eastern European countries, the Community had granted them most-favoured-nation treatment, but the special nature of the economic systems of the acceding countries had made it necessary to draft special accession protocols to deal adequately with the question of quantitative restrictions.

17. The Community also granted other States with centrally planned economies most-favoured-nation treatment on an autonomous basis and had unilaterally applied to them all the reductions in its common customs tariff. Thus, in its relations with the countries of Eastern Europe, the Community had viewed most-favoured-nation treatment as a means of promoting East-West trade.

18. The Community would therefore wish the draft article to reflect to a greater extent the concerns and practices of the Community and its member States vis-à-vis countries with centrally planned economies and the specific role of the most-favoured-nation clause in agreements with those countries, within the general framework of trade based on equivalent reciprocity. The draft should also reflect the particular terms on which certain Eastern European countries had acceded to GATT, and the resulting effects on the scope of the clause.

19. The Community therefore suggested that the International Law Commission should include in the draft a provision for the application of the clause to commercial relations between States or groups of States with different economic systems; the provision could be based on the Final Act of the Conference on Security and Co-operation in Europe. Lastly, the Community suggested that the Secretariat should be asked to transmit the draft articles to the various regional economic groups for their comments.

The meeting rose at 3.50 p.m.