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A/CN.4/SR.1334

Summary record of the 1334th meeting

Topic:
Most-favoured-nation clause

Extract from the Yearbook of the International Law Commission:-
1975, vol. I

international law were particularly useful. They served to bring home the views, needs and requirements of the regions to the Commission in its task of making universal law. Europe, as a highly developed region which had produced many great jurists in the past and had sent outstanding international lawyers to the International Law Commission, had a special contribution to make to that task. The Commission derived great benefit from the work and the experience of the European Committee for Legal Co-operation.

50. He had been impressed by the Observer's reference to the question of participation by the European Economic Communities in a treaty as parties in their own right. He had also been greatly interested by the description of the new mechanism whereby the Communities could become bound by a treaty as institutions, quite independently of their member States, which might or might not be parties to the treaty. That process, whereby a European institution made itself responsible to the world community for the application of a convention, was particularly important at a time when the discussions on European security appeared to be about to lead to a definite agreement.

51. He had found equally interesting the Observer's description of the work of the European Committee on criminal law. In its early days, the International Law Commission had worked in that field; in 1954 it had adopted a Draft Code of Offences against the Peace and Security of Mankind. [11] The Commission had also worked for a number of years on the question of an international criminal jurisdiction.

52. There was one point relating to co-operation between the two bodies, to which he had referred in 1974 when he had appeared as an observer at Strasbourg, and which he wished to stress again. It was the question of maintaining close contact in regard to the approach to items under consideration by the International Law Commission. The Statute of the Asian-African Legal Consultative Committee specified that one of that Committee's purposes was to study the work of the International Law Commission and possibly to comment on it. Pursuant to that provision of its Statute, the Asian-African Committee had discussed such topics as the law of treaties and international rivers, and its work had been very useful to the Commission. It would be of great benefit to the Commission if the European Committee on Legal Co-operation were likewise to examine topics on the Commission's agenda, in addition to discussing problems of particular interest to Europe.

53. He expressed the Commission's regret at its inability, owing to pressure of work, to send an observer to the meeting of the European Committee held the previous week. He hoped it would be possible for the Commission to send an observer to the meeting to be held in December.

54. In conclusion, he expressed the hope that the close co-operation between the International Law Commission and the European Committee on Legal Co-operation would continue to develop to their mutual benefit.

The meeting rose at 1 p.m.

[11] *Yearbook ... 1954*, vol. II, pp. 149-152.

1334th MEETING

Friday, 20 June 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Most-favoured-nation clause

(A/CN.4/266; [1] A/CN.4/280; [2] A/CN.4/286)

[Item 3 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 7 (The *ejusdem generis* rule) and

ARTICLE 7 *bis* (The scope of the most-favoured-nation clause regarding persons and things) [3] *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of articles 7 and 7 *bis* submitted by the Special Rapporteur.

2. Mr. TSURUOKA said that, in principle, he agreed with the ideas expressed in those two provisions. The Special Rapporteur seemed to have tried to stress three aspects of the problem: the necessary relationship between the persons and things in question and the beneficiary State; the subject-matter of the clause; and the identity of the relationship between the persons and things and the third State, with the relationship between the persons and things and the beneficiary State.

3. Since the only remarks he had to make related to drafting, he would reserve them for the Drafting Committee, but he would like the Special Rapporteur to explain, at the present stage, what was the difference, if any, between the "subject-matter of the clause", the "scope of the clause" and the "agreed sphere of relations".

4. Mr. PINTO said he understood the revised articles 7 and 7 *bis* to mean that, in addition to the requirement that the rights claimed must relate to the subject-matter of the most-favoured-nation clause, those rights must also be of the same essential character as the rights granted to the third State. If that understanding was correct, he agreed with the remark made at the previous meeting that the expression *ejusdem generis*, which was used in the title, did not convey the intended meaning to an English-speaking lawyer. [4]

5. In the text of article 7, the phrase "relating to the subject-matter of the clause" was inappropriate. In one sense it was too wide, because everything relating to that subject-matter would not necessarily be *ejusdem generis;* in another sense it was too narrow, because it was not only rights relating to the same subject-matter, but also rights having the same essential character which

[1] *Yearbook ... 1973*, vol. II, pp. 97-116.

[2] *Yearbook ... 1974*, vol. II, Part One, pp. 117-134.

[3] For texts see previous meeting, para. 1.

[4] *Ibid.*, para. 31.

were covered. Article 7 thus required that the rights should fall within some specific definition imported by the most-favoured-nation clause.

6. The provisions of article 7 *bis* constituted a further elaboration of that specific limitation. Paragraph 1 laid down the potential scope by specifying that the operation of the clause was confined to the "class of persons or things expressly specified in the clause" or "implicitly indicated by the agreed sphere of relations" in which the clause applied. Paragraph 2 specified the actual or available scope of the clause by reference to the rights which were accorded by the granting State to a third State.

7. He did not disagree with the substance of paragraph 2, but thought that the wording needed improvement. The use of the adjective "same" before the word "class" was not satisfactory; the adjective "equivalent" would seem closer to the intended meaning. For example, if a third State was given certain fishing facilities, but with the qualification that the fishing vessels must be manned by its own nationals, or that there should be some other clear connexion between those vessels and the third State, the expression "belonging to the same class" would not properly cover the situation. The beneficiary State under the clause might well claim that any fishing vessel flying its flag belonged to "the same class" as the vessels of the third State to which the facilities had been accorded, and ignore the requirement of a direct connexion.

8. With regard to the drafting of article 7 *bis*, he preferred the shorter text proposed by Mr. Kearney, [5] which was clearer and more logical.

9. Mr. SETTE CÂMARA said that the Commission was faced with the dilemma referred to in paragraph (6) of the commentary to article 7: [6] either to draft a general rule, at the risk of its being interpreted too rigidly; or to specify the situations which might arise, at the risk of the enumeration being incomplete. In that situation, he agreed with Sir Francis Vallat in preferring a general statement of the rule. The discussions, which had been proceeding for two meetings, had not clarified the variety of situations that could arise.

10. The rule in article 7 was obviously a provision on interpretation which would operate in the light of articles 31 and 32 of the Vienna Convention on the Law of Treaties. [7] The various means of interpretation set out in those articles would clarify the application of article 7.

11. He strongly supported the suggestion that the Latin expression *ejusdem generis* should be avoided; it was not used by lawyers in a great many countries and would not be readily understood. Moreover, the Commission had in the past consistently avoided the use of Latin expressions wherever possible. Even the universally known doctrine of *rebus sic stantibus* had been described as "fundamental change of circumstances" in article 62 of the Vienna Convention on the Law of Treaties.

12. Mr. USTOR (Special Rapporteur), summing up the discussion on articles 7 and 7 *bis*, noted that there was general agreement on the principles involved; the discussion had centred on the drafting, which was extremely difficult, and he thanked members for all their valuable suggestions.

13. With regard to the use of the word "same" in article 7 *bis*, paragraph 2, which Mr. Pinto had suggested should be replaced by the word "equivalent", he drew attention to the following passage in paragraph (3) of the commentary to article 5, as adopted by the Commission in 1973: "The expression 'same relationship', however, has to be used with caution because, to continue the example, the relationship between State A and its nationals is not necessarily the same as the relationship between State B and its nationals. Nationality laws of States are so diverse that the sum total of the rights and obligations arising from one State's nationality laws might be quite different from that arising from another State's nationality laws". [8] His own suggestion would be to retain the word "same" on the understanding that it was not intended to mean identity, but indicated more than mere similarity.

14. As to the use of Latin, he would be quite prepared to drop the expression *ejusdem generis* if suitable expressions in the working languages could be found to replace it. He himself had so far been unable to find any terse wording which conveyed the intended idea.

15. In reply to the question raised by Mr. Tsuruoka, he explained that the term "subject-matter" was intended to refer to the matter to which the most-favoured-nation clause related, such as international trade or *cautio judicatum solvi*. The word "scope" was used with two rather different meanings in articles 7 and 7 *bis*, which had not been drafted at the same time. In article 7, it was used in a general meaning and could perhaps be dispensed with. In article 7 *bis*, however, the expression "scope of the persons or things" referred to the class of persons or things to which the most-favoured-nation clause related. The problem of a class of products was one which arose very often in connexion with the most-favoured-nation clause. One obvious example was that of treaties relating to customs tariffs.

16. On the question of relationship with the beneficiary State or with the third State, where persons were concerned, nationality and residence were the criteria most commonly applied. For a ship, it was generally the flag that was decisive. In the case of legal entities, the usual criteria were those of headquarters, control, and the laws under which the entity was organized or incorporated. For products, the relationship was generally based on the place of production or manufacture.

17. Reference had been made to the dilemma regarding article 7: whether to draft it in general terms, which might make for excessively generous application, or to make the rule explicit and thus unduly restrictive. A similar dilemma had been faced by the Commission many times in connexion with the other topics on its agenda, such as State responsibility and succession of States. The only

[5] *Ibid.*, para. 25.

[6] *Yearbook ... 1973*, vol. II, p. 104.

[7] 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. 293.

[8] *Yearbook ... 1973*, vol. II, p. 219.

way to deal with that difficulty was to try to maintain a balance between the two extremes of abstraction and generality on the one hand, and excessive detail on the other. He believed that articles 7 and 7 *bis* struck the required balance and thanked Mr. Kearney for his valuable suggestion for shortening the wording of the latter article.

18. In reply to Mr. Šahović, he explained that the rule in article 7 applied to all most-favoured-nation clauses, whether conditional or unconditional.

19. Sir Francis Vallat had raised the question of the relationship between the articles under discussion and the articles on interpretation in the Vienna Convention on the Law of Treaties. On that point, his view was that the study of the most-favoured-nation clause was a continuation of the Commission's work on the law of treaties, in the course of which the question of the clause had first arisen. There was no intention to question any of the rules embodied in the Vienna Convention. The Commission was only trying to ascertain whether it could identify any rules of existing international law applying to the most-favoured-nation clause, in order to codify those rules. An effort should be made to frame rules which would be useful to the community of nations and to all those engaged in drafting treaties containing a most-favoured-nation clause. He did not altogether exclude the possibility of some element of progressive development being introduced into the present work, but the task remained essentially one of codification.

20. The distinction between persons or things "expressly specified" in the clause and those "implicitly indicated" by the agreed sphere of relations in which the clause applied, was not always easy to make. He agreed that the wording of paragraph 1 of article 7 *bis* should be improved.

21. He was grateful to Mr. Pinto for his analysis of article 7 *bis* and agreed with him that paragraph 1 of that article referred to the potential scope of the most-favoured-nation clause and paragraph 2 to its actual or available scope. He also agreed with Mr. Pinto that the expression "relating to the subject-matter", in article 7, was not very satisfactory; the Drafting Committee would endeavour to find better language.

22. Mr. KEARNEY said that the discussion had revealed the enormously wide range of problems raised by the provisions of the draft articles under discussion. For the benefit of the Drafting Committee, he had revised the text he had proposed for article 7 *bis* at the previous meeting. The revised text read:

> "Persons or things included within a class specified as entitled to most-favoured-nation treatment under a most-favoured-nation clause shall be accorded by the granting State the favours accorded by that State to a comparable class of persons or things in a third State and having substantially the same relationship with the third State as the persons or things in the specified class are required to have with the beneficiary State under the clause."

23. In that revised text, the provisions of the article were framed as a rule having direct legal effect, not as an interpretation. The rule required not only that the class should be the same, but also that the relationship should be the same. At the previous meeting, he had discussed the possible existence of a case in which compliance with only one of those two requirements would suffice; but on reflection he had come to the conclusion that both requirements should apply in all cases. He had replaced the idea of the "same class" by that of a "comparable class", and had introduced the qualification "substantially" before the words "the same relationship". The second of those changes would cover such questions as the different nationality laws in different countries, to which the Special Rapporteur had referred in his summing up.

24. Sir Francis VALLAT, speaking on a point of order, pointed out that the revised text of article 7, which was before the Commission, began with the words "Under a most-favoured-nation clause or a national treatment clause". Since the Commission had postponed its decision on the inclusion of national treatment clauses, [9] he assumed that article 7 would be referred to the Drafting Committee without the words "or a national treatment clause", which would be reserved for future discussion.

25. The CHAIRMAN said that assumption was correct. If there were no further comments, he would take it that the Commission agreed to refer articles 7 and 7 *bis* to the Drafting Committee for consideration in the light of the discussion.

It was so agreed. [10]

ARTICLES 8 AND 8 *bis*

26. The CHAIRMAN invited the Special Rapporteur to introduce articles 8 and 8 *bis*, which read:

Article 8

The most-favoured-nation clause and benefit-restricting stipulations (clauses réservées)

The right of the beneficiary State to most-favoured-nation treatment is not affected by an agreement between the granting State and one or more third States confining treatment to their mutual relations.

Article 8 bis

The most-favoured-nation clause and multilateral agreements

The right of the beneficiary State to most-favoured-nation treatment is not affected by the fact that treatment by the granting State of a third State or of persons or things in a determined relationship with it has been accorded under a multilateral agreement.

27. Mr. USTOR (Special Rapporteur), introducing his revised article 8 and the new article 8 *bis*, said that very extensive explanations were given in the commentary to those articles in his sixth report (A/CN.4/286).

28. The text of article 8 was very short and the rule it contained was, in a sense, self-evident. It dealt with two possible situations. The first was that in which the granting State, after having granted most-favoured-nation treatment to the beneficiary State, entered into an agreement with a third State; by that agreement it conferred, in matters within the scope of the most-favoured-nation

[9] See 1330th meeting, paras. 7-41.

[10] For resumption of the discussion see 1352nd meeting, para. 32.

clause, a certain advantage upon that third State, but the concession was confined to their mutual relations, so that the advantage would not be extended to any other State. Clearly, the agreement with the third State was in conflict with the promise made to the beneficiary State in the most-favoured-nation clause. As far as the beneficiary State was concerned, the second agreement was *res inter alios acta* and could be disregarded when claiming most-favoured-nation treatment from the granting State.

29. The second possible situation was that in which the granting State granted most-favoured-nation treatment to the beneficiary State after it had made the agreement with the third State. Clearly, the granting State could not evade its obligations under the most-favoured-nation clause by invoking its earlier agreement with the third State, which was also *res inter alios acta* as far as the beneficiary State was concerned.

30. Article 8, which was drafted in simple terms, covered both those cases. It showed that the granting State must not give conflicting promises to the beneficiary State and a third State. Any agreement between the granting State and one or more third States confining treatment to their mutual relations would have no effect on the right of the beneficiary State to most-favoured-nation treatment.

31. Any dispute which arose out of such a conflict would have to be settled by the ordinary means of settlement of disputes. Mr. Kearney had referred to the special machinery which existed in GATT, and international trade agreements often contained arbitration clauses. Questions relating to the settlement of disputes, however, were not the immediate concern of the Commission at that stage.

32. Article 8 *bis* dealt with the question of advantages extended by the granting State under a multilateral agreement. That was a very delicate question, but the Commission had to state the law as it stood. The rule of contemporary international law in the matter was, as he saw it, that if the granting State had, in good faith, promised most-favoured-nation treatment to the beneficiary State without excluding certain advantages given under a multilateral agreement, the most-favoured-nation clause would apply to the advantages extended to any third State, whether by bilateral or by multilateral agreement.

33. There was only one exception to that rule. It related to the situation, described in detail in annex 1 to his second report, [11] in which developing countries wished to reserve certain trade advantages to themselves without extending them to developed countries. That question, however, would be dealt with at a later stage.

34. Mr. USHAKOV said he was prepared to accept articles 8 and 8 *bis*. He proposed that they should be referred to the Drafting Committee.

35. Sir Francis VALLAT said that the articles were obviously sound in principle and delicate in drafting; the real problem was that of the commentary. He believed that to send the articles to the Drafting Committee forthwith would save time, and he could agree to that course on the understanding that further discussion would be possible when the Committee's versions became available.

36. Mr. PINTO said that, as there were a number of points in the articles to which he wished to give further thought, he hoped the decision to send them to the Drafting Committee could be postponed until the next meeting.

37. Mr. KEARNEY said that, whereas article 8 was very necessary, since it dealt with a precise problem, article 8 *bis* stated something so obvious and indisputable that it might be considered superfluous. The article should be given more substance to justify its retention.

38. Mr. CALLE Y CALLE said he approved of articles 8 and 8 *bis* and was willing for them to be referred to the Drafting Committee at once. They were an expanded version of the original article 8, [12] which had followed from the unconditional, automatic nature of the most-favoured-nation clause and had implied that treatment should be accorded to the beneficiary State in good faith.

39. He would be grateful if the Special Rapporteur would explain why, in revising article 8, he had not retained the notion that a limitation could be placed on the rights of the beneficiary State if it expressly consented thereto. It seemed to him that such a provision would be useful, for while it was generally accepted that the right acquired by the beneficiary State could not be altered by agreements concluded between other States, it was conceivable, in view of the complexity of international life, that exceptional circumstances might arise in which some restriction of that right would be necessary.

40. Mr. AGO said he had no objection to articles 8 and 8 *bis* being referred to the Drafting Committee, provided that did not in any way imply that the Commission accepted the principle stated in those articles. Coming from a country which was a member of the European Economic Community, he was particularly concerned about the wording of those two provisions. He was, of course, in favour of the widest possible use of the most-favoured-nation clause, but on condition that it would not have the effect of preventing certain countries from establishing their own economic communities and thus gradually arriving at some form of federation. In his opinion, it was necessary to find a balance between two different and sometimes contrary needs. There, the Special Rapporteur had touched on an essential and extremely delicate problem.

41. Mr. USTOR (Special Rapporteur) explained that the idea in the original article 8 mentioned by Mr. Calle y Calle was still valid, but he had not thought it necessary to express it in the revised version which, like all the other articles, was in the nature of *jus dispositivum*. He would have no objection to restoring the clause in question.

42. He assured Mr. Ago that he was aware of the repercussions of articles 8 and 8 *bis* for members of the European Economic Community and other associations based on customs unions. He believed in the right of States

[11] *Yearbook ... 1970*, vol. II, pp. 237-239.

[12] *Op. cit., 1973*, vol. II, p. 108.

to join such associations, but he also believed that other States, which had concluded treaties with them prior to their joining, had a right to protection. Articles 8 and 8 *bis* were closely linked with article 234 of the Treaty of Rome establishing the European Economic Community,[13] for the idea behind all three articles was that States should exercise their right to associate without causing undue harm to others and that, wherever prior obligations were incompatible with membership of an association, they should be dissolved or amended by agreement between the parties concerned.

43. Mr. PINTO said he was afraid the wording of article 8 might be too simple. It seemed to him that, as it stood, the article could lead to an unfair situation. For example, a State which depended for its survival on the export of low quality copper, which would not be competitive in the open market, might succeed in persuading an importing State to make its product the sole beneficiary of a low tariff. There was nothing in the article to prevent the importing State from subsequently extending most-favoured-nation treatment to another State which exported better quality copper, although the consequences of such action would be disastrous to the low quality exporter.

44. Mr. USTOR (Special Rapporteur) reminded the Commission that in introducing the articles under discussion he had said that they were general rules and that he hoped to introduce later an exception applying to international trade associations of developing countries. As could be seen from Annex I to his second report, he had more or less reached agreement on that point with UNCTAD and discussions were continuing.

45. Mr. PINTO said he was grateful for the clarification provided by the Special Rapporteur, but he would still prefer the Commission to wait until the next meeting before referring articles 8 and 8 *bis* to the Drafting Committee.

46. The CHAIRMAN said it seemed to be the general wish that the articles should be referred to the Drafting Committee forthwith. Members of the Commission would still be free to comment on them after that step had been taken. Since time was short and many matters were still outstanding, the Commission should take every opportunity of speeding up its work.

47. Mr. PINTO said he would agree to immediate reference of the articles to the Drafting Committee, on the understanding that that did not imply acceptance of their substance.

48. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that, while he was most embarrassed at having to oppose the Chairman's efforts to hasten progress, he thought the discussion had shown that it would be advisable to allow more time for comment on the articles. That would not delay the Drafting Committee, which already had a good deal of work on hand.

49. He had much sympathy with what other speakers had said about the articles. It was easy to make and justify comparatively neat rules, but as the Special Rapporteur himself had often pointed out, no rule could actually solve the problem of applying one situation agianst another. What had been expressed with regard to article 8 *bis* was not opposition to its restatement of a proposition too basic to be queried, but concern that in some way it might alter the climate in which judgements would be made. It was for those reasons that he thought more time was required.

50. Mr. USHAKOV said that reference of articles 8 and 8 *bis* to the Drafting Committee would not mean that those articles had been adopted by the Commission. Hence the discussion on them would not be closed.

51. Mr. AGO said he was opposed to referring articles 8 and 8 *bis* to the Drafting Committee immediately; they were very important articles which required more thorough discussion.

52. The CHAIRMAN said that the articles would remain open for discussion until the Commission had adopted its report.

The meeting rose at 12.45 p.m.

[13] United Nations, *Treaty Series*, vol. 298, p. 91.

1335th MEETING

Monday, 23 June 1975, at 3.15 p.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Most-favoured-nation clause

(A/CN.4/266;[1] A/CN.4/280;[2] A/CN.4/286)

[Item 3 of the agenda]

(*continued*)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 8 (The most-favoured-nation clause and benefit-restricting stipulations (*clauses réservées*)) and

ARTICLE 8 *bis* (The most-favoured-nation clause and multilateral agreements)[3] (*continued*)

1. Mr. SETTE CÂMARA said that he was basically in agreement with the texts of articles 8 and 8 *bis* as proposed by the Special Rapporteur. The sound and thorough examination of the evolution of doctrine and State practice which the Special Rapporteur had made in his fourth and sixth reports (A/CN.4/266 and A/CN.4/286) left no room for doubt as to the validity of the principles underlying the articles.

2. The old ideas concerning *clauses réservées*, such as those of Nolde and the League of Nations Economic Committee,[4] had rightly been discarded by the Special Rapporteur as inconsistent with modern thinking on the

[1] *Yearbook ... 1973*, vol. II, pp. 97-116.

[2] *Yearbook ... 1974*, vol. II, Part One, pp. 117-134.

[3] For texts see previous meeting, para. 26.

[4] *Yearbook ... 1973*, vol. II, p. 108, para. (4).