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Summary record of the 1384th meeting

Topic:
Most-favoured-nation clause

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tions and refused to grant most-favoured-nation treatment would be obliged to make reparation. The State might then not apply the treaty, but its responsibility would be entailed and it would have to accept the consequences. That was what happened when a State concluded a subsequent treaty which was incompatible with an earlier treaty.

50. Mitigating circumstances could perhaps be imagined, but they would not change the nature of the responsibility itself; they would, however, permit a solution to be reached by negotiation in good faith.

51. States had the right to unite, but if they exercised that right they must accept the consequences and not forget that there were other rights equally worthy of respect. Sir Francis Vallat had said that there was no rule in favour of an exception to the clause in the case of Customs unions, but that the exception was to be found in many treaties. The practice showed that States were generally in favour of such an exception. He therefore believed that, if the Commission wished to respect international practice, it should not establish a presumption in its draft articles in favour of an exception to the clause but leave States to make an exception if they so desired. It might perhaps emphasize that right by stressing the freedom of States in that matter. International practice required that States should be explicit if they wished to limit the scope of a most-favoured-nation clause. Thus, by not formulating any presumption, the Commission would be adopting a position that was more in conformity with practice.

The meeting rose at 1 p.m.

1384th MEETING

Friday, 4 June 1976, at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Most-favoured-nation clause (*continued*) (A/CN.4/293 and Add.1, A/CN.4/L.242)

[Item 4 of the agenda]

THE CUSTOMS-UNION ISSUE (*concluded*)

1. Mr. USHAKOV said he wished to clarify certain points concerning the capacity of States to restrict the application of the most-favoured-nation clause by negotiation, in the case of a Customs union.

2. Clearly, *ratione materiae*, any limitation was possible, since the parties agreed on the subject-matter to be covered by the clause. Thus a clause could apply to one matter only, without that limitation constituting an exception. *Ratione personae*, on the other hand, no limitation was possible. The granting State could not invoke its membership of a Customs union to deny the benefit of the most-favoured-nation clause to the beneficiary State, since the new situation created by the establishment of the Customs union in no way changed the pre-existing situation and the third State remained the third State. In his view, therefore, it was not possible to make an exception to the most-favoured-nation clause for Customs unions.

3. Mr. USTOR (Special Rapporteur), summing up the discussion, said it had shown that, subject to some reservations, there was virtual unanimity among members as to the position *de lege lata:* there was at present no general rule of customary international law that would exclude Customs-union benefits from the operation of the most-favoured-nation clause in the absence of an express stipulation in the treaty containing the clause. Some members, however, had drawn attention to the very many Customs-union exceptions contained in treaties and to the important exception embodied in article XXIV of GATT and had taken the view that those exceptions reflected the practice of States.

4. For his part he agreed with Mr. Yasseen that a general rule on the Customs-union exception could only be deduced from practice showing that States which had not stipulated an exception were prepared to admit the existence of an implied exception in regard to situations arising from a Customs union. Since no such practice existed, it was clear that the implied exception did not constitute a general rule of customary international law.

5. Approximately half the members of the Commission favoured the inclusion in the draft articles of a rule stating the implied Customs-union exception, but they agreed that it would be a rule *de lege ferenda*, so that its inclusion in the present draft would not constitute codification, but progressive development of international law.

6. The Statute of the Commission contained, in article 16, very detailed provisions on the progressive development of international law. Those provisions, which were of a procedural character, made the Commission's powers very much subject to the wishes of States. From the point of view of substance, however, the Statute did not place any limits on the powers of the Commission to propose changes in international law. With regard to such proposals, however, he agreed with Mr. Tammes that progressive development was desirable only if the proposed changes were in the direction of justice and of greater reliability of the law.

7. It had been suggested by some members, including Mr. Hambro, that since the Commission had been bold enough, in draft article 21, to accept considerable changes in the law for the benefit of the developing countries, it should be equally bold with regard to the Customs-union issue.[1] He could not accept that argument: the introduction of changes in the law to meet the needs of the

[1] See 1382nd meeting, para. 14.

developing countries was a response to compelling demands for justice expressed by the international community. The suggested Customs-union exception did not have the same ethical pressure behind it and was much less important.

8. With regard to the various tentative proposals that had been made, he would deal first with that based on the 1936 resolution of the Institute of International Law to which Mr. Hambro had referred. The resolutions of that Institute were not, of course, of a law-making character; they only expressed the wishes and opinions of its membership. He did not believe that an adequate solution to the Customs-union issue would be provided by Mr. Hambro's suggestion of a stipulation that the provisions of the draft articles would not prejudge any question that might arise from a Customs union or a free-trade area.[2]

9. Mr. Reuter had drawn attention to the fact that, in its draft articles on succession of States in respect of treaties, the Commission had included a provision on the effects of a uniting of States in respect of treaties in force at the date of the succession of States.[3] Under that provision, certain treaties concluded by the predecessor States would lapse, because their application would be incompatible with the purposes of the union. The situation dealt with in that provision, however, was different from the one under discussion. If two or more States united, they ceased to exist as separate States, and the successor State formed by their union would not be responsible for certain treaties that they had previously concluded. In the case of a Customs union, however, the member States continued to exist and remained sovereign; they were still in a position to fulfil their obligations. If they renounced certain powers in their relations with other members of the Customs union, that did not relieve them of obligations previously undertaken vis-à-vis outsiders.

10. The argument derived from article 30 of the draft articles on succession of States in respect of treaties was, moreover, contradicted by another point which Mr. Reuter himself had stressed, namely that a granting State which entered into a Customs union had a duty to negotiate with the beneficiary State and to ensure that no injustice was done to it. The fact that the granting State was under an obligation to compensate the beneficiary State for any loss of most-favoured-nation benefits showed that there was no analogy with the case of the lapsing of certain treaties in the event of a uniting of States.

11. Looking at the problem realistically, the Customs-union situation appeared to be only one instance among many of a State finding it necessary, for economic reasons, to terminate its obligations under a treaty. From the legal point of view, however, the *pacta sunt servanda* rule applied; if one State granted most-favoured-nation treatment to another under a treaty, it was under an obligation to perform that treaty obligation. A situation could of course arise, not only because of a Customs union but for other economic reasons, in which the granting State found itself unable to keep its promise.

12. The non-fulfilment of a promise to give most-favoured-nation treatment would thus represent, for the granting State, the breach of a treaty obligation. Since the obligation in question only affected economic interests, the breach would not constitute an international crime; it would simply engage the international responsibility of the granting State. Hence the matter came under the law of State responsibility, which was a separate topic on the Commission's agenda. Moreover, entry into a Customs union would not always have that effect. In the example given by Mr. Ushakov, the beneficiary State relied on the most-favoured-nation clause to protect its position in the granting State's market for a product which was not affected by the Customs union. Since the union had no detrimental effect on the exports of the beneficiary State, the entry into it of the granting State was not relevant.

13. The Commission now had to consider what course it would adopt. The question was of limited importance, because any provision on the Customs-union issue would have only a small field of application. The bulk of international trade was conducted by States that were Contracting Parties to GATT, which had its own rules and appropriate machinery for dealing with the matter. The Commission could neither modify those rules nor impose them on States which were not Contracting Parties of GATT; any attempt to do so would be fruitless. Moreover, States which were not Contracting Parties to GATT nearly always included a stipulation on the Customs-union exception in their bilateral treaties. Such stipulations were, of course, rather rudimentary compared with the elaborate provisions of GATT, but the fact remained that those States had found a means of dealing with the problem.

14. That being the present position, he saw no compelling reason to change it. The most-favoured-nation clause meant *prima facie* that the granting State would extend to the beneficiary State the same advantages as it gave to any other State in the world. States were well aware of that position and if they wished to make an exception for Customs unions, they could do so explicitly. It was an altogether unacceptable proposition to say that a pure most-favoured-nation clause was presumed to be qualified by an implied exception.

15. It was true that some representatives in the Sixth Committee of the General Assembly had drawn attention to the difficult position of a granting State that wished to join economic grouping. But he had been struck by the fact that most of them represented States that were Contracting Parties to GATT, under which the question was covered by article XXIV. If a Customs union conformed with the terms of that article, no problem would arise for those States. Moreover, he saw no reason why Contracting Parties to GATT should regard it as important to suggest rules for States which were not Contracting Parties and which had not accepted any general rule on the effects of a Customs union on the application of the most-favoured-nation clause.

[2] *Ibid.*, para. 21.

[3] *Ibid.*, para. 53.

16. Apart from Mr. Hambro, none of the members who wished to include a rule on the Customs-union issue had suggested that the rule should release the granting State, on its entry into a Customs union, from its obligations to the beneficiary State. They had merely stressed the indisputable freedom of the granting State to enter a Customs union. The rule which those members advocated would release the granting State from its obligations under the most-favoured-nation clause only subject to its duty to compensate the beneficiary State for any loss of its market. That proposal was not very far removed from his own approach, which was to regard non-fulfilment of the promise of most-favoured-nation treatment as a breach of an international obligation, which engaged the international responsibility of the granting State. Should a case of that kind come before an arbitral tribunal, pecuniary compensation would be awarded to the beneficiary State. Most members would share his view that such a matter should be covered by the rules on State responsibility and that it had no place in the present draft.

17. As to developing States, their position would differ according to whether they were members of a Customs union or not. Developing States which formed a Customs union among themselves would, of course, wish to free themselves from most-favoured-nation obligations. Developing States which were outside an economic union would naturally wish to retain their most-favoured-nation rights or to obtain compensation for any loss of those rights.

18. His approach to the Customs-union issue had been described by Mr. Reuter as an eloquent plea for the view prevailing in his own region. He had tried to be as objective as possible and he was satisfied that he was advocating not only the prevailing view of one region, but also a position that adequately reflected contemporary international law and its progressive development. The existing situation in most parts of the world was that the Customs-union issue was adequately settled. There was no reason to change the existing presumption in favour of the *prima facie* meaning of the most-favoured-nation clause; neither the demands of distributive justice nor the need to make the law more reliable required such a change.

19. He was in the hands of the Commission but, as Mr. Quentin-Baxter had pointed out at the previous meeting, it would be difficult for him to draw up a provision on the Customs-union issue that went against his own views. He therefore suggested that the Commission should submit a detailed report to the General Assembly and to Governments, reflecting the views of its members. It would then be for States to decide on the course that should be adopted; for under the Statute of the International Law Commission, it was States which were the judges in all matters of progressive development.

20. Mr. HAMBRO said he wished to clarify his position, as stated earlier [4] in reply to the comments by the Special Rapporteur, whose views he fully understood but with which he was unable to agree.

21. In the first place, throughout the Commission's discussions on the most-favoured-nation clause, he had never suggested that there was the same ethical right for Customs unions as there was for developing countries. Secondly, he wished to reiterate his full agreement with the exception for the benefit of the developing countries. Thirdly, he had not urged the Commission to be as bold on the Customs-union issue as it had been on the question of the developing countries. He had only stressed that one could not say that the rule in favour of the developing countries formed part of customary international law and at the same time adopt the opposite view in regard to Customs unions. In fact, the practice in regard to developing countries was more recent, and was not more general, than that relating to Customs unions. The provision on the developing countries was a matter of progressive development and he supported that development.

22. The question of Customs unions was not a minor matter. As he had already stressed, it was a question which concerned not only the developed countries, but also the developing countries, since they were equally interested in forming economic groups, which could be of great assistance to them.

23. Lastly, he reminded the Commission that he had suggested a number of possible solutions for the Customs-union issue and that one of his suggestions had been to deal with it by means of an article modelled on article B, which would read:

> The provisions of the present articles shall not prejudge any question that may arise from a Customs union or a free-trade area.

24. Mr. REUTER said that the discussion had only confirmed his pessimism. He noted that the Special Rapporteur had described the matter under consideration as one of minor importance, and that he believed it would be fruitless to include an exception in favour of Customs unions in the draft articles. In his (Mr. Reuter's) opinion it was by no means a minor question. The future convention, even if it was only to serve as a model, would apply in the future and would certainly have an important influence on future negotiations. Moreover, the article proposed by the Special Rapporteur might even have effects on the past. The last-mentioned aspect of the problem seemed to have worried some members of the Commission, whereas others were more concerned with the most-favoured-nation clauses that would be included in future agreements.

25. The most important question now being examined by the United Nations was that of a new international economic order, so the Commission should consider what repercussions the draft articles might have on that question. In that regard, the point which the Commission was now studying was of considerable importance. Since he has adopted a very clear-cut position, he did not feel qualified to give an opinion on whether the discussion should be continued in the Drafting Committee or in the Commission itself. The views of members of the Commission would certainly be reported in the summary records and in the Commission's report on its present session, but those views were, for the most part, also very clear-cut.

[4] *Ibid.*, paras. 13 *et seq.*

26. Unlike Mr. Tammes, he did not think the Commission should undertake progressive development of international law in the present case. It was called upon to determine, not how matters would stand in the future, but what was happening at present. The question which arose was the following: did a most-favoured-nation clause have the effect of automatically extending to the beneficiary State the advantages granted within a Customs union? Some members of the Commission had given an affirmative and others a negative answer; some had invoked the existence of a customary rule, while others had based their position on interpretation, observing that even in the absence of a customary rule it was normal to interpret a most-favoured-nation clause according to practice. Those who adopted that view should define what was meant by "practice" and whether, for example, it was a developing custom. He, too, based his position on interpretation, but under article 31 of the 1969 Vienna Convention on the Law of Treaties,[5] a treaty must be interpreted taking into account, among other things, any relevant rules of international law applicable in the relations between the parties. For that reason he considered that, where a most-favoured-nation clause did not contain any provision in favour of Customs unions, account must be taken not only of practice, but also of the fundamental right of each State to become a member of such a union; a State could not be presumed, in the absence of an express provision, to have renounced that right.

27. Several members of the Commission, and the Special Rapporteur himself, appeared to reproach him for trying to transfer the question to the area of State responsibility. In that connexion, he protested against the Commission's method of work. In article 60 of the 1969 Vienna Convention, the Commission had indirectly dealt with a question of responsibility, but it had refrained from dealing with all other questions of responsibility. Similarly, in the draft articles on succession of States in respect of treaties, it had included a reservation on the question of responsibility. In his view, it was not possible always to reserve questions of responsibility, especially where a substantive rule was involved. That was why he had raised the question whether States were committing an international delict when they voluntarily joined together in a union which made the performance of prior treaties impossible.[6] His view was that there was no international delict. He was willing to agree that the Commission should not settle that delicate question at present, but he wished to emphasize the importance of the views to be expressed on it in the commentary.

28. Not only had the Special Rapporteur maintained that the inclusion in the draft of an exception in favour of Customs unions would be fruitless, but some members of the Commission had made veritable funeral orations, in particular over GATT, which they held to be operating very badly. Although he did not share their concern, he agreed that it was open to question whether the preparation of draft articles on most-favoured-nation clauses that would be inapplicable in the future would be useful or not.

29. With regard to the developing countries, he wished to affirm his complete confidence that although they were not developed economically they were certainly developed politically, and that they would undoubtedly be able to defend their interests as required. He would unreservedly support any provision in their favour, even if it placed other States in a difficult position. The developing countries were not called upon to defend the interests of the European countries, which had exploited them long enough, and he would welcome their success. But, although he supported the thesis of the developing countries, it rather worried him, as a lawyer, that other countries should be excluded because they were not developing countries. It was unsatisfactory to draft a clause so strict that no one would approve of it and that the only States which accepted it would be those obliged to do so for other than legal reasons.

30. Mr. USHAKOV expressed astonishment that it could be thought that the draft articles might prevent States from forming Customs, political, economic, cultural or other unions. He wondered how a most-favoured-nation clause or any other clause contained in a bilateral or multilateral treaty could prevent States from establishing a union by common consent, whatever its sphere of activity. No other international instrument which the Commission had prepared or was preparing, including the draft articles on State responsibility, could have such a result. Nor could the draft under consideration prevent States from concluding treaties on a basis other than the most-favoured-nation clause. States had full freedom to include any clauses whatsoever in their treaties. That point might be stated in a separate article. Such a solution would certainly be a strange one, but he would be prepared to accept it.

31. With regard to the problem of retroactivity, he stressed that the future convention would not be retroactive, not only by reason of article C of the draft, but also because, as provided in article 28 of the 1969 Vienna Convention, a treaty was not retroactive unless a different intention appeared from the treaty or was otherwise established. That non-retroactivity, however, did not affect the concept of the most-favoured-nation clause itself, which remained the same. A most-favoured-nation clause containing an exception for a Customs union had never been and would never be a true most-favoured-nation clause. The draft was not intended for clauses of that type, though they were certainly valid, and the Soviet Union itself had accepted, in a great many of its trade agreements, clauses excluding the EEC countries from the category of third States.

32. The comparison between a Customs union and a State resulting from a uniting of two or more States was quite invalid. Moreover, the basic principle in the case of a uniting of States was that of the continuity of treaty obligations. Such a comparison would therefore mean that obligations contracted before the formation of a Customs union subsisted. The position of a Customs union might as well be assimilated to that of a newly independent State; it would then be the "clean slate"

[5] For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

[6] See 1382nd meeting, para. 52.

principle that would apply. That comparison would be more valid, but such comparisons should be distrusted.

33. Mr. USTOR (Special Rapporteur) drew attention to article C, concerning the non-retroactivity of the present draft articles (A/CN.4/293 and Add.1, para.29), which had been intended to dispel the concern of members who strongly advocated recognition of an implied exception for Customs unions. The article had been submitted in the light of Mr. Tsuruoka's suggestion at the twenty-seventh session that the insertion of such a provision would show that the draft related exclusively to treaties containing most-favoured-nation clauses concluded after its entry into force.[7] That would make it easier for the supporters of an implied Customs-union exception to adopt the draft articles in their present form, since future granting States would be in a position to include in their treaties a provision excluding benefits or advantages deriving from a Customs union.

34. The CHAIRMAN said that the Special Rapporteur was to be commended for bringing the whole problem to the attention of the Commission. Mr. Hambro was submitting written suggestions to the Drafting Committee, which could discuss the problem and advise the Commission on whether to include a provision in the draft or to insert an appropriate paragraph in its report. If there were no further comments, he would take it that the Commission agreed to that procedure.

It was so agreed.[8]

The meeting rose at 12.55 p.m.

[7] See *Yearbook... 1975*, vol. I, p. 204, 1343rd meeting, para. 25.

[8] For the decision of the Drafting Committee, see 1404th meeting, paras. 34-36.

1385th MEETING

Tuesday, 8 June 1976, at 3.15 p.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Most-favoured-nation clause (*continued*) (A/CN.4/293 and Add.1, A/CN.4/L.242)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE E (Most-favoured-nation clauses in relation to treatment extended to land-locked States)

1. The CHAIRMAN invited the Special Rapporteur to introduce article E, in his seventh report (A/CN.4/293 and Add.1, para. 82), which read:

Article E. — Most-favoured-nation clauses in relation to treatment extended to land-locked States

A beneficiary State, unless it is a land-locked State, is not entitled under a most-favoured-nation clause to any treatment extended by a granting State to a land-locked third State if that treatment serves the purpose of facilitating the exercise of the right of access to and from the sea of that third State on account of its special geographical position.

2. Mr. USTOR (Special Rapporteur) said that the question of an implied exception in respect of special treatment granted to land-locked States because of their special situation had first been raised at the United Nations Conference on the Law of the Sea, in 1958. In 1964, when dealing with the transit trade of land-locked countries, the United Nations Conference on Trade and Development had adopted a text which stated that the facilities and special rights accorded to land-locked countries in view of their special geographical position were excluded from the operation of the most-favoured-nation clause.[1] That principle had been reaffirmed in the preamble to the 1965 Convention on Transit Trade of Land-locked States of 8 July 1965,[2] article 10 of which specified that the facilities and special rights accorded by the Convention to land-locked States were excluded from the operation of the most-favoured-nation clause.

3. During the Third United Nations Conference on the Law of the Sea, an informal single negotiating text had been prepared to provide a further basis for negotiation of the special rights of land-locked States. Article 110 of that text stated that

> Provisions of the present Convention, as well as special agreements which regulate the exercise of the right of access to and from the sea, establishing rights and facilities on account of the special geographical position of land-locked States, are excluded from the application of the most-favoured-nation clause.[3]

That provision was now embodied in article 111 (Exclusion of application of the most-favoured-nation clause) of a revised single negotiating text drawn up for the fourth session of the Conference.[4] It was evident that there was wide agreement among States that such an exception should be adopted.

4. Article E was simply a translation of the proposed provision into the language employed by the Commission; it broadened the scope of article 10 of the 1965 Convention. The number of land-locked States now stood at 29, of which 20 were developing countries. The principle stated in article E could be regarded as a consolidation of the agreement emerging within the international community and as progressive development of international law.

[1] See *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No. E.64.II.B.11), p. 25, annex A.I.2, principle VII.

[2] United Nations, *Treaty Series*, vol. 597, p. 3.

[3] See *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. IV (United Nations publication, Sales No. E.75.V.10), p. 168, document A/CONF.62/WP.8, document A/CONF.62/WP.8/Rev.1/Part II.

[4] *Ibid.*, vol. V (United Nations publication, Sales No. E.76.V.8), p. 170, document A/CONF.62/WP.8/Rev.1, document A/CONF.62 WP.8/Rev.1/Part II.