Document:-
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Summary record of the 1218th meeting

Topic:
Most-favoured-nation clause

Extract from the Yearbook of the International Law Commission:-
1973, vol. I

the articles, but in fact were not. A document of that type had been submitted by Mr. Ago some years previously in connexion with State responsibility and had proved very useful to the Commission.

The meeting rose at 1 p.m.

1218th MEETING

Friday, 1 June 1973, at 10.20 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Most-favoured-nation clause

(A/CN.4/213; A/CN.4/228 and Add.1; A/CN.4/257 and Add.1; A/CN.4/266)

[Item 6 of the agenda]

(continued)

ARTICLE 5 (The source of the right of the beneficiary State) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of article 5 in the Special Rapporteur's third report (A/CN.4/257 and Add.1).

2. Mr. YASSEEN said that article 5 stated a very important rule of the institution known as the most-favoured-nation clause. When the Commission had been studying the law of treaties and, more particularly, the rules relating to the principle of relativity treaties, he and some other members had opposed the idea of treating the most-favoured-nation clause as an exception to that principle.[1] He remained convinced that it was purely and simply the application of the provisions of the law of treaties.

3. There was no denying that the right of the beneficiary State had its source in the original treaty. The other event—agreement, law, practice, etc.—was merely an act fulfilling a condition, which created in favour of a third State, a certain potential status provided for in the original treaty.

4. Moreover, the principle remained the same whatever the nature of the act fulfilling the condition—internal practice, legislative or administrative rule of internal law, or treaty. The mechanics were the same. Of course, the most-favoured-nation clause did not specify the scope of the treatment to be granted; that would be determined by the future event, which might define the scope of the original obligation contained in the clause.

5. It was a potential obligation whose origin was not the act fulfilling the condition, but the clause containing it. That was a general question which was not confined to the most-favoured-nation clause alone. There were many cases of conditional obligations. It was not the fulfilment of the conditions which was the source of the obligation, but the provision establishing the condition. He therefore supported the rule stated in article 5 which, legally, was the only possible rule.

6. With regard to the drafting, the enumeration of acts fulfilling the condition was not exhaustive and should either be amplified to include administrative acts and regulations, or be replaced by a formula of wider scope, such as "by virtue of internal law". That comment also applied to article 3.

7. In view of those considerations he was in favour of retaining article 5 and proposed that it be referred to the Drafting Committee.

8. Mr. SETTE CÂMARA said that, despite the explanations given during the discussion by Mr. Ago and Mr. Tammes,[2] he still had doubts about the practical difference between the fields covered by articles 4 and 5 respectively.

9. Article 4 laid down that a State could claim most-favoured-nation treatment only on the ground of a most-favoured-nation clause. *A contrario sensu*, a beneficiary State could not invoke such treatment on the basis of some other agreement, a legislative act or a practice.

10. Article 5 provided that the beneficiary State's right to claim the treatment granted to the favoured State arose from the treaty containing the most-favoured-nation clause. There appeared to be no difference between that proposition and the one in article 4.

11. Mr. Tammes had referred to the temporal problem, which had arisen in the *Anglo-Iranian Oil Company case (jurisdiction)*,[3] and had suggested that article 5 was intended to deal in part with that problem. Once the rule had been laid down, however, that no other basis could be invoked for most-favoured-nation treatment than the most-favoured-nation clause, the temporal problem was excluded. There was only one possible source, which could only operate at one moment.

12. For those reasons, he wished to repeat his suggestion that the Drafting Committee should consider the possibility of merging articles 4 and 5. If the Commission decided to retain article 5 as a separate article, however, he would propose the deletion of the last phrase: "the treaty containing the clause creates the legal bond between the granting State and the beneficiary State". That phrase did not state a legal norm; it was in the nature of a justification of the norm contained in the previous phrase and should therefore be transferred to the commentary.

13. Mr. AGO said that one of the difficulties pointed out by Mr. Sette Câmara arose from the fact that the titles of articles 4 and 5 were confusing, since they appeared to say the same thing in different ways, whereas they really dealt with two entirely different things.

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[1] See *Yearbook of the International Law Commission, 1964*, vol. I, pp. 184-188.

[2] See previous meeting, paras. 36-39 and 71-76.

[3] *I.C.J. Reports 1952*, p. 93.

14. In article 4, the Special Rapporteur had wished to emphasize that, in general, a State could only claim most-favoured-nation treatment if there was a treaty giving it the right to do so. The problem dealt with in article 5 was more delicate: it had to be stated whether the treatment in question derived from the treaty granting certain treatment to a third State, or from the treaty containing the most-favoured-nation clause concluded between the granting State and the beneficiary State. In other words, if a State A concluded with a State C an agreement granting it certain treatment, and concluded with a State B an agreement containing a most-favoured-nation clause, would the right of State B to claim from State A the treatment accorded to State C derive from the treaty concluded by State A with State B or from the treaty concluded by State A with State C?

15. The Special Rapporteur had rightly concluded that the right to claim most-favoured-nation treatment derived from the most-favoured-nation clause itself. For instance, if Italy concluded an agreement with Switzerland providing for the import of Swiss watches free of duty, and then concluded an agreement with Japan containing a most-favoured-nation clause, Italy's obligation to allow the import of Japanese watches free of duty would derive from its treaty with Japan and not from its treaty with Switzerland. But the existence of the latter treaty was the necessary condition for producing the effects of the clause between Italy and a third State, in that instance, Japan. It might be said that the most-favoured-nation clause was a clause with variable content and automatic effect. It was because of the agreement between Switzerland and Italy that the most-favoured-nation clause immediately created an obligation between Italy and Japan, but that obligation nevertheless derived from the clause contained in the treaty between Italy and Japan. That was the point which had to be made clear in article 5.

16. The situation remained the same whatever the chronological order in which the agreements were concluded. Thus, if the agreement between Italy and Switzerland was subsequent to the agreement between Italy and Japan, the clause contained in the latter agreement would produce no effects so long as the agreement between Italy and Switzerland had not been concluded. That was what was said in the first sentence of the article proposed by the Special Rapporteur.

17. With regard to the drafting, it was difficult to see how a legislative act could contain a most-favoured-nation clause; it would rather be an administrative act. Moreover, the true nature of the clause was that of a treaty provision; the other cases were exceptions. The last phrase of the paragraph should be in negative form. The Special Rapporteur had no doubt wished to emphasize that it was not the treaty concluded between States A and C which was the source of the obligation between States A and B.

18. Mr. KEARNEY said that it was not appropriate in English to speak of the beneficiary State's "right to claim"; anyone could make a claim. The real issue was the source of the beneficiary State's right to enjoy a certain treatment, and the wording should be adjusted accordingly.

19. He saw no reason to repeat in article 5 the enumeration in paragraph 2 of article 3: "treaty, other agreement, autonomous legislative act or practice".

20. With regard to a point just raised by Mr. Ago, he could visualize a situation in which advantages were extended to certain States by means of legislative acts of the granting State.

21. As it stood, article 5 did not appear to be very different from article 4. The commentary, however, which dealt at length with the *Anglo-Iranian Oil Company case (jurisdiction)*, showed that a major object of article 5 was to deal with the temporal aspects of the most-favoured-nation clause; but that intention was not clearly brought out by the text of the article. He therefore suggested that it be redrafted so as to refer to the right of the beneficiary State to enjoy the advantages accorded to a third State at the time of the entry into force of the most-favoured-nation clause or subsequently.

22. Mr. RAMANGASOAVINA said he approved of article 5 as orally amended by the Special Rapporteur when introducing it.[4]

23. He questioned the need for article 4, however, since the difference between the two articles was very slight. One article said that a State might claim most-favoured-nation treatment from another State solely on the ground of a most-favoured-nation clause, and the other said that the right to claim the treatment accorded to a third State arose from the most-favoured-nation clause. The only additional particular contained in article 5 was the enumeration of the instruments by means of which the treatment might have been accorded.

24. He approved of the inclusion of that enumeration, which he had himself requested, which expanded the notion of a "treaty" into an agreement in any form whatsoever. The words "other agreement" and "autonomous legislative act" adequately covered the various possible cases other than a treaty, such as an investment code, economic plan or agreement between countries having special links.

25. In the final version, commas should be inserted in the French text after the words "*Etat tiers*" and the word "*pratique*".

26. In the last phrase, the word "treaty" should be replaced by a more general term such as "document".

27. Mr. USHAKOV said he supported the principle stated in article 5. With regard to the drafting, it should be specified that the clause from which the right in question arose must relate to the same subject as the treatment accorded to the third State. It was not a most-generally-favoured-nation clause.

28. Similarly, it should be specified that the treaties, other agreements or practice by virtue of which privileged treatment had been accorded to a third State meant treaties, other agreements or practice between the granting State and the third State.

29. Lastly, the words "to claim" should be replaced by a less imperative expression such as "to be accorded";

[4] See previous meeting, para. 64.

the words "the treatment accorded" should be replaced by "the same treatment as is accorded"; and the words "arises from the most-favoured-nation clause" should be replaced by "exists only by virtue of the most-favoured-nation clause", with the explanation that the clause related to the same subject as the treatment accorded.

30. Mr. ELIAS said that he would not dwell on the theoretical basis for article 5, but would suggest a slight reformulation in the light of what appeared to him to be the crux of the matter. The objection that there was very little difference between articles 4 and 5 had some justification with the present wording. It was not only the title, but also the actual text of article 5 that made for confusion with the contents of article 4.

31. He agreed with the Special Rapporteur that there was a very real difference between the intended meaning of article 4 and that of article 5. Article 4 dealt with the first stage of the problem and laid down the rule that most-favoured-nation treatment could only be claimed on the basis of the most-favoured-nation clause. Article 5 dealt with another stage of the problem, and the colon used to separate its two parts indicated that the second part was a sort of definition of what went before. It explained that the legal bond between the granting State and the beneficiary State, and the right of the beneficiary State, derived from the treaty containing the most-favoured-nation clause.

32. For those reasons, he suggested that article 4 should be left as it stood, but that article 5 should be reworded on the following lines: "The right of the beneficiary State... arises from the most-favoured-nation clause in the treaty between the granting State and the beneficiary State".

33. The Special Rapporteur had found it necessary to introduce into article 5 the enumeration given in paragraph 2 of article 3. It would be confusing if that enumeration were not repeated in some form in article 4 as well. At a later stage, it might also have to be introduced into other articles of the draft, thereby making the provisions somewhat unwieldy. He accordingly suggested that a new sub-paragraph be introduced into article 1 to explain that, wherever the draft referred to the treatment accorded by the granting State to a third, or favoured, State, the reference was to a treatment based upon treaty, other agreement, autonomous legislative act or practice. That would obviate the need to repeat the enumeration in the various articles.

34. Mr. MARTÍNEZ MORENO said that he had been glad to hear Mr. Yasseen refer to the possibility of most-favoured-nation treatment being granted by an administrative act. Clearly, such treatment could be granted by an act other than an "autonomous legislative act". From his own experience, he could cite a case in which most-favoured-nation treatment had been granted as the result of a judgment of a national court.

35. The case was one in which Costa Rican importers of eggs from El Salvador had successfully challenged, in the Costa Rican courts, the administrative action of the Costa Rican Executive in banning the import of eggs from El Salvador, but not from other Central American States, because their low price made them too competitive with domestic production. The judgement had ordered that most-favoured-nation treatment, or even national treatment, should be given to imports from El Salvador. He accordingly suggested that the words "autonomous legislative act" be replaced by a broader formula which would cover any act or action under internal law.

36. He agreed with the proposition in the last part of article 5, that the legal bond between the granting State and the beneficiary State was created by the treaty containing the most-favoured-nation clause. At the same time, he wished to draw attention to the fact that, as a result of a dispute on a matter such as the determination of the goods covered by the clause, its application could be governed by a judicial or arbitral decision. The question might then arise whether the bond between the two States concerned had not been created by that decision.

37. Mr. TSURUOKA said he was in favour of retaining article 5, subject to a few drafting amendments. In particular, the last phrase was unnecessary. It was true that articles 4 and 5 were closely connected, but the object of the Commission's work was to draw up an instrument that would be easy to apply, and there was no reason not to emphasize a point, provided it would not hinder the attainment of that object.

38. As they stood at present, he thought article 5 contained a substantive rule and article 4 a procedural rule; if that were so, since substantive rules generally preceded procedural rules, the order of the articles should be reversed.

39. Mr. USTOR (Special Rapporteur) said that it might be helpful if, at that stage, he made a brief comment on the meaning of articles 4 and 5.

40. Article 4 was intended to say that, without prejudice to the duty of States not to discriminate between each other, the rule was that most-favoured-nation treatment could not be claimed unless a State held a valid title to it. The claim could not be based on any general rule of international law. The rule in article 4 was thus clearly a substantive rule and not a procedural rule.

41. As to article 5, in order to understand its purpose the case in which special treatment was accorded by the granting State to a third, or favoured, State on the basis of an autonomous legislative act or mere practice could be left aside. The purpose of article 5 was to make it clear that, where there were two treaties, one containing the most-favoured-nation clause and another granting special benefits to a third, or favoured, State, it was the former and not the latter treaty which constituted the basis for the claim to most-favoured-nation treatment.

42. The present text of the two articles was not, perhaps, sufficiently clear and the language used in the titles was somewhat confusing. The Drafting Committee would endeavour to improve the wording so as to bring out the intended meaning.

43. Sir Francis VALLAT said he was grateful to the Special Rapporteur for his explanation of the distinction between articles 4 and 5 and the scope of article 5 itself.

44. With regard to the principle in article 5, he found himself in the position of having to choose between the opposite views expressed, respectively, by Sir Eric

Beckett in his argument in the *Anglo-Iranian Oil Company case* [5] and by Sir Gerald Fitzmaurice in his article in *The British Yearbook of International Law*.[6] In the light of the reasons given by the Special Rapporteur and of those put forward by Mr. Ago and Mr. Yasseen, he had no difficulty in aligning himself, in principle, with the view expressed by Sir Gerald Fitzmaurice.

45. At the same time, he wished to point out that in the *Anglo-Iranian Oil Company case (jurisdiction)* the International Court of Justice had dealt with a declaration made by Iran under Article 36 (2) of the Statute of the Court, in which that country had expressly referred to a treaty. The issue was then whether that reference was to the treaty between the United Kingdom and Iran which contained the most-favoured-nation clause, or to a subsequent treaty.

46. That case should therefore be read as relating to the specific question just raised by the Special Rapporteur. If article 5 had dealt only with treaties, he would have found it easier to accept.

47. It was also possible to imagine a clause providing that the granting State would grant most-favoured-nation treatment to the beneficiary State upon that State's request. He had himself seen clauses of that kind, at least in draft, the purpose of which was to leave no doubt about the situation. In the present text, it would therefore be possible to insert at the end the additional proviso: "...and the right of the beneficiary State will only arise as from the time of the request".

48. From what he had said, it was clear that article 5 really dealt with two different juridicial concepts: first, that of the legal source of the right or obligation; secondly, the temporal question, which could well be a quite different one.

49. While it was true that, as Sir Gerald Fizmaurice had said, the most-favoured-nation clause was the mainspring of the clock, it was also true that, from the point of view of actual time, it could be argued that the right did not arise until the request was made.

50. It had been his intention to discuss other kinds of declaration referring to acts, or facts, or rights arising after the date of a declaration under Article 36 (2) of the Statute of the Court. In the light of the explanations given by the Special Rapporteur, however, it would not be necessary to elaborate on that point. He would only say that one could easily imagine a declaration regarding which the issue would be somewhat different from that which had arisen in the *Anglo-Iranian Oil Company case (jurisidction)*.

51. Mr. SETTE CÂMARA said that, after hearing the Special Rapporteur's very clear explanation, he could agree to the retention of articles 4 and 5 as separate articles. Indeed, article 5 appeared to be a logical consequence of article 4, and he hoped that the Drafting Committee would understand it in that light.

52. Mr. REUTER said he fully approved of article 5, but wished to draw the attention of members to the various acceptations of the term "practice".

53. The present draft was an extension of the Vienna Convention on the Law of Treaties, and when the Commission came to examine the related question of treaties concluded by international organizations it would have to distinguish between the different forms of practice. Well-established practice, which was a source of rights, could be contrasted with practice consisting simply in a *de facto* attitude, which did not create any right. It might be advisable to explain in the commentary to article 5 that it was the latter form of practice that was meant.

54. The CHAIRMAN, speaking as a member of the Commission, said that while there was undoubtedly a close connexion between articles 4 and 5, there was also a conceptual difference; he was therefore basically in agreement with the Special Rapporteur's text and prepared to accept it.

55. As to the word "practice", however, he agreed with Mr. Reuter that it should be clarified in the commentary. The practice in question was something of a purely bilateral nature, which arose *de facto* from the relationship between the granting State and the third State and conferred certain advantages that did not have to be confirmed by a formal treaty. It had nothing to do with customary law or with a practice which was common to many States.

56. Mr. USTOR (Special Rapporteur), summing up the discussion, said that it appeared to be generally agreed that the thesis stated in article 5 was acceptable, although admittedly it was one that the Drafting Committee might find it difficult to formulate.

57. He was prepared to accept the suggestion made by Mr. Tammes at the previous meeting that he should submit a list of the articles he intended to draft in the future.[7] One of those articles would deal with the contingent character of the most-favoured-nation clause and would, in particular, take account of the element of timing.

58. Mr. Yasseen had referred to the difference between a legislative act and an administrative act, but Mr. Kearney had observed that a legislative act might very well include an administrative act in the French sense of that term. In any case, the enumeration in article 5 merely repeated that in article 3, paragraph 2. The question was primarily one of terminology and the Drafting Committee should try to find some term which would cover all the legal systems of the world. In the light of the present discussion, he did not think article 5 should be restricted to the case in which two treaties existed.

59. Mr. Sette Câmara had advanced strong arguments for the amalgamation of articles 4 and 5, and he was pleased to note that he, too, was now prepared to keep them separate.

60. Mr. Kearney had said that article 5 should cover the two possibilities of advantages being granted upon

[5] *I.C.J. Pleadings*, Anglo-Iranian Oil Co. Case (United Kingdom *v.* Iran), pp. 543-582 and 628-669.

[6] See *The British Yearbook of International Law*, 1955/6, vol. XXXII, pp. 84 *et seq.*

[7] See previous meeting, para. 76.

the entry into force of the most-favoured-nation clause and after its entry into force. That point would be dealt with in a later article, on the contingent character of the clause. He agreed with Mr. Kearney that it would be better to replace the words "right to claim" by the words "right to enjoy".

61. He agreed with Mr. Ramangasoavina that the most-favoured-nation clause should be embodied in treaties between States and that it could not be inferred from a mere oral agreement or by other means. Some saving clause should therefore be included in the draft, on the lines of those contained in articles 1 and 3 of the Vienna Convention on the Law of Treaties.[8]

62. Mr. Ushakov had made the important observation that the most-favoured-nation clause could create rights only in a particular domain or specific field.

63. He was grateful to Mr. Elias for his proposal for an additional definition, which should certainly be considered by the Drafting Committee.

64. Mr. Martínez Moreno had rightly underlined the importance of a reference to administrative acts.

65. He noted that Mr. Reuter had reaffirmed the need for a saving clause along the lines of those in the Vienna Convention on the Law of Treaties.

66. He agreed in principle with the comments by Sir Francis Vallat.

67. Lastly, he agreed with the Chairman that the "practice" referred to in article 5 was always of a bilateral nature, and hoped that that point would be clearly reflected either in the article itself or in the commentary.

68. Mr. YASSEEN said that, like Mr. Martínez Moreno, he believed that not only the legislative and executive powers, but also the judicial power could establish legal rules on the treatment to be accorded to a third State, since judicial decisions were a source of law. Consequently, both in article 3 and in article 5, the enumeration of the different means of according certain treatment to a third State should either be exhaustive, or be drafted in general, unambiguous language. Of course, if the definition in article 3 was sufficiently clear and complete, it would not be necessary to include the enumeration in the following articles.

69. Mr. RAMANGASOAVINA said that he had not meant to suggest that the various possibilities to which he had referred should all be mentioned in article 5. On the contrary, he thought the provision was already drafted in sufficiently flexible terms to cover the different practices of States.

70. The CHAIRMAN suggested that article 5 be referred to the Drafting Committee.

It was so agreed.[9]

71. Sir Francis VALLAT observed that articles 2, 3, 4 and 5 had now been referred to the Drafting Committee. However, since all those articles bore a certain relationship to article 1, he proposed that the Drafting Committee be asked to consider, at least provisionally, the latter article as well.

72. Mr. BARTOŠ said it was the Commission's practice not to consider the definitions article until after it had examined all the other articles in a draft. Examination of the whole draft might lead it to omit or amend provisional definitions.

73. Mr. USTOR (Special Rapporteur) said that Mr. Bartoš was certainly right in saying that it was the Commission's practice to consider the article on definitions only after it had completed its discussion of the other articles. But the Drafting Committee could, of course, consider article 1 provisionally, on the understanding that it could be subsequently revised.

74. He suggested that the Drafting Committee should be empowered to submit saving clauses to the Commission, of the kind mentioned during the discussion.

75. The CHAIRMAN said he took it that the Special Rapporteur's suggestions were acceptable to the Commission.

It was so agreed.

The meeting rose at 12.45 p.m.

1219th MEETING

Monday, 4 June 1973, at 3.10 p.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Welcome to Mr. Calle y Calle

1. The CHAIRMAN welcomed Mr. Calle y Calle, who had been elected a member of the Commission to fill one of the casual vacancies which had occurred since the last session.

2. Mr. CALLE y CALLE, thanking the Chairman, said it was an honour and a privilege for him to participate in the work of the Commission. His country had an old legal tradition and, like all developing countries, was deeply interested in the progressive development of international law. In Joining the Commission, he wished to pay a tribute to two of his Latin American predecessors, Mr. Ruda, who was now a judge of the International Court of Justice, and Mr. Alcívar, whose memory was particularly dear to him.

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[8] 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.

[9] For resumption of the discussion see 1238th meeting, para. 33.