Document:-
A/CN.4/SR.1339

Summary record of the 1339th meeting

Topic:
Most-favoured-nation clause

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

approached the matter from the standpoint of the now outmoded "American" conditional most-favoured-national clause. Modern thinking held that, unless otherwise specified in the agreement, the operation of the clause depended on the kind of treatment accorded to the third State, not on the conditions under which that treatment arose, and that was what he had had in mind in drafting the paragraph.

52. He believed that the Commission would be doing its duty in regard to the problems raised for economic unions by provisions such as articles 8 and 13 if it described those problems in detail in the commentaries. He did not think the exceptions referred to by Mr. Hambro yet formed part of the body of international law. On the contrary, he believed the present situation was that all economic associations advised their members to make individual arrangements to bring their prior commitments into harmony with their obligations as members of the group. He undertook to reflect both the supporting and the opposing views as fully as possible in the commentary to article 13.

53. The CHAIRMAN suggested that article 13 should be referred to the Drafting Committee.

It was so agreed. [13]

The meeting rose at 1.05 p.m.

[13] For resumption of the discussion see 1352nd meeting, para. 56.

1339th MEETING

Friday, 27 June 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, 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 14

1. The CHAIRMAN invited the Special Rapporteur to introduce article 14 in his fifth report (A/CN.4/280), which read:

Article 14

Cumulation of national treatment and most-favoured-nation treatment

If in an agreed sphere of relations both most-favoured-nation treatment and national treatment are stipulated by the granting State, the beneficiary State has the right to claim that treatment which it deems more favourable.

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

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

2. Mr. USTOR (Special Rapporteur) said that it seemed appropriate to have an article dealing with the not uncommon situation in which the beneficiary State was promised both most-favoured-nation treatment and national treatment in a particular field. The rule in article 14 was in conformity with the generally accepted principle that the beneficiary State could choose between the two standards of treatment. He knew of nothing in legal theory to invalidate the idea underlying article 14. National treatment was usually more favourable than most-favoured-nation treatment, since in most spheres nationals had wider rights than the best-treated foreigners, but there were instances of States granting to foreigners or foreign products special advantages not enjoyed by their nationals.

3. Mr. PINTO said that, since the phrase "agreed sphere of relations" had been used elsewhere, care should be taken to ensure that it was used with the same meaning in all cases. He took it to mean the relations created by treaties between the granting State and third States, on which the effect of the most-favoured-nation clause was in a sense superimposed.

4. There appeared to be some ambiguity about the choice before the beneficiary State. The use of the word "cumulation" in the title seemed to imply that the benefits of most-favoured-nation treatment were added to those of national treatment and that the beneficiary State could pick and choose among the whole range of benefits available under the two clauses, since the article stated that the beneficiary State had the right to claim "that treatment", not "that category of treatment", which it deemed more favourable. If the intended meaning was that the beneficiary State was required to choose between the two categories of treatment—most-favoured-nation treatment and national treatment—the wording should be made more specific.

5. Mr. ELIAS said he shared some of Mr. PINTO's concern about the wording. The underlying principle of article 14 was not as difficult to accept as that of article 13, but it needed to be formulated more clearly. The expression "agreed sphere of relations" had been found too imprecise in another context and an alternative had been found. The drafting Committee might do the same for the present article.

6. He was not sure why the treatment referred to in article 14 was expected to be "stipulated" by the granting State; if the intention of the article was to establish the concept of the co-existence of two types of treatment, it would be better to do so without introducing the notion of stipulation.

7. He assumed that the reference to the beneficiary State's "right to claim" meant that it was entitled to the treatment in question. Although the title spoke of "cumulation", the article itself did not seem to entitle the beneficiary State to claim both types of treatment, but only to choose one or the other. It should be made clear which was intended.

8. Subject to drafting improvements, the article appeared to be acceptable and could be referred to the Drafting Committee.

9. Mr. AGO said he was fully convinced of the validity of the principle stated in article 14, which was merely a

concrete application of a general rule of the law of treaties. When a State was a party to two different agreements, it was entitled to take advantage of the more favourable agreement. He doubted, however, whether the term "cumulation" was the most appropriate, and thought it might perhaps be necessary to define its meaning more precisely, either in the text of the article or in the commentary. In point of fact, when a State benefited from two different agreements, one granting it national treatment and the other most-favoured-nation treatment, its freedom of choice was not freedom to choose one agreement or the other, but freedom to choose under each agreement the treatment most favourable to it. Thus, if national treatment was more favourable for persons, but most-favoured-nation treatment was more favourable for certain goods, the beneficiary State was entitled to choose, under each clause, the treatment it considered the more favourable. And the choice need not be made once and for all. If the beneficiary State had first been granted most-favoured-nation treatment and then national treatment, it could choose national treatment if it considered that more favourable than the other treatment. But if the granting State subsequently accorded more favourable treatment to a third State, the beneficiary State was entitled to change its initial decision and renounce national treatment in order to claim, under the most-favoured-nation clause, the more favourable treatment granted to the third State. The choice must thus be open to review at any time, so that the beneficiary State could always choose the treatment best suited to its interests.

10. Subject to those explanations, article 14 was in full conformity with the general principles of the law of treaties and should be approved.

11. Mr. KEARNEY said that article 14 stated the obvious, since its provisions operated automatically, on the basis of the actual most-favoured-nation treatment and national treatment clauses in effect in each case. For example, the relevant national treatment clauses in certain United States agreements with France and Iraq specified, additionally, that the treatment should be not less favourable than that accorded to any third country in similar situations. It was not a question of choice, but of a legal obligation on the part of the granting State to accord whichever treatment was the more favourable to the beneficiary State. There was no other possible interpretation of such a clause.

12. Sir Francis VALLAT said that the draft articles were leading further and further into the field of interpretation. Article 14 would have to be very carefully drafted to ensure that it was in harmony with the clauses used in practice. He agreed that the term "cumulation", which conveyed the notion of addition, did not accord with the substance of the article, which was concerned with alternatives and therefore a choice. The relevant provision in the 1642 Anglo-Portuguese treaty, cited in paragraph (1) of the Special Rapporteur's commentary (A/CN.4/280), was cumulative in that the granting State had to observe both the standard of most-favoured-nation treatment and the standard of national treatment. On the other hand, the multilateral convention cited in the same paragraph appeared to offer a choice between most-favoured-nation treatment and national treatment.

13. Article 14 should not have implications which might cut across the actual effect of clauses used in practice. If it specified choice, it would tend to limit the freedom of the beneficiary State in particular cases. Some cases were complicated: for example, if there was an obligation to accord national treatment or some specific right under a bilateral treaty, and an obligation to grant most-favoured-nation treatment under a multilateral treaty, it would be very difficult to interpret the relationship between the two obligations.

14. It might therefore be better to draft the article in the form of a saving clause rather than to establish a specified right of choice, which would require circumstances to be defined and could not cover all cases. He agreed with the general idea underlying article 14, however, and thought the text should be referred to the Drafting Committee for improvement in the light of the comments made by other speakers.

15. Mr. TSURUOKA said that, in principle, he supported the idea expressed in article 14. The article would be very useful to foreign ministries, because the cases it covered were often encountered in the practice of the international community. It was obvious that it was the beneficiary State that chose the treatment it deemed the more favourable and not the granting State that decided. But he was prepared to go further than Mr. Ago in that respect, for he considered that two shipping companies belonging to a country entitled to both national treatment and most-favoured-nation treatment could, if they wished, choose different treatments—one national treatment and the other most-favoured-nation treatment.

16. Mr. ŠAHOVIĆ said that in the light of State practice he too supported article 14. He had some doubts about the use of the word "cumulation", however, and thought that the wording of the article should be made clearer. It was necessary to decide whether the Commission wished to stress the right to the most favourable treatment or the right to freedom of choice.

17. Mr. RAMANGASOAVINA said he did not think that article 14 raised any problems, because it was quite normal for a granting State which granted both most-favoured-nation treatment and national treatment to allow the beneficiary State to choose between the two. It might, of course, be asked how a most-favoured-nation clause could contain provisions that were more favourable than provision for national treatment. Cases of that kind were rare, but it did sometimes happen that most-favoured-nation treatment gave the beneficiary State greater advantages than national treatment. In such a case, he saw no reason why the beneficiary State should not benefit from the cumulation of national treatment and most-favoured-nation treatment, provided that such cumulation did not make the nationals of the granting State feel frustrated because they thought they were being less well treated than the nationals of the beneficiary State.

18. He had no difficulty with the apparent contradiction between the title and the body of the article; for although one got the impression that the beneficiary State chose between national treatment and most-favoured-nation treatment, the choice was theoretical in most cases, for in reality most of the advantages of national treatment

and most-favoured-nation treatment were generally the same. It was only in borderline cases that it was really possible to choose between the two treatments. Thus article 14 was perfectly acceptable, subject to minor improvements by the Drafting Committee.

19. Mr. QUENTIN-BAXTER said that, in its present form, article 14 appeared to deal equally with most-favoured-nation treatment and national treatment in enunciating a positive rule which applied to both. While it was appropriate to lay down a rule for most-favoured-nation treatment in the present context, he doubted the wisdom of doing so for national treatment. The proper function of article 14 seemed to be to indicate that a most-favoured-nation clause could not be interpreted restrictively to deprive the beneficiary State of any more favourable treatment to which it might be entitled by virtue of some other kind of grant.

20. Mr. SETTE CÂMARA said he agreed with Mr. Elias and Mr. Pinto that the Drafting Committee should reconsider the wording of article 14, especially the use of such terms as "cumulation" and "stipulated".

21. Referring to Mr. Šahović's doubts about whether the emphasis should be on freedom of choice or the most favourable treatment, he said that the virtue of the present text was that it did not refer to freedom of choice. It would be in conformity with the logic of the draft articles to place the emphasis on the most favourable treatment the beneficiary State was entitled to claim. A reference to freedom of choice might confuse States negotiating agreements; the question of the right of a State to choose the treatment it deemed the more favourable should be left open.

22. Mr. AGO said that, following the statement by Sir Francis Vallat, he wished to stress that national treatment was only one of the ways in which a State could grant to another State certain treatment for its nationals or its goods and grant such treatment direct, without reference to the treatment accorded to another State—which reference was characteristic of the most-favoured-nation clause. It was clear, however, that in the context of the draft articles it was necessary to cover the case of the choice between treatment accorded indirectly through the operation of the most-favoured-nation clause and treatment accorded direct under another agreement, which was not necessarily national treatment and could be either more or less favourable than national treatment. Article 14 should therefore be completed by another provision dealing with that case.

23. The Commission should remember that the interpretation of the agreements to which it was referring could lead to a different conclusion from that which followed from article 14. It should also make allowance, in each specific case, for the possible effect of the reciprocity clause.

24. Mr. BILGE said that he accepted article 14 with the same reservations as he had made in regard to article 13.

25. Mr. USTOR (Special Rapporteur) said that the concern expressed by members appeared to arise from the need to avoid any conflict between the draft articles on the most-favoured-nation clause and the relevant provisions of the Vienna Convention on the Law of Treaties.[3] Since that Convention covered all treaty situations, it could be argued that there was no need for articles on the most-favoured-nation clause, especially those which appeared to lay down rules of interpretation, as they might be a source of confusion. As Mr. Tsuruoka had rightly pointed out, however, even a banal article which appeared to state the obvious, and the commentary to it, would help foreign ministries to draft most-favoured-nation clauses and to interpret them. In view of the wide diversity of most-favoured-nation clauses, however, the articles would have to be drafted very carefully.

26. Mr. Pinto's remarks about the term "agreed sphere of relations" were entirely justified and the point would be taken up in the Drafting Committee.

27. The reference to "cumulation" was perhaps incorrect in the present context, as it was intended to convey the notion of the co-existence of most-favoured-nation and national treatment clauses in certain cases, not of their combined application. Mr. Pinto had rightly interpreted it to mean that the beneficiary State should be entitled to choose between two different categories of treatment.

28. He agreed with Mr. Elias that the article should be made clearer; the word "entitled" had been used in previous drafts in preference to "the right" to claim.

29. The point made by Mr. Ago was quite valid, but would not be easy to express in the article; it could perhaps be dealt with in the commentary. For example, under the Convention on Co-operation in Maritime Commercial Navigation, cited in paragraph (1) of the commentary to article 14 (A/CN.4/280), the beneficiary State, in his opinion, could choose national treatment for port entry and most-favoured-nation treatment for loading and unloading operations. If the situation changed, the beneficiary State could always choose the best standard of treatment.

30. Mr. Tsuruoka's idea that different companies of the beneficiary State might be able to choose different standards of treatment seemed rather dubious.

31. He agreed with the remarks made by Mr. Šahović.

32. Mr. Sette Câmara appeared to interpret the term "cumulation" rather restrictively. If the beneficiary State had the right to claim the treatment it considered the more favourable, would it be entitled to claim less favourable treatment? The matter should be left to the beneficiary State's judgement unless otherwise agreed.

33. The CHAIRMAN suggested that article 14 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[4]

ARTICLE 15 AND 16

34. The CHAIRMAN invited the Special Rapporteur to introduce articles 15 and 16 of his fifth report (A/CN.4/280), which read:

[3] 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.

[4] For resumption of the discussion see 1352nd meeting, para. 62.

Article 15

The commencement of the functioning of a most-favoured-nation clause

1. An unconditional most-favoured-nation clause commences to function at the time of its entry into force provided that at that time the treatment specified in the clause has been accorded by the granting State to a third State. If that treatment is accorded later, the clause commences to function at the time of the according of that treatment.

2. A most-favoured-nation clause subject to material reciprocity commences to function at the time defined in paragraph 1 provided at that time material reciprocity has been established between the granting State and the beneficiary State in respect of the treatment specified in the clause. If that reciprocity is established later, the clause commences to function at the time of the establishment of that reciprocity.

Article 16

Termination or suspension of the functioning of a most-favoured-nation clause

1. The functioning of an unconditional most-favoured-nation clause shall be considered as terminated or suspended at the time of the termination or suspension of the operation of the clause—or at the time of the termination or suspension of the according of the favoured treatment by the granting State to a third State—whichever is earlier.

2. The functioning of a most-favoured-nation clause subject to reciprocity shall be considered as terminated or suspended at the time defined in paragraph 1 or at the time of the termination or suspension of the material reciprocity between the granting State and the beneficiary State in respect of the treatment specified in the clause—whichever is earlier.

35. Mr. USTOR (Special Rapporteur) said that articles 15 and 16 were technical articles, dealing respectively with the commencement of the functioning of a most-favoured-nation clause and the termination or suspension of that functioning. The content of the two articles was largely based on the relevant rules of the Vienna Convention on the Law of Treaties.

36. The articles referred to the "functioning" of the most-favoured-nation clause and not to its operation, because the expression "operation of the treaty" was used in the Vienna Convention in a different sense. A treaty provision was "in operation" within the meaning of the Vienna Convention when it had entered into force and had not been terminated or suspended. In draft articles 15 and 16, however, the reference was to the most-favoured-nation clause being brought into play by the granting of certain benefits to a third State. A most-favoured-nation clause could be in force and "in operation", in the sense of the Vienna Convention, without actually functioning, if no grant had been made to a third State.

37. Paragraph 1 of article 15 dealt with the unconditional most-favoured-nation clause and specified that it commenced to function on two conditions: first, that the clause itself should be in force; secondly, that the treatment specified in the clause should have been accorded by the granting State to a third State. Paragraph 2 of the article dealt with a most-favoured-nation clause subject to material reciprocity; for such a clause to be brought into play, a third condition was necessary, namely, that material reciprocity should be established.

38. Apart from the commencement of the functioning of the clause and the termination or suspension of that functioning, which was the subject of article 16, there was another point on which it would be desirable to include an article in the draft. The most-favoured-nation clause was a floating device: its functioning changed according to the treatment extended in the course of time to the third State or States by the granting State. He had attempted to draft an article to deal with that particular characteristic of the most-favoured-nation clause, but had not so far succeeded in producing a satisfactory text. He would welcome comments by members on that question.

39. Mr. KEARNEY said that the principles stated in article 15 were irreproachable, but the expressions used caused him some misgivings. In the first place, the reference in paragraph 1 to the "treatment specified in the clause" was ambiguous. It would raise the problem of the extent of the treatment extended by the granting State to a third State. Moreover, the use of the word "specified" made the provision unduly restrictive. He suggested that the first sentence of paragraph 1 be redrafted to read: "An unconditional most-favoured-nation clause commences to function at the time of its entry into force with respect to any favours within the scope of the clause that have been accorded by the granting State to a third State".

40. He noted that, in both sentences of paragraph 1, the verb "to accord" was used in a sense somewhat different from that in which it had been used elsewhere in the draft. It would be necessary to define the meaning of that term, so as to explain whether it was intended to refer to the physical activity of extending a favour or to the contractual commitment to grant it.

41. A similar problem arose with regard to the interpretation of paragraph 2 of article 15, which referred to material reciprocity being "established" between the granting State and the beneficiary State. That passage could be construed as referring to either of two different things: the contractual commitment to grant material reciprocity, and the actual putting into effect of material reciprocity. The same problem arose with regard to the second sentence of paragraph 2, dealing with the case in which reciprocity was "established later". There again, the provision could be interpreted as referring to a subsequent treaty arrangement or to the mere fact of reciprocal treatment.

42. Mr. USHAKOV said that article 15 was acceptable in principle, though he doubted whether it was necessary to specify that the most-favoured-nation clause commenced to function at the time of its entry into force, since the draft articles obviously referred only to most-favoured-nation clauses that were in force. Of course, a distinction could be made between the *de facto* situation and the *de jure* situation; hence it might be advisable to indicate that as soon as the granting State had granted to a third State the treatment specified in the clause, the clause began to function not only legally, but also in practice.

43. He hoped the Special Rapporteur would try to improve the drafting of article 15 in order to clarify the legal rules deriving from the situations it described.

44. Mr. AGO said that he would confine his comments to paragraph 1 of article 15. The Special Rapporteur had distinguished, in that paragraph, between the validity of the most-favoured-nation clause and its effectiveness. Like any treaty rule, the clause entered into force at a certain time, but it might be at another time that it produced its practical effects, that was to say, that it brought into the relations between the granting State and the beneficiary State the treatment provided for in the the agreement between the granting State and the third State.

45. Those distinctions raised some terminological problems. For instance, the words "commences to function" well expressed the fact that the functioning of the clause began at a certain moment, but it was open to question whether the French expression "*prend effet*" was equally clear. Similarly, it was not appropriate to speak of the treatment "specified" in the clause, because a most-favoured-nation clause was characterized precisely by the fact that it did not itself specify a particular treatment, but merely referred to treatment which would be "specified" in an agreement between the granting State and a third State.

46. The rule set out in paragraph 1 of article 15 was well founded, but the drafting could be improved.

47. Mr. USTOR (Special Rapporteur) said he wished to thank Mr. Kearney for his valuable drafting suggestions; they would be duly taken into consideration by the Drafting Committee.

48. The verb "to accord" had been used in article 15 in the sense of the legal commitment to grant a right, not of actual or physical performance. The relevant point in time was the point at which the entitlement to the right arose.

49. Similar considerations applied to the use of the word "established", in paragraph 2 of article 15. The reference was to an agreement between the granting State and the beneficiary State; it was that agreement which "established" a clear situation and fulfilled the condition of material reciprocity specified in paragraph 2 for the entitlement to most-favoured-nation treatment.

THE CASE OF CUSTOMS UNIONS AND SIMILAR ASSOCIATIONS OF STATES

50. The CHAIRMAN said that a member wished to raise a point arising out of the discussion at an earlier meeting.

51. Mr.HAMBRO said that during the discussion on articles 8 and 8 *bis*, the Special Rapporteur had said that he hoped to introduce, later, an exception applying to international trade associations of developing countries. [5] That was an outcome of the interesting study in chapter IV (The most-favoured-nation clause and the different levels of States' economic development) of his sixth report (A/CN.4/286).

52. The Special Rapporteur's sixth report also contained a chapter III entitled "The case of customs unions and similar associations of States", which contained much valuable material. He had read that chapter carefully, but thought that matters were perhaps not as simple as was suggested in its concluding paragraphs. He thought that the subject of customs unions and similar associations of States should be discussed by the Commission at some stage.

53. Mr. USTOR (Special Rapporteur) said that the ideas which he had put forward at some length in chapter III of his sixth report were connected with his proposed article 8 *bis*, dealing with the relationship between the most-favoured-nation clause and multilateral agreements. During the debates on articles 8 and 8 *bis*, that subject had not been discussed very thoroughly. His own view on the matter, following his study of State practice, was that there was no basis for drafting a rule of international law on the relationship between the most-favoured-nation clause and customs unions, either as codification or as progressive development. The fact that the granting State had entered into a customs or economic union could not have the effect of terminating the validity of that State's pledge to grant most-favoured-nation treatment.

54. Of course, problems arose in regard to the impact of economic groups on the most-favoured-nation clause; but any conflicts that arose had to be settled by negotiation or other means of peaceful settlement. In practice, such matters were dealt with in the agreements relating to existing economic unions, which contained provisions requiring their members to take steps lawfully to terminate their most-favoured-nation obligations.

55. He had thus reached the conclusion that it was not desirable to draft an article on the subject. A State which was faced with conflicting obligations arising out of a most-favoured-nation clause and membership of an economic union should take steps to terminate one or the other set of obligations in the proper manner.

The meeting rose at 12.50 p.m.

1340th MEETING

Monday, 30 June 1975, at 3.10 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. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

---

[5] See 1334th meeting, para. 44.