UNITED NATIONS

A

General Assembly

Distr.
GENERAL

A/40/444
6 September 1985
ENGLISH
ORIGINAL: ARABIC/ENGLISH/
SPANISH

Fortieth session
Item 128 of the provisional agenda*

CONSIDERATION OF THE DRAFT ARTICLES ON MOST-FAVOURED-NATION CLAUSES

Report of the Secretary-General

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I. INTRODUCTION

1. On 19 December 1983, the General Assembly adopted resolution 38/127, entitled "Consideration of the draft articles on most-favoured-nation clauses". Paragraphs 1, 2 and 3 of the resolution read as follows:

> "The General Assembly,
>
> " ...
>
> "1. Requests the Secretary-General to reiterate his invitation to Member States and interested organs of the United Nations as well as interested intergovernmental organizations, to submit or bring up to date, not later than 31 March 1985, any written comments and observations which they deem appropriate on chapter II of the report of the International Law Commission on the work of its thirtieth session, in particular on:
>
> "(a) The draft articles on most-favoured-nation clauses adopted by the International Law Commission;
>
> "(b) Those provisions relating to such clauses on which the International Law Commission was unable to take a decision;
>
> "(c) Any other aspects of problems relating to most-favoured-nation clauses that Governments may consider relevant in view of recent developments of international practice, including the recommendation of the International Law Commission on the conclusion of a convention;
>
> "2. Also requests the Secretary-General to invite Member States to comment on the most appropriate procedure for completing work on most-favoured-nation clauses and on the forum for future discussion, bearing in mind the suggestions and proposals made in the Sixth Committee, including the suggestion to establish a working group of the Sixth Committee after one of the existing working groups accomplishes its mandate;
>
> "3. Further requests the Secretary-General to submit to the General Assembly at its fortieth session a report containing the comments and observations received pursuant to paragraphs 1 and 2 above with a view to taking a final decision on the procedure to be followed".

2. On 15 May 1984 the Legal Counsel in letters addressed on behalf of the Secretary-General to Member States and interested organs of the United Nations, as well as interested intergovernmental organizations, invited comments and observations in response to paragraphs 1 and 2 of resolution 38/127.

3. As at 31 August 1985 communications had been received from: Barbados, Czechoslovakia, German Democratic Republic and Qatar; United Nations Conference on Trade and Development (UNCTAD) and Economic and Social Commission for Asia and the Pacific (ESCAP); Food and Agriculture Organization of the United Nations and International Atomic Energy Agency (IAEA); Latin American Integration Association and European Economic Community (EEC). The present report reproduces these communications. Any additional communications that might be received will be published in addenda to the present report.

II. COMMUNICATIONS RECEIVED FROM GOVERNMENTS

BARBADOS

[Original: English]

[16 April 1985]

1. The draft articles on most-favoured-nation clauses codify into a separate and autonomous body of rules this aspect of the law of treaties.

2. The general law of treaties is codified under the Vienna Convention on the Law of Treaties to which Barbados is a Party and it is thought that the draft articles on most-favoured-nation clauses should be interpreted in the light of the former.

CZECHOSLOVAKIA

[Original: English]

[22 March 1985]

The Czechoslovak Socialist Republic remains committed to its comments on the draft articles of the International Law Commission on most-favoured-nation clauses as contained in document A/35/203 and to the position explained by the Czechoslovak delegate at the thirty-eighth session of the General Assembly.

GERMAN DEMOCRATIC REPUBLIC

[Original: English]

[3 July 1985]

1. The German Democratic Republic attaches great political and legal importance to the codification of principles to govern the application of most-favoured-nation treatment.

2. In so doing it is guided by the view that agreement concerning most-favoured-nation treatment in intergovernmental relations provides the foundation for adherence to the respective principles and, consequently, favourable conditions for all-round and fruitful international co-operation. This was also underlined by the member countries of the Council for Mutual Economic Assistance, which, at their top-level economic consultations in June 1984, singled out most-favoured-nation treatment as one of the principles of intergovernmental co-operation whose strict observance is required for the recovery of international economic relations.

3. The creation of a universal legal instrument on the application of most-favoured-nation clauses would be a major contribution to promoting the mutually advantageous and equal co-operation of all States and thus to the further strengthening of the material foundations of peace and détente. If codification work on the draft articles on most-favoured-nation treatment could be successfully completed and if the family of nations adopted these draft articles in the form of

a binding legal instrument, this would mean the translation into binding legal terms of a major recommendation concerning international economic relations contained both in the Charter of Economic Rights and Duties of States and the Final Act of the Conference on Security and Co-operation in Europe (Helsinki).

4. In the view of the German Democratic Republic the draft articles submitted by the International Law Commission provide an appropriate foundation for putting the finishing touches to a legal instrument on the application of most-favoured-nation clauses. They offer a good example for the codification of international legal norms that have become common law.

5. To ensure a high degree of effectiveness of such a future legal instrument along the above-mentioned lines the German Democratic Republic regards it as necessary, however, to reconsider some of the present provisions of the draft articles.

6. The German Democratic Republic holds the view that a legal instrument on most-favoured-nation treatment should orient States toward the conclusion of most-favoured-nation clauses with the broadest possible scope of application. The practice of international relations shows that it is only if most-favoured-nation treatment is applied in the most comprehensive manner in intergovernmental relations that it can make its full contribution to trade relations based on equal rights and mutual advantage, and help overcome or avoid discrimination.

7. Another problem, which the draft articles have not quite coped with yet, is that of conditional most-favoured-nation treatment. Conditional most-favoured-nation treatment, i.e. the practice of making its granting conditional upon certain advance services, generally leads to a system of bilateralism that is hard to fathom. This kind of most-favoured-nation treatment encourages the placing of artificial obstacles in the way of trade relations to enable the party seeking such treatment to offer sufficient concessions in return. Moreover, if most-favoured-nation treatment is made subject to certain conditions, this creates many openings for bringing pressure to bear, contrary to international law, on a trading partner interested in obtaining such treatment. Therefore, conditional most-favoured-nation treatment cannot have the same positive effect in terms of equal and mutually advantageous co-operation as unconditional most-favoured-nation treatment. That is why in practice the latter has come to prevail. Unlike the draft articles submitted in 1976 the final draft of the International Law Commission does not contain a provision to the effect that in case of doubt as to the meaning of a clause on most-favoured-nation treatment it is presumed to be unconditional. By contrast, the conditional form is dealt with very broadly. However, the commentaries on articles 11, 12 and 13 rightly emphasize that that form is now largely of historical significance (A/33/10, arts. 11 to 13, para. 11). In our view it is necessary to follow the perceptions contained in the commentaries and to expressly give priority in the draft articles to unconditional most-favoured-nation treatment.

8. Another highly important matter is exceptions to most-favoured-nation treatment. While such exceptions cannot be waived, too many of them tend to invalidate such treatment. In the view of the German Democratic Republic the International Law Commission has succeeded in proposing a rather well-balanced

formula in this regard. Further exceptions should not therefore be provided for. This applies in particular to the suggestion to make provision for an exception in favour of the facilities that the parties to a customs union or economic community may grant each other. The various aspects involved here should be settled by contract between the States concerned.

9. The International Law Commission has proposed that its draft articles should form the basis of a convention. The German Democratic Republic supports this proposal. Such a convention could greatly strengthen the régime of most-favoured-nation treatment.

10. In view of the fact that the question of most-favoured-nation treatment has been on the agenda of the General Assembly since 1978, the German Democratic Republic believes that the time has come for putting the appropriate finishing touches to this project. This task should be assigned to an international forum of representatives of States. The United Nations Commission on International Trade Law (UNCITRAL) could be such a forum. However, the German Democratic Republic could also agree to assigning the further consideration of most-favoured-nation clauses to a working group of the Sixth Committee. What is important is that an appropriate body of State representatives should meet at an early date to finalize work on most-favoured-nation clauses.

11. In conclusion, the German Democratic Republic wishes to give the assurance that it will do all in its power to make a constructive contribution to the earliest possible successful conclusion of work on a convention on most-favoured-nation treatment.

QATAR

[Original: Arabic]

[2 October 1984]

1. In response to General Assembly resolution 38/127, adopted on 19 December 1983, and with reference to the letter of the Legal Counsel dated 15 May 1984, the Government of the State of Qatar presents below its comments on chapter II of the report of the International Law Commission on the work of its thirtieth session, including the points indicated in subparagraphs (a), (b) and (c) of paragraph 1 of the above-mentioned resolution of the General Assembly.

2. Taken as a whole, the draft article may be viewed as an important step in the codification and progressive development of contemporary international law in the vital areas relating to economic and legal co-operation among States on the basis of the sovereign equality of States, non-discrimination and mutual advantage.

3. The competent authorities of the State of Qatar consider that serious efforts must be made in order to ensure that the draft articles on most-favoured-nation clauses obtain the general approval of States or, at the very least, extensive support. That is a fundamental condition if this future international legal instrument is to be useful and effective.

I. Questions on which the Commission was unable to adopt a position

1. The most-favoured-nation clause in relation to the disparity in levels of economic development

4. The Government of the State of Qatar believes that the Commission's draft contains, in articles 23 and 24, the requisite minimum for the protection of the legitimate interests of a developing State. It also, in article 30, leaves the door open for the establishment of new legal provisions of the same kind.

5. The Government of the State of Qatar believes, therefore, that there is no reason to incorporate the two proposed articles A and 21 ter, particularly since they are somewhat complicated and it seems that their implementation - at least as presently worded - would not be easy.

6. However, it is clear that the interests of the developing countries cannot be realized by such generalizations as that contained in article 30. There is an urgent need to ascertain whether the recommendations of the United Nations Conference on Trade and Development (UNCTAD) and the principles of the Charter of Economic Rights and Duties of States are being implemented in a realistic manner that is in keeping with legal and economic considerations. The developing countries must enjoy all new tariff and non-tariff preferences, and, in addition, the trade and development needs of those States require the non-implementation of the most-favoured-nation clause for a certain period of time, which does not conflict with the principles of non-discrimination and equality among States enshrined in the United Nations Charter.

2. The most-favoured-nation clause in relation to customs unions and similar economic associations

7. The Commission discussed this question and finally decided not to include an article on it in the draft, leaving it to Member States at subsequent stages of the codification process to take the final decision about ruling out the application of the most-favoured-nation clause to special treatment extended by one member of a customs union and the like to another member.

8. The Government of the State of Qatar considers that restriction of the special treatment arising from the existence of a customs union or a similar association to the members of such union or association and the non-applicability of the most-favoured-nation clause in respect of such treatment is a matter that has long since been decided by international custom and State practice. The custom in that area has been codified, for example, in article 24 of the General Agreement on Tariffs and Trade (GATT) and in the decisions of the Institute of International Law adopted at its Edinburgh session in 1969.

9. We therefore propose that there be added to the draft an article providing for an exception to its provisions in favour of States members of customs unions and the like, so that the special treatment agreed upon between the States members of a union does not extend to any third State that is not a member thereof, even where a treaty containing the most-favoured-nation clause exists between such State and a State member of the union.

10. The view thus expressed prompts us to make an objective observation on draft article 17, which provides that the acquisition of rights by the beneficiary State under a most-favoured-nation clause is not affected by the fact that the treatment by the granting State of a third State is provided under a bilateral or multilateral agreement. We would observe that, in spite of the Commission's decision not to adopt a position on the question of customs unions, draft article 17 opens the door wide to the enjoyment by States that are not members of a customs union of all the advantages of the union that are supposed to be restricted to members, because any customs union or similar economic association is, necessarily, based on a bilateral or multilateral treaty, and, if we accept that the granting of special treatment as a result of such a treaty does not prevent the enjoyment by other States of the same treatment under the most-favoured-nation clause, that eliminates the raison d'être of customs unions and effaces the difference between a State member of the union and a non-member State. Accordingly, we consider that, failing the inclusion of an express exception for customs unions, draft article 17 should be deleted. With regard to this opinion, we agree in principle with the Governments of Guinea, Luxembourg and Sweden and with the secretariats of a number of international organizations (Yearbook of the International Law Commission, 1978, vol. II (Part One), pp. 19-20) and also with the Governments of Spain and Venezuela (document A/38/344).

3. Settlement of disputes by arbitration

11. The Commission ultimately decided not to include in its draft provisions concerning arbitration of disputes relating to the interpretation and application of the draft articles, thus leaving the matter to be decided by Member States in the General Assembly or a conference that might be convened for the conclusion of an international convention on the most-favoured-nation clause.

12. The Government of the State of Qatar believes that the draft articles presented are only a legal framework for the regulation of the effects of the most-favoured-nation clause that might be included in treaties or other international agreements. The draft contains no objective provision with specific content concerning the most-favoured-nation clause. The outbreak of disputes about such a bare legal framework is but a remote possibility. Disputes might arise only in connection with the interpretation and application of a specific provision contained in a specific treaty containing the most-favoured-nation clause, and, in that event, such provisions as might be contained in that specific treaty concerning the settlement of disputes, whether by arbitration or by some other method, would be followed with regard to the dispute, and in the resolution of that dispute, the draft presented would serve as a guide in the interpretation and application of the most-favoured-nation clause that gave rise to the dispute.

13. For that reason and for the other reasons put before the International Law Commission by the Special Rapporteur and by some Member States (Yearbook of the International Law Commission, 1978, p. 30), the Government of the State of Qatar considers that it would be more appropriate not to include provisions on the settlement of disputes in the draft articles.

II. Observations on the draft articles

Article 1

14. The competent authorities of the State of Qatar wish to emphasize that the draft should be compatible with the structure and terminology of the Vienna Convention on the Law of Treaties, concluded in 1969, and with the spirit of the work that the International Law Commission is now about to complete on treaties concluded between States and international organizations and between two or more international organizations.

15. Accordingly, the State of Qatar feels that consideration should be given to the possibility of making the draft cover entities other than States, where such entities derive under international law rights and obligations from international agreements to which they are contracting parties and such agreements contain the most-favoured-nation clause.

Article 4

16. This article contains a definition of the most-favoured-nation clause that may be categorized as a cyclical definition, since in both parts of it the expression "most-favoured-nation" is repeated. It is, therefore, tautological and fails to define that which is to be defined. We agree in this negative evaluation of the text of article 4 with the view expressed earlier by the Government of Luxembourg, a view with which the Special Rapporteur did not agree, as he indicated to the Commission (Yearbook of the International Law Commission, 1978, pp. 11-12).

17. The Government of the State of Qatar goes further and proposes the following alternative formulation:

Article 4

Most-favoured-nation clause

"The most-favoured-nation clause is a treaty provision whereby a State undertakes to accord another State the treatment provided for in article 5 in an agreed sphere of relations."

Articles 8-9 and 14-22

18. In these articles, two expressions are repeated, namely "for itself or for the benefit of persons or things in a determined relationship with it" and "or to persons or things in the same relationship with that third State".

19. The Government of the State of Qatar notes, first of all, that the above-mentioned articles are all subsequent to article 5, which contains the following definition of most-favoured-nation treatment:

"Most-favoured-nation treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State".

20. Inasmuch as the concept of persons and things in a determined relationship with the beneficiary State and persons and things in a similar relationship with a third State has in this way entered into the definition of "most-favoured-nation treatment", the Government of the State of Qatar considers that the repetition of those expressions in the other draft articles wherever the text relates to the said treatment constitutes redundance that serves only to produce tedium and render the text cumbersome to read, for reference to the definition contained in article 5 whenever it is necessary to determine what is meant by "most-favoured-nation treatment" is self-evident. There is no need to repeat the mention of persons and things in a determined relationship with the beneficiary State and in a similar relationship with the third State whenever a provision of the draft deals with an aspect of that treatment that has already been defined.

21. The Government of the State of Qatar therefore proposes the deletion of the above-mentioned expressions (and similar expressions that render the same meaning with a slight change in wording) from draft articles 8-9 and 14-22. One of the aims of drafting is, of course, to express a legal provision with the clearest and most concise expression, without redundance or repetition.

Article 9

22. There is another comment that we must make on this article, namely, that paragraph 2 is superfluous, its purpose being already fulfilled by paragraph 1, which provides that the beneficiary State acquires only those rights that fall within the limits of the subject-matter of the clause. The word "limits" here covers the limits of the most-favoured-nation clause as to content and persons, since there is no restriction to content in the text that would call for a second paragraph dealing with persons. Nothing proves more clearly that the second paragraph is superfluous than the fact that - although it apparently relates to persons - it refers to the "subject-matter" of the clause, which clearly establishes that the "limits" of that subject-matter, as paragraph 1 indicates, extend to the persons of the beneficiaries and also to the material content of the subject-matter of the most-favoured-nation clause.

23. The Government of the State of Qatar therefore considers that paragraph 2 of article 9 should be deleted.

Article 10

24. This article too is based on the arbitrary distinction - which is found in article 9 - between the material content of the most-favoured-nation clause and the persons who are the beneficiaries of that clause. This is an unnecessary distinction, which serves no purpose from the viewpoint of the legal consequences of the most-favoured-nation clause. Perhaps the text of paragraph 2 is valid as a commentary and illustration of all that is laid down in paragraph 1, but it does not contain any new legal provision calling for an independent paragraph. It is clear that the material content of the most-favoured-nation clause or "the subject-matter of the clause", to use the words of paragraph 1, cannot be conceived of independently and in isolation from the persons of the beneficiaries under the clause; the two concepts are closely interlinked and can be separated only by a deliberate intellectual process having no legal consequence. Accordingly, the expression "the limits of the subject-matter of the clause", as used in paragraph 1, specifies who the beneficiaries of the clause are, while, at the same time, it specifies the subject-matter or material content of the clause.

25. For the reasons stated above, the State of Qatar proposes that paragraph 2 of article 10 be deleted, in order to improve the text and rid it of superfluities.

III. Recommendation of the Commission on the conclusion of a convention

26. The Government of the State of Qatar considers that the Commission's recommendation that the draft articles that it has prepared should - after revision and finalization - be incorporated in an international multilateral convention is most apposite and that such a convention might be the ideal mould in which to cast the articles relating to the most-favoured-nation clause.

IV. Procedure to be followed in completing the work and the body to be responsible for its completion

27. With regard to paragraph 2 of General Assembly resolution 38/127 mentioned above, the Government of the State of Qatar supports the proposal that the draft articles on most-favoured-nation clauses be referred to a working group of the Sixth Committee, which would start work after one of the existing working groups of the Sixth Committee accomplishes its mandate. The said working group would review the Commission's draft in the light of the comments of those Member States and international organizations that have commented on the draft. It would then revise its provisions and cast them in a final agreed form. The Government of the State of Qatar expects that the establishment of a working group with such a mandate would facilitate arrival, at a future diplomatic conference, at speedy agreement on the provisions of the desired international convention.

V. Comments on the Arabic text of the Commission's draft

28. Lastly, the Government of the State of Qatar proposes an alternative Arabic wording for the text of draft articles 25 and 26, with a view to making the text easier to understand, more precise in meaning and closer to the English original in construction.

29. It is self-evident that the proposed alternative formulation does not affect the content of articles 25 and 26 and has no significance for the other languages of the draft.

III. COMMUNICATIONS RECEIVED FROM ORGANS OF THE UNITED NATIONS

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD) 1/

[Original: English]

[29 March 1985]

1. The relevance of the unconditional most-favoured-nation régime for the non-discriminatory and mutually beneficial development of international trade relations has on many occasions been emphasized both by UNCTAD and other international organizations. In particular, at the sixth session of the Conference it was agreed, in paragraph 14 of section II on the "International trading system", in Conference resolution 159 (VI) of 2 July 1983, that "The Trade and Development Board should review and study in-depth developments in the international trading system. The Board could, while fully respecting the principles of MFN and non-discrimination, make recommendations on principles and policies related to international trade, and make proposals as to the strengthening and improvement of the trading system with a view to giving it a more universal and dynamic character as well as to making it more responsive to the needs of developing countries and supportive of accelerated economic growth and development, particularly that of developing countries" (emphasis added).

2. In the background document to the Conference (document TD/274, p. 30), the UNCTAD secretariat indicated that the principle of unconditional most-favoured-nation treatment was an essential component of the tariff-based system. It ensured that negotiated tariff concessions constituted an obligation to the entire membership of GATT thus imparting a greater degree of security to the concessions. The obligation that all trade measures should be non-discriminatory ensured that the allocation of resources on the basis of comparative advantage would not be distorted to the benefit of some and not others. The concept of trade preferences in favour of developing countries constituted a variation of, but not a departure from, the basic theory underlying this approach.

3. One area where the erosion of the unconditional most-favoured-nation principle has been evident is through the application of the concept of market disruption, which pemitted discriminatory safeguard actions against certain countries. Although this form of discrimination has been "institutionalized" in GATT only in the textile and clothing sector, it has nevertheless permeated trade policies and attitudes toward trade. The pressures for acceptance of a selective safeguard clause, if successful, would extend this discriminatory régime to trade in general.

4. It is clearly more difficult to ensure that non-tariff measures are applied on an unconditional most-favoured-nation basis. The text of GATT article XIII illustrates the complexity of ensuring the non-discriminatory application of quantitative restrictions. The extent to which other frequently used non-tariff measures, such as anti-dumping and countervailing duties, are applied in a non-discriminatory manner depends upon the criteria adopted and the manner of determining whether they have been respected. The erosion of the unconditional most-favoured-nation principle can be attributed, in part, to the decline of the relevance of the taiff as an instrument of trade policy.

/...

5. The manner in which the Tokyo Round Agreements were negotiated and applied resulted in the resurrection of the "conditional" most-favoured-nation concept. Certain of the countries primarily involved in the negotiation of the various codes considered that the only way to induce other countries, and especially developing countries, to accept these new obligations was to withhold the benefits from non-signatories and even to introduce additional discriminatory measures so as to "encourage" countries to adhere to the codes. This "conditional" application was in complete conflict with GATT article I and departed from the approach used in similar situations in the past, where new rules were extended on a most-favoured nation basis once they had been accepted by certain "key" countries.

6. The draft articles represent the first comprehensive attempt to generalize the experience gained in the application of the most-favoured-nation clause. As such, the document can represent a valuable source of reference. However, the objective of the Commission is to conclude "a convention".

7. While noting the statement that "all modern developments which may have a bearing upon the codification of rules pertaining to the operation of the clause" had been taken into consideration (para. 63 of the Commission's report), it would not seem to be the case. This might be explained partially by the fact that the International Law Commission finished its work on the issue in 1978, i.e. a year before the completion of the multilateral trade negotiations (MTN) and the consequent coming into effect of the so-called "post-MTN" trading system. In its present shape the draft convention gives the impression of being "academic".

8. The major weakness of article 23, as presently drafted, is that it is confined to the generalized system of tariff preferences. The extension of preferences to areas other than tariffs has been underlined, inter alia, in the Charter of Economic Rights and Duties of States, and in resolutions 91 (IV) and 96 (IV) of UNCTAD. Moreover, since the adoption of the report by the International Law Commission in 1978, agreement was reached in the Framework Group of the Tokyo Round negotiations to the effect that, notwithstanding the provisions of article I of GATT, contracting parties may accord differential and more favourable treatment to developing countries without according such treatment to other contracting parties. In addition to the generalized system of preferences, this enabling clause covers differential and more favourable treatment with respect to non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of GATT.

9. Article 23 should therefore be redrafted to take into account the above-mentioned agreements in the area of trade. It is suggested that the article could be drafted along the following lines:

> "A beneficiary State is not entitled under a most-favoured-nation clause to preferential treatment in the field of trade extended by a developed granting State to a developing third State on a non-reciprocal basis in conformity with the relevant rules and procedures of a competent international organization of which the States concerned are members".

10. As regards the establishment of new rules of international law in favour of developing countries (art. 30), attention is drawn to the work on the

negotiation of principles and rules for the control of restrictive business practices having adverse effects on international trade, particularly that of developing countries and the economic development of these countries. A basic requirement in the drawing up of those principles and rules was that they should be equitable. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices as adopted by the General Assembly (resolution 35/63 of 5 December 1980) in section C (III) on "Preferential and differential treatment for developing countries" provides in paragraph 7 that:

> "In order to ensure the equitable application of the Set of Principles and Rules, States, particularly developed countries, should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in:
>
> "(a) Promoting the establishment on development of domestic industries and the economic development of other sectors of the economy; and
>
> "(b) Encouraging their economic development through regional or global arrangements among developing countries".

11. The problem of that application of most-favoured-nation treatment in international trade relations is a complex issue that involves a whole series of economic, political and social questions. It is far from being a more "technical economic" problem as is argued in paragraph 62 of the Commission's report.

ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC (ESCAP)

[Original: English]

[21 November 1984]

1. The draft articles on most-favoured-nation clauses and their various aspects, together with commentaries as contained in chapter II of the report of the International Law Commission on the work of its thirtieth session, 2/ indicate the extent of the background work and studies carried out in the field. Such work includes the history of the most-favoured-nation treatment up to the Second World War and even the work on the clauses undertaken in the League of Nations or under its aegis, as well as commentaries of international organizations, including the recommendations adopted by UNCTAD on the matter at its first session.

2. By and large, ESCAP is of the view that the various aspects of most-favoured-nation treatment should be considered with high priority being given to the trade needs of developing countries with due regard to their stages of development. Countries have different levels of economic growth and the application of most-favoured-nation treatment should therefore take full cognizance of the needs of the least developed and land-locked countries, in particular, including those needs relating to reciprocity. It may be relevant to mention, in this connection, that ESCAP has been carrying out programmes of assistance to developing countries towards greater intraregional trade expansion and co-operation in the Asia and Pacific region.

IV. COMMUNICATIONS RECEIVED FROM SPECIALIZED AGENCIES AND THE INTERNATIONAL ATOMIC ENERGY AGENCY

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

[Original: English]

[9 July 1985]

FAO does not have any further comments or observations other than those contained in document A/35/443.

INTERNATIONAL ATOMIC ENERGY AGENCY

[Original: English]

[23 August 1984]

Reference is made to the comments and observations of IAEA dated 14 November 1977. 3/

V. COMMUNICATIONS RECEIVED FROM OTHER INTERNATIONAL ORGANIZATIONS

LATIN AMERICAN INTEGRATION ASSOCIATION

[Original: Spanish]

[26 March 1985]

1. Attention should first of all be drawn to the valuable work carried out by the International Law Commission in drafting a set of articles (30 articles) with a reasoning based on doctrine, jurisprudence and the most widely accepted international practices relating to the most-favoured-nation clause, which represents a scholarly study on the matter in question.

2. It may be said that the articles, as a whole, are satisfactory and that they provide solutions combining the soundest approaches to the various problems raised by the functioning of the clause.

3. Without prejudice to the reservations entered below, acceptance of the articles is facilitated by the provisions laid down in draft articles 28 and 29.

4. The fact that the set of articles is applicable only to most-favoured-nation clauses in treaties or international agreements concluded by States and other subjects of international law after the entry into force of the articles with regard to such States, and the fact that the articles represent law supplementing the will of States, means that States can regulate the application of the clause with prior knowledge of the applicable law and that, if the law in question is not in keeping with the specific characteristics of the actual relationship between them, they can adapt it or modify it to take account of those characteristics, setting aside the articles in their relations in the future.

5. Although the provisions in question limit the normative effectiveness of the draft considerably, they are designed to facilitate a wider consensus on the draft than that that would have been achieved if an attempt had been made to give the draft a more imperative nature.

6. In order to achieve the basic goals of the Latin American Integration Association, an area of economic preferences including a regional tariff preference, agreements of regional scope and agreements of partial scope was established under the Treaty of Montevideo of 1980. The long-term goal of the Association is the establishment of the Latin American Common Market, and, in implementing the Treaty and working towards their final goal, States members must take account of the principles of pluralism, convergence, flexibility, differential treatment and multiplicity, which are laid down in article 3 of the Treaty.

7. The purpose of this operational framework is to establish a network of partial agreements of a multilateral nature and multilateral machinery, which is to be developed further in due course. As the network of agreements grows denser, covering more extensive areas, and is consolidated as a result of the development of the regional tariff preference, which is a multilateral mechanism, more advanced stages of integration will be readily attainable.

8. The most-favoured-nation clause is in keeping with these concepts. Article 44 of the Treaty makes provision for an unconditional and automatic most-favoured-nation clause similar to the one that governed the functioning of the Latin American Free Trade Association. However, an endeavour has been made, through other provisions, to make the clause quite flexible as regards relations among States members, relations between States members and Latin American non-member States and, moreover, other developing countries outside Latin America.

9. An endeavour has been made to go beyond criteria relating to formal equality, taking account of the various levels of economic development existing in the area, and to draw lessons from the implementation of the Treaty of Montevideo of 1960, of which the clause was a fundamental component. In the Treaty, the unconditional, automatic and general nature of the clause made the instrument inflexible or, rather, gave it an inflexibility that could not be attenuated by the principle of reciprocity as regards both expectations and results, which was either disregarded or difficult to implement owing to an unequal distribution of costs and benefits arising from the process in question as a result of the various levels of economic development of the parties.

10. It was only through interpretative machinery that a number of exceptions emerged: resolution 99 (IV) on complementary agreements and resolution 202 (CM-II/VI-E) and 222 (VII) concerning subregional agreements. When the general negotiations came to a virtual halt a number of de facto situations contrary to article 18 were resorted to: the so-called agreements between two countries (resolution 354-XV).

11. It should be stressed that, although many of the difficulties concerned were engendered by the inflexibility of the commitments made, article 18 was without doubt the obstacle to any solution not involving national lists and the compromise of a common list.

12. In the new Treaty of Montevideo (1980), the wording of the most-favoured-nation clause is similar to that of article 18 of the Treaty of Montevideo of 1960, but important exceptions are made to the clause through the text of other provisions, such as the exceptions resulting from differential treatment (art. 3 (d), art. 9 (d) and art. 15 and the following articles) and conditional applications, as in the case of agreements of partial scope among States members (art. 7, second paragraph, and art. 9 (b) of the Treaty), between States members and non-member States or other Latin American integration areas (art. 25, particularly subpara. (a)) and between States members and non-member States or integration areas outside Latin America (art. 27, particularly subpara. (b)), although in the case of the latter the most-favoured-nation clause sets a limit to the advantages to be gained (art. 27 (b)).

13. Furthermore, the provision is made for the traditional exemption of the frontier-traffic clause (art. 45).

14. Consequently, in its unconditional form the clause covers the following:

(a) Any advantages, favours, rights, immunities and privileges granted by a State member to another State member, outside the framework of the instruments establishing the area of economic preference, which must automatically and unconditionally be extended to other States members;

(b) Any advantages, favours, rights, immunities and privileges granted by a State member to another neighbouring State member, outside the framework of the instruments establishing the area of economic preference, which must automatically and unconditionally be extended to the other neighbouring States members;

(c) Any advantages, favours, rights, immunities and privileges granted by a State member to non-member States whether developed or developing, which must automatically and unconditionally be extended to the other States members, unless they are covered by the machinery laid down in articles 24, 25 and 27 of the Treaty of Montevideo;

(d) It is also understood that any advantages, favours, rights, immunities and privileges granted by a State member to another State member under the instruments established in the area of economic preferences laid down in the Treaty of Montevideo of 1980 are not to be extended to a non-member State that is the beneficiary of a most-favoured-nation clause in a treaty linking it to the State member that granted the right in question.

15. The foregoing explains the first major reservation to be entered with respect to the set of articles drawn up by the International Law Commission.

16. According to article 17:

> "The acquisition of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with the third State has been extended under an international agreement, whether bilateral or multilateral."

17. Neither this article nor the accompanying reasoning give a clear answer to the question of whether or not treaties relating to economic integration constitute an exception to commitments undertaken under the most-favoured-nation clause. Moreover, it would appear that such treaties would not constitute an exception if they were included in the articles.

18. Nevertheless, there would not appear to have been any case or decision relating to the extension to a non-member State of any advantages granted by a State member to another State member within the framework of a customs union, free-trade area or any regional integrated grouping.

19. Moreover, at its Edinburgh meeting (1969) the Institute of In Law adopted a resolution reflecting the actual problems:

> "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."

20. Furthermore, in the framework of GATT the exception in question was explicitly recognized in article XXIV of the General Agreement on customs unions and free-trade areas and in the decision of 28 November 1979 establishing compatibility between preferential treatment and the "GATT-MTN statute", the so-called enabling clause, for economic-preference areas and other preferential machinery among developing countries.

21. Any solution running counter to the exception or that gave rise to uncertainty about it could become a source of serious difficulties for existing customs unions, free-trade areas and integrated systems; if the exception were lacking, the many countries that are members of such organizations would be obliged to enter reservations when signing any convention envisaging such a solution.

22. It is understood that the term "developed" used in connection with the beneficiary State should be deleted from the first paragraph of draft article 24. In view of the possibility that, within the legal framework laid down in the article, two or more developing States could set up reciprocal preferential treatment, any agreements reached by them must be exempted from application of the clause both to developed States and to other developing States. It should be established that in order to benefit from this exemption the agreements in question must be open to accession by the other developing States. This is so in the case of the Protocol Relating to Trade Negotiations Among Developing Countries adopted in Geneva on 8 December 1971 under the auspices of GATT; the Protocol is open to accession by all developing countries, and exemptions regarding implementation of the provisions of article I, paragraph 1, of the General Agreement were authorized in connection with the Protocol.

23. Although it is possible that this article was drafted with a global system of preferences among developing countries in mind, on the basis of the resolution of the Third Ministerial Meeting of the Group of Seventy-seven, Manila, the Fifth Conference of Heads of State or Government of Non-Aligned Countries, Colombo, and the Mexico conference on co-operation among developing countries, and the relevant

UNCTAD resolutions (23/II, 48/III, 92/IV, 127/V and 139/VI), it must be recognized, as acknowledged in a number of these resolutions, that there are preferential trade agreements among developing countries that have a limited scope and that in such cases the developing countries benefiting from most-favoured-nation clauses in bilateral or multilateral agreements that do not participate in such preferential agreements should not benefit from the advantages granted by developing countries participating in the agreements. For example, attention should be drawn to the multilateral preferential trade agreement signed on 23 December 1967 at New Delhi by India, the United Arab Republic and Yugoslavia.

24. In this connection, it would be desirable to adopt the criteria of the so-called enabling clause, or decision of 28 November 1979, which resulted from the multilateral trade negotiations held in the context of GATT and which to a certain extent represents the outcome of a process of refinement taking place over a number of years, in the course of which, through norms, procedures, acts, statements of intent and agreements more or less representing compromises, a binding legal formula for differential treatment for developing countries that commands a sizeable consensus in the international community has been developed.

25. In general, draft article 23 concerning the generalized system of preferences prompts similar comments as to the need for or desirability of bringing it into line with subsequent drafts on the matter in question, particularly the above-mentioned decision of 28 November 1979.

26. As far as the actual text of that article is concerned, it is understood that the term "developed" should be added to the reference to "A beneficiary State ...", since it would not appear necessary to exclude developing States from application of the clause; it is assumed that the generalized systems of preferences should not be discriminatory, and in order not to be discriminatory they must include all developing countries, whether or not they benefit from a most-favoured-nation clause granted by a State that is a developing country.

27. It is acceptable that the following paragraphs should refer to the desirability of adopting an approach that takes account of the dynamics of the rules of international law relating to the developing countries, as draft article 30 does.

28. With regard to the remaining draft articles, it is understood that they contain criteria for the application of general rules of international law, definitions or descriptions based on the most widely accepted doctrines and opinions, and interpretative rules to be used in a residual manner, and that in some cases it may be said that they are so general as to give rise to interpretative difficulties, although it must be acknowledged that it is extremely difficult to be more specific in the areas in question. The reason for this would appear to be that it is extremely difficult to make rules for the most-favoured-nation clause or to reduce it to codified norms, owing to its special nature.

EUROPEAN ECONOMIC COMMUNITY

[Original: English]

[17 May 1985]

1. The European Economic Community wishes to submit the following comments in response to resolution 38/127, adopted by the General Assembly on 19 December 1983, inviting Member States and interested intergovernmental organizations to submit or bring up to date their comments on chapter II of the report of the International Law Commission on the work of its thirtieth session, in particular the draft articles on most-favoured-nation clauses, and the provisions concerning such clauses on which the Commission was unable to take a decision.

2. As the European Economic Community has made clear in its previous written observations and in its statements in the Sixth Committee (see A/CN.4/308, A/35/203 and A/36/145), any general rules on most-favoured-nation clauses, in addition to being well-balanced, should reflect practical realities. There is already a large body of law and practice in this area that is applied in the conduct of the trade and other international dealings of all countries. It would accordingly be undesirable to interfere with this existing law and practice, so as to affect arrangements now in operation, without the fullest consideration being given to the implications of any possible modifications and obtaining the agreement of all those concerned.

3. The European Community is a leading trading partner of the majority of Member States of the United Nations. It may be useful therefore to recall some of the main aspects of its practice in the application of most-favoured-nation clauses or treatment. The standard rule, which is applied notably in the case of developed countries, is that the Community normally provides most-favoured-nation treatment, either under the GATT provisions or autonomously. In the case of developing countries however, for whom the Community is a principal export market, 4/ preferential treatment (i.e. treatment better than most-favoured-nation treatment) is provided in most instances. Under the Community's Scheme of Generalized Preferences, which is a major example, imports from developing countries are given duty-free access, either on an unlimited basis or, for specific products, within a specific quota. The exports of many developing countries benefit substantially from the Community's Scheme. It would obviously tend to undermine these arrangements if third States, perhaps more highly developed, could put forward claims to similar duty-free access to the Community market on the basis of a most-favoured-nation clause.

4. Similarly under the Lomé Convention, a series of measures are provided by the Community for the benefit of developing countries in Africa, the Caribbean and the Pacific. 5/ Besides the provision of access to the Community market for the exports of these countries under favourable terms, their economic development is aided under the Lomé Convention by the STABEX system, for example, a compensatory financing system linked to commodity exports. 6/ In view of the range and importance of the existing trading arrangements, any disturbance of these arrangements, or risk of calling them in question that could cause serious problems, for a substantial number of developing countries, is therefore to be avoided.

5. In the light of its considerable practice in this area and the significance of that practice for the Community's trading partners, notably the developing countries, the Community would like to state, as it has on previous occasions, that the draft articles submitted by the International Law Commission do not in its view deal appropriately with a number of points, of which the following are the most important.

6. First, the draft articles do not include express recognition of the well-known principle that the existence of a most-favoured-nation clause, or of a clause providing for national treatment, does not entitle a third State to claim the benefits of membership of a customs union or similar regional integration arrangement. A considerable number of such bodies have been established, involving a large number of countries in different parts of the world.

7. Secondly, the draft articles are restricted to clauses contained in treaties between States. However, following the establishment of regional integration bodies, most-favoured-nation treatment, or preferential treatment, is frequently provided in practice under agreements concluded by such bodies: this is the case, for example, with the European Community. The draft articles fail to allow for these very significant developments, thus substantially reducing their usefulness.

8. Thirdly, while the draft articles contain exceptions to the application of most-favoured-nation clauses in favour of developing countries, the terms used are not defined and would therefore be difficult to apply. Moreover, as already indicated, the draft articles do not take into account the significant arrangements for the benefit of developing countries described below.

9. In the light of the considerations advanced above, the European Community is not in favour of continuing work on the draft articles at the present time. The General Assembly may therefore wish at its fortieth session to take note of the work done by the International Law Commission in this sphere and of the comments that have been made. The General Assembly could bring the draft articles, and the various proposals for amendment that have been submitted, to the attention of States and others, such as regional integration bodies, for their consideration and use in appropriate cases.

Notes

1/ UNCTAD's views on the question of most-favoured-nation treatment and its relationship to preferential treatment of developing countries were reflected in a statement made by the representative of UNCTAD at the 1497th meeting of the ILC held on 9 June 1978. See document A/33/10, pp. 435-438.

2/ Official Records of the General Assembly, Thirty-third Session, Supplement No. 10 (A/33/10), pp. 6-176.

3/ Ibid.

Notes (continued)

4/ EEC imports from developing countries totalled $108,000 million (1983). The figures for the United States were $107,400 million and for Japan $69,900 million.

5/ The third Lomé Convention between the European Community and the African, Caribbean and Pacific States was signed on 8 December 1984. The 66 African, Caribbean and Pacific countries that have signed the Convention are: Africa: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Djibouti, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Ivory Coast, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, Sudan, Swaziland, Togo, Uganda, United Republic of Tanzania, Zaire, Zambia, Zimbabwe; Caribbean: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago; Pacific: Fiji, Kiribati, Papua New Guinea, Solomon Islands, Western Samoa, Tonga, Tuvalu, Vanuatu.

6/ The aims of the STABEX system are set out in article 147, paragraph 1, of the Lomé Convention:

> "With the aim of remedying the harmful effects of the instability of export earnings and to help the ACP States overcome one of the main obstacles to the stability, profitability and sustained growth of their economies, to support their development efforts and to enable them in this way to ensure economic and social progress for their peoples by helping to safeguard their purchasing power, a system shall be operated to guarantee the stabilisation of earnings derived from the ACP States' exports to the Community or other destinations of products on which their economies are dependent and which are affected by fluctuations in price or quantity or both these factors."
