

Document:-
A/CN.4/L.270

Draft articles on the most-favoured nation clause: article 28 proposed by Mr. Tsuruoka

Topic:
Most-favoured-nation clause

Extract from the Yearbook of the International Law Commission:-
1978, vol. II(2)

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tion similarly does not contain such a provision. The Commission therefore considered that, although most-favoured-nation clauses very often contained provisions for rights to be enjoyed by individuals, it was preferable, in the absence of a codification of the general rules on the matter, and in the light of the relationship between the draft articles and the general law of treaties and the Vienna Convention,⁶⁷ to remain within the limits of the sphere of application of that Convention.

67. The Commission is also fully aware that the implementation of the rules on most-favoured-nation clauses may cause particular difficulties inasmuch as they often refer expressly or by implication to domestic laws, and hence their application may involve conflict-of-laws rules. However, the Commission has confined itself to the sphere of public international law in the belief that the difficulties of implementation in particular cases are inherent in the subject and that the existence of such difficulties does not detract from the value of adopting rules of a general international law character.

68. Lastly, the Commission is aware that the provisions of the draft articles will not provide an automatic solution to all questions that may arise in connexion with the interpretation and application of most-favoured-nation clauses. The Commission has maintained its tradition of dealing with the subject-matter as much as possible within the framework of a codification of general rules, and has not embarked on a "case-by-case" approach. As noted earlier,⁶⁸ the first Special Rapporteur had referred in his seventh report to the question of the settlement of disputes. The new Special Rapporteur also referred to that question in his first report, submitted at the current session.⁶⁹ In addition, the Commission was seized of a proposal by one member for an additional article on the question, reading as follows:

Article 28. Settlement of disputes

1. Any dispute between two or more parties concerning the interpretation or application of the present articles which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration in accordance with the annex to the present articles.

2. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

ANNEX

1. A list of arbitrators shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State Party shall be invited to nominate two arbitrators, and the names of the persons so nominated shall constitute the list. If at any time the arbitrators nominated by a State Party in the list so constituted shall be fewer than two, that State Party shall be entitled to make further nomination as necessary. The name of an arbitrator shall remain on the list until withdrawn by the State Party which made the nomination, provided that such arbitrator shall continue to serve until the completion of any case in which the arbitrator has begun to serve.

2. The arbitral commission shall consist of five members and shall, unless the parties otherwise agree, be constituted as follows:

⁶⁷ See para. 59 above.

⁶⁸ See para. 37 above.

⁶⁹ See A/CN.4/309 and Add.1 and 2, sect. IV.

(1) Each party to the dispute shall appoint one member who shall be chosen from the list and may be its national. In the case of the party requesting arbitration, such appointment shall be made at the time of the request.

(2) The other three members shall be appointed by agreement of the parties and shall be chosen preferably from the list and shall be nationals of third States, unless the parties otherwise agree.

(3) The parties to the dispute shall, by agreement, appoint the President of the arbitral commission from among these three members.

3. In the absence of an agreement to the contrary between the parties to the dispute, the arbitral commission shall lay down its own procedure assuring to each party a full opportunity to be heard and to present its case.

4. Decisions of the arbitral commission shall be taken by a majority vote of its members. In the event of an equality of votes, the President shall have a casting vote.

5. The arbitral commission shall apply the present articles and other rules of international law not incompatible with the present articles.

If the parties to a dispute so agree, the arbitral commission shall decide a case *ex aequo et bono*.

6. The award shall be final and shall be complied with by all parties to the dispute. It shall have no binding force except between the parties and in respect of that particular dispute.

7. The expenses of the arbitral commission, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares.⁷⁰

69. Although the proposal attracted some support, the Commission decided not to include a provision on the settlement of disputes in the draft articles on most-favoured-nation clauses. It was decided that the question should be referred to the General Assembly and Member States and, ultimately, to the body that might be entrusted with the task of finalizing the draft articles.

(b) *Form of the draft*

70. The Commission has cast its study of most-favoured-nation clauses in the form of a group of draft articles, as recommended by the General Assembly. The Commission was of the view that the preparation of draft articles was the most appropriate and effective method of studying and identifying the rules of international law relating to most-favoured-nation clauses. The draft articles have been prepared in a form designed to render them capable of serving as a basis for the conclusion of a convention, should that be decided upon by the General Assembly. The corresponding recommendation is made in paragraph 73 below.

(c) *Scheme of the draft*

71. The Commission did not deem it necessary to depart from the general scheme of the draft, which is composed of only 30 articles, by introducing therein chapters or sections. However, the Commission wishes to point out the following: the first eight articles may be considered as introductory articles of a definitional nature, and as relating to the scope and basis of most-favoured-nation treatment; articles 9 to 22 relate to the general application of the most-favoured-nation clause; articles 23 to 26 relate to exceptions to the application of the clause; and articles 27 to 30 constitute what may be considered as miscellaneous provisions.

⁷⁰ A/CN.4/L.270.