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Summary record of the 1337th meeting

Topic:
Most-favoured-nation clause

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yet be assessed. For there was now a tendency among States—particularly young States—to form customs unions in order to increase their prosperity and hasten their development. And if one of the States members of an economic community had, before joining it, granted most-favoured-nation treatment to another State not a member of the community, that extraneous element, introduced through the operation of the most-favoured-nation clause, would suffice to destroy the whole system of preferences laboriously built up in the interests of the community.

60. In his opinion, it was not yet possible to gauge all the consequences of the rules stated in articles 13 and 14. The Special Rapporteur had been rather laconic on that point, for practice did not yet offer sufficient precedents to illustrate the possible consequences of those articles. He therefore shared the opinion of some members of the Commission who would prefer to defer a decision on articles 13 and 14 until a more thorough study had been made to determine the possible consequences of the cumulation of national treatment and most-favoured-nation treatment. He was impatiently awaiting the articles on non-reciprocal preferences to be granted to developing countries, which might perhaps throw some light on the possible consequences of the principles stated in articles 13 and 14. He appreciated that those articles were of definite interest, but he had some fears—possibly unjustified—about their consequences.

61. The CHAIRMAN observed that there seemed to be general agreement that the Commission should proceed to consider articles 13 and 14 and revert to articles 9 to 12 at some later stage.

62. Mr. USTOR (Special Rapporteur) said that, while he regretted that the Commission had not adopted that course at the beginning of the meeting, the discussion had been useful in throwing light on the difficulties of the subject. Since the study of most-favoured-nation clauses and of the cumulation of national treatment and most-favoured-nation treatment being prepared by the Secretariat would be essentially statistical, it would not be possible to use it in connexion with the discussion of national treatment in the way some members of the Commission hoped. He had been rather puzzled by the calls for further time to study articles 13 and 14, which had been available for more than a year, and he trusted that the Commission would be able to deal with them quickly at its next meeting.

The meeting rose at 1 p.m.

1337th MEETING

Wednesday, 25 June 1975, at 10.20 a.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)

STATEMENT BY THE SPECIAL RAPPORTEUR ON THE QUESTION OF THE NATIONAL TREATMENT CLAUSE

1. Mr. USTOR (Special Rapporteur) said that he hoped he had not offended members of the Commission by his remarks at the end of the previous meeting. While he naturally accepted the view of the majority that the question of the national treatment clause should not be brought within the scope of his study at the present stage, he remained unconvinced by the arguments adduced in support of that view.

2. Those arguments related to procedure and to the merits of his proposal. As the procedure, the Commission had always tried to maintain a certain intellectual freedom in relation to the General Assembly. Indeed, it had been the Commission, not the Sixth Committee, which had first decided that a study of the most-favoured-nation clause should be undertaken. That being so, he thought the Commission could take the liberty of extending the study to some degree.

3. While much had been said about the need for caution and for making haste slowly, little had been said about the actual merits of his proposal. For example, no one had said, in regard to any particular article, that extension of that article to national treatment would be very difficult, and he did not think there was any instance in which that would, in fact, be the case. Had it considered the national treatment clause, the Commission would have remained within the sphere of the law of treaties; just as it had not discussed the merits of the most-favoured-nation clause, but had merely adopted rules for its application, so the Commission would have had no need to go into questions of national treatment and minimum standards of international law.

4. He believed that when explaining the Commission's decision to the General Assembly, he would be justified in saying that the Commission might extend its study to national treatment clauses at its next session.

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 13

5. The CHAIRMAN invited the Special Rapporteur to introduce article 13, which read:

Article 13

The right of the beneficiary State under a most-favoured-nation clause to national treatment

1. The beneficiary State acquires under a most-favoured-nation clause the right to national treatment if the granting State has accorded national treatment to a third State.

2. Paragraph 1 applies irrespective of whether national treatment has been accorded by the granting State to a third State unconditionally or subject to material reciprocity or against any other compensation.

¹ Yearbook . . . 1973, vol. II, pp. 77-116.

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

6. Mr. USTOR (Special Rapporteur) said that the rule proposed in article 13 seemed obvious, at least from a simple reading of the most-favoured-nation clause. By that clause, the granting State promised the beneficiary State treatment no less favourable than it accorded to a third State; the beneficiary State was thus able to claim any advantages enjoyed by third States which exceeded the advantages granted to itself under the most-favoured-nation clause, irrespective of the way in which those advantages had arisen. For example, State A might levy harbour dues of one penny per ton on its own ships and threepence per ton on all other ships. If State A subsequently granted national treatment to State B and most-favoured nation treatment to State C, the dues levied on B's ships would be lowered to equal those levied on the ships of the territorial State, and State C, relying on the promise given to it by that State, could claim the same reduction. Since State A would be unable to dispute the contention that national treatment was the more favourable, it would have to satisfy C's claim. He had included some examples of State practice in his commentary (A/CN.4/280), and they showed that the unanimous opinion was that most-favoured-nation treatment also embraced national treatment.

7. For the sake of objectivity, he had also included in his commentary examples of opposing views. But however seductive they might be, those views did not rely on State practice, but on conjecture, and should not be entertained by the Commission. The suggestion was that national treatment was not of the same nature as most-favoured-nation treatment, and that the most-favoured-nation clause itself precluded claims for benefits of any kind other than those to which it related. The example he had given, of ships and harbour dues, showed that the two types of treatment were not different in nature. It was clear to him that in situations where the most favourable treatment was that accorded to a third State, the same treatment would have to be accorded to the beneficiary State, irrespective of whether the favours given to the third State derived from a bilateral treaty, national legislation of the granting State, or a national treatment clause. It was because that idea was inherent in the most-favoured-nation clause that Sir Francis Vallat had said that article 13 was unnecessary; while he sympathized with that view, he thought it would be useful to lay down a formal rule, because of the controversy to which the question had given rise.

8. It had been said that most-favoured-nation treatment could not encompass national treatment, because the former was often granted unconditionally and the latter subject to reciprocity. However, as provided in the new version of the second paragraph of articles 6 *bis* and 6 *ter* adopted by the Drafting Committee,³ the rights of a beneficiary State under a most-favoured-nation clause must be upheld independently of whether the granting State had accorded favours to a third State gratuitously or against compensation. That provision was based on the *pacta sunt servanda* rule and on general State practice, which was to invoke the condition of reciprocal treatment by a third State as a reason for withholding certain favours

from a beneficiary State only where appropriate exceptions had been provided for in the most-favoured-nation clause. Article 13 meant that, in the absence of such exceptions, the beneficiary State must receive all the advantages the granting State accorded to any third State, even if those advantages had been accorded under a national treatment clause.

9. He was well aware that there was an increasing tendency for States which were members of economic unions to conclude multilateral agreements under which they accorded national treatment to each other. In his objective opinion as Special Rapporteur, the most-favoured-nation clause would operate in the presence of such agreements, as provided in article 8 (A/CN.4/286). In other words, he did not believe that the rules of international law had developed beyond the point of allowing no exceptions to the clause other than those expressly stipulated in it. The present situation, which was recognized in such important international instruments as the 1957 Treaty of Rome,⁴ was that States which found that their obligations under a most-favoured-nation clause were incompatible with their obligations under a subsequent multilateral agreement, could release themselves from their earlier commitments, which would otherwise remain valid, only by negotiation with the beneficiary State or by means for which provision was made in the earlier agreement. He did not think it would be desirable to introduce into international law institutions which, of themselves, would free States from their treaty obligations.

10. Mr. ŠAHOVIĆ said that the discussion at the previous meeting had been very useful because it had enabled the Commission to clarify a number of points. The Special Rapporteur had said that he had wished to deal with a number of questions which were directly connected with the most-favoured-nation clause and had reached the conclusion that it was impossible to leave national treatment aside. He (Mr. Šahović) agreed with the Special Rapporteur on that point and thought that articles 13 and 14 were necessary. He did, however, have certain difficulties with the relationship between most-favoured-nation treatment and national treatment, which were two different notions. In his opinion, it would be necessary to define the notion of national treatment and to study its legal nature more thoroughly, particularly from the point of view of international law.

11. With regard to article 13, he thought the Special Rapporteur had been much stricter in the wording of the article than in his commentary. He had said that the rule in that article was self-evident, but had described the situation in much more flexible terms when he had affirmed, in paragraph (9) of his commentary (A/CN.4/280), that "If a State wishes to exclude previous or future national treatment grants from its most-favoured-nation pledge, it is free to do so". He seemed thus to have contemplated the possibility of an exception to the rule in article 13. Hence it seemed that the rule could be made more flexible by adding a saving clause such as "unless

³ See 1352nd meeting, para. 45.

⁴ United Nations, *Treaty Series*, vol. 298, p. 11; see article 234.

the parties agree otherwise", as had been suggested in the case of other draft articles.

12. While he did not wish to discuss the pertinence of Pescatore's arguments, he thought that some of them were important and warranted consideration. In particular, it would be necessary to study more thoroughly the problem of reciprocity and the problem of the time element. The practice of States, on which the Special Rapporteur's commentary was based, was certainly convincing, but all aspects of the question should be taken into account.

13. He doubted whether paragraph 2 was really necessary, since the Commission had formulated other rules that were valid for all forms of most-favoured-nation clause without saying so expressly in the articles.

14. Mr. AGO said he thought article 13 had a place in the draft. For if a State had granted most-favoured-nation treatment to another State and later granted national treatment to a third State, it was evident that, through the operation of the most-favoured-nation clause, national treatment must be accorded to the State benefiting under the clause. Hence he was only concerned about the possible consequences of paragraph 2.

15. He recognized that the Special Rapporteur had been perfectly consistent, because paragraph 2 was simply the counterpart of paragraph 2 of article 6 *bis*. But the consequences of paragraph 2 of article 13 led him, in retrospect, to have some doubts about the consequences of article 6 *bis*. For if the State which granted most-favoured-nation treatment to another State had not yet granted national treatment to a third State, it was quite obvious that the State benefiting under the most-favoured-nation clause was not entitled to national treatment for its nationals and things. If the same State subsequently granted national treatment to a third State, but on condition of reciprocity, was the beneficiary State under the most-favoured-nation clause entitled to claim from the granting State, without reciprocity, the national treatment which it had granted to the third State? In his opinion such a solution would be unacceptable, since it would go beyond the operation of the most-favoured-nation clause by introducing into the relations between State A and State B, through the operation of that clause, the national treatment provided for between State A and State C—and that not within the limits to which the national treatment was subject in the relations between State A and State C, but without any limitation. It was the most-favoured-nation clause as such—that was to say as a formal instrument granting a specific treatment to a State—which was unconditional, whereas the treatment was specifically determined by the content of the treaties which State A had concluded with other States. If State A had accorded national treatment to State C only on condition of reciprocity, State B could not claim that treatment unless it agreed to accord national treatment to State A. Thus a strict and correct interpretation of the most-favoured-nation clause could not lead to the conclusion stated in article 13, because State B would obtain from State A more favourable treatment than that accorded to State C, in other words, treatment more favourable than most-favoured-nation treatment.

16. Those considerations were prompted by respect for the *pacta sunt servanda* principle, which the Special Rapporteur had so rightly stressed.

17. Mr. USHAKOV said that, in principle, he supported articles 13 and 14, subject to a few drafting changes. States were not children; the Commission must have confidence in them and assume that they did not act without due consideration, but were fully aware of all the possible consequences of an agreement when they concluded it.

18. Article 13 did not concern standards for the status of aliens; those standards related to civil and political rights, whereas the most-favoured-nation clause applied mainly to commercial and consular relations affecting property and goods. The question of standards relating to the status of aliens was a very broad one, whereas national treatment accorded under a most-favoured-nation clause was limited to the agreed sphere of relations to which the clause applied.

19. In article 13, the Commission had to settle the question whether the beneficiary State acquired the right to national treatment under a most-favoured-nation clause when the granting State had accorded national treatment to a third State. It must answer that question categorically—in the affirmative or in the negative—without reservations. Thus in article 13 it must state an absolute rule, without trying to make it more flexible by means of a saving clause, as Mr. Šahović had suggested. For if the granting State had accorded national treatment to a third State, it was obliged to grant that same treatment to the State benefiting under the most-favoured-nation clause. Whatever the conditions under which the granting State had granted national treatment to a third State, the beneficiary State was entitled to the same treatment unconditionally. It was free to choose between national treatment and most-favoured-nation treatment. When the Special Rapporteur had said, in paragraph (9) of his commentary to article 13, that "If a State wishes to exclude previous or future national treatment grants from its most-favoured-nation pledge, it is free to do so", he had not intended to make an exception to the rule in article 13, as Mr. Šahović believed. He had simply meant that the granting State and the beneficiary State could agree, when concluding the most-favoured-nation clause, to exclude from that clause the benefit of national treatment granted to a third State. That was not a general rule of international law, but an exception mutually agreed by the two States.

20. He agreed with the Special Rapporteur that the rule in article 13 was self-evident. But that was not the opinion of some members of the Commission, who believed that, on the contrary, the beneficiary State did not automatically acquire the right to national treatment under the most-favoured-nation clause when the granting State had accorded national treatment to a third State. It would therefore be possible to formulate a contrary rule excluding the benefit of national treatment from the most-favoured-nation clause; but current State practice seemed to confirm the position taken by the Special Rapporteur, as he had shown in his commentary.

21. He therefore supported articles 13 and 14, subject to certain improvements in drafting.

22. Mr. TAMMES said it was perhaps because the rule in article 13 was self-evident that, even taking into account the relevant sections of the commentary to article 14, the space devoted to it in the Special Rapporteur's fifth report (A/CN.4/280) was small. From what the Special Rapporteur had said, particularly at the previous meeting, it appeared that no new material had been added in the year the article had been before the Commission, and that no more could be expected from the Secretariat study.

23. The two court decisions quoted by the Special Rapporteur in his commentary proved once again that most-favoured-nation and national treatment clauses were invoked direct by the persons for whose benefit they were drafted, and that their application need not give rise to laborious negotiations. Of the two writers quoted, Pescatore offered a sort of *ejusdem generis* rule, which was applied not to the persons and things covered by a most-favoured-nation clause, but to the corresponding clauses and instruments as such, independently of what they contained in the way of a promise. As he had said earlier, the impression created by such theories was that they were rather artificial. At all events, they differed widely from the Commission's understanding of the *ejusdem generis* rule.

24. The third paragraph of the quotation from Pescatore, in paragraph (8) of the commentary to article 13, contained the statement that "national treatment is normally granted only on the basis of reciprocity". Perhaps that was now true enough for the statement to be added to article 13 as a rebuttable presumption, thus placing before the Commission a clear alternative on which it, and subsequently the General Assembly, could pronounce.

25. Mr. TSURUOKA congratulated the Special Rapporteur on his oral introduction of the article under consideration and assured him that he fully shared his views on the freedom of action which the Commission should retain.

26. The rule stated in article 13 appeared to be subject to four conditions. First, when the clause was unconditional, it was in accordance with the provisions of article 6 *bis* that the beneficiary State acquired the right to national treatment. If, on the other hand, the clause was conditional, it was article 6 *ter* that applied. Thus if it was stipulated in the clause that the beneficiary State could only enjoy most-favoured-nation treatment on the same conditions as the third State concerned, and if the third State obtained national treatment subject to reciprocity or against compensation, the beneficiary State could only claim national treatment subject to reciprocity or against the same compensation. While it was true that national treatment was normally accorded on condition of reciprocity, as Mr. Tammes had pointed out, the practice of Japan nevertheless appeared to show that that country quite often accorded national treatment without that condition. Secondly, the national treatment accorded to the third State must relate to the subject-matter of the most-favoured-nation clause. Thirdly, the principles concerning the exceptions to be specified in the revised article 8 and article 8 *bis* must also apply to the national treatment. Fourthly, when national

treatment was accorded to the third State subject to the limitations which might be required, for instance, for the security of the granting State, and those limitations took effect for the third State, the beneficiary State could only claim national treatment under the most-favoured-nation clause subject to the same limitations.

27. If those were in fact the conditions of application of article 13, he could only approve of the content of that provision. According to draft article 14, however, the beneficiary State had the choice between national treatment and most-favoured-nation treatment, and it should also have that choice in the situation referred to in article 13. For most-favoured-nation treatment was not always less favourable than national treatment; hence it should be explained in the commentary to article 13 that the beneficiary State was free to confine its claim to most-favoured-nation treatment, without requesting national treatment.

28. For those reasons, he thought paragraph 2 of article 13 was unnecessary. The article could accordingly be drafted to read: "Subject to the provisions of the present articles, the beneficiary State may claim the right to national treatment under a most-favoured-nation clause if the granting State has accorded national treatment to a third State". The phrase "Subject to the provisions of the present articles" was intended to show that article 13 applied under the conditions already specified in other provisions of the draft. The phrase "the beneficiary State may claim" was intended to show that the beneficiary State had the choice between national treatment and most-favoured-nation treatment, which did not appear from the present wording of article 13.

29. Mr. KEARNEY said that Mr. Ushakov's reminder of the late Gilberto Amado's favourite dictum, "*les Etats ne sont pas des enfants*", was certainly appropriate. It could indeed be said that if a State granted a most-favoured-nation clause, it should do so in full knowledge of the consequences. Viewed in that light, the rule stated in paragraph 1 of article 13 was quite logical: the granting State should be aware that if it granted national treatment to a third State, that treatment must be extended to the beneficiary State under the most-favoured-nation clause. At the same time, he could not help feeling some concern at the possible ramifications of that logical process, partly because he was not sure of the consequences of the rule in every sphere of relations.

30. The provisions of paragraph 2 of the article involved even greater complications, mainly because of the uncertainty surrounding State practice in the matter. An example was provided by the case of *Kolovrat et al., v. Oregon*, heard in the United States Supreme Court in 1961, which was discussed in paragraph (6) of the commentary to article 13. In that case, the most-favoured-nation clause granted by the United States to Serbia, the predecessor State to Yugoslavia, had been successfully invoked by Yugoslav citizens to claim the benefit of national treatment, which had been granted to Argentinians under the 1853 Treaty of Friendship between the United States and Argentina. From his own knowledge of that case, he could supplement the information given in the commentary by drawing attention to the fact that

the United States Supreme Court had mentioned, in its reasoning, the treaties between Yugoslavia, on the one hand, and Czechoslovakia and Poland on the other, whereby national treatment was granted on a reciprocal basis to their respective nationals in each other's territory. It was his feeling that if that element of reciprocity had been absent, the official position of the United States Government would probably not have been different, but could anyone be certain that the United States Supreme Court would have given the same ruling?

31. An examination of existing treaties did not indicate that the most-favoured-nation clause was always clear and unconditional. When a State granted the benefit of national treatment, it was doubtful that it always had in mind that the grant would attract the operation of the most-favoured-nation clause and thus be extended to the nationals of other States. On the other hand, he had examined a number of treaties containing national treatment clauses, and had found that almost invariably the grant was made on a reciprocal basis.

32. There were also cases in which a most-favoured-nation clause was granted in a context in which national treatment would be impossible. For instance, the Convention of Establishment concluded by the United States with France⁵ provided, in article V, that national treatment would be accorded to the nationals and companies of the two countries in the territory of each other, with respect to commercial, industrial and financial activities. The provision added that the nationals of the two countries were permitted to form companies in each other's territory under the general company laws of the State concerned. Clearly, national treatment of that type could not possibly apply in a State which had no company law and in which private companies could not be formed. In some States there was no legal structure to permit certain commercial, financial or industrial activities by private persons, and it would not be possible to import into the relations with a State of that kind the concept of national treatment to which article V of the Convention on Establishment referred.

33. There was not enough knowledge of State practice regarding cases of that kind. It would be easier for him to accept article 13, particularly paragraph 2, if a study of the practice showed that when States subscribed to a most-favoured-nation clause, they intended it to include national treatment regardless of the circumstances in which that treatment was granted to nationals of a third State.

34. For those reasons, he supported the suggestion made by Mr. Tammes, which could be put into effect by inserting, at the beginning of paragraph 2 of article 13, some such opening proviso as "Unless otherwise established". It was difficult to accept the flat rule stated in paragraph 2 of the article as it stood.

35. Mr. PINTO said that his views on article 13 were similar to those he had expressed on article 8.⁶ While he could find no fault with the admirable logic and precision of the article, he was concerned at its implications

for the life of States, and thought it necessary to study its provisions in a particular perspective. The whole concept of the most-favoured-nation clause was valid and important for an equal striving with equals for equality. He, for one, hoped that the day would come when all countries had reached the stage at which the struggle for non-discrimination had a meaning. In the meantime, however, it was necessary to see the problem in the setting of present conditions.

36. A hypothetical example was provided by the 200-mile economic zone many countries would like to see established under the law of the sea, which was in process of formulation under United Nations auspices. If such a zone came to be established in the future, the coastal State would have exclusive fishing rights in it, and in appropriate cases might agree to grant national treatment to the fishing vessels of a neighbouring land-locked developing country. In that case, the rule laid down in paragraph 1 of article 13 might have the effect of extending the national treatment in question to the fishing fleet of a major fishing State which happened to have been granted a most-favoured-nation clause in a commercial treaty with the coastal State. A result of that kind would defeat the whole purpose for which the 200-mile economic zone had been proposed.

37. It was no answer to say that a State which granted the most-favoured-nation clause should be aware of the consequences of that clause. The State was an abstraction: treaties concluded on its behalf were in fact negotiated by statesmen and officials, who sometimes acted under great pressure of time. A most-favoured-nation clause might well be included somewhat hastily in a treaty of friendship concluded on the occasion of the visit of a foreign Head of Government. He was seriously concerned that a most-favoured-nation clause accepted under those circumstances might lead to the far-reaching results stated in article 13.

38. A remedy had been suggested in the form of a saving clause to be inserted at the beginning of paragraph 2; a similar proposal had been made with regard to article 8. He did not favour that approach, which would tend to destroy the logic of the Special Rapporteur's admirable draft. He would prefer to place States on notice by introducing, at the beginning of the draft articles, a provision to the effect that, when granting most-favoured-nation treatment, States could make that treatment subject to certain conditions; specific reference would be made to such conditions as material reciprocity and the exclusion of national treatment. A provision of that kind would help States to protect themselves against their own mistakes. In form, it would be rather like article 19 (Formulation of reservations) of the Vienna Convention on the Law of Treaties.⁷

The meeting rose at 1 p.m.

⁵ United Nations, *Treaty Series*, vol. 401, p. 76.

⁶ See 1335th meeting, paras. 4-7 and 49.

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. 291.