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Summary record of the 1377th meeting

Topic:
Most-favoured-nation clause

Extract from the Yearbook of the International Law Commission:-
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the obligation to make reparation.[37] That was not untrue, but it seemed to him that the Commission should lay the emphasis on the converse idea, namely, that a criminal act should entail the application of penalties in addition to the obligation to make reparation. There was no need to be unduly apprehensive about possible abuses, which were in fact inevitable, both at the internal level and at the international level.

34. In conclusion, he said that the very affirmation that international crimes existed might make it easier subsequently to determine the penalties and the procedures applicable. Historically, the definition of crimes had preceded that of punishments, which in turn had preceded the establishment of a procedure for the application of punishments. At the international level there could be no rapid evolution, but there was a discernible tendency to distinguish between international crimes and international delicts, and that should lead to the establishment of more severe régimes of responsibility for the former and, ultimately, to a system for the application of sanctions.

35. The CHAIRMAN suggested that draft article 18 be referred to the Drafting Committee for consideration in the light of the comments and suggestions made during the discussion.

It was so agreed.[38]

The meeting rose at 1.5 p.m.

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[37] *Ibid.*, para. 33.

[38] For consideration of the text proposed by the Drafting Committee, see 1402nd and 1403rd meetings.

1377th MEETING

Wednesday, 26 May 1976, at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Most-favoured-nation clause (A/CN.4/293 and Add.1)

[Item 4 of the agenda]

1. The CHAIRMAN invited the Special Rapporteur to introduce his seventh report on the most-favoured-nation clause (A/CN.4/293 and Add.1).

2. Mr. USTOR (Special Rapporteur) said that the Commission had adopted articles 1-7 of the draft articles on the most-favoured-nation clause at its twenty-fifth session, in 1973, and articles 8-21 at its twenty-seventh session, in 1975.[1] The seventh report had been prepared in the light of the relevant discussion in the Sixth Committee of the General Assembly at its thirtieth session.[2] It consisted of two parts, the first containing general provisions, which should be dealt with expeditiously, so as to allow ample time for consideration of the second part, which dealt with the more important aspect of the question, namely, provisions in favour of the developing countries.

3. The first part of the report contained a brief introduction discussing the topicality of the most-favoured-nation clause. The view had been expressed in the Sixth Committee that the clause was clearly an institution corresponding to past economic realities, which were being superseded by new realities that required an adjustment of rules. That view was to some extent true, but the clause was still a most important provision of many treaties —a fact that had been recognized by the Charter of Economic Rights and Duties of States,[3] article 26 of which stated that

> ... International trade should be conducted without prejudice to generalized non-discriminatory and non-reciprocal preferences in favour of developing countries, on the basis of mutual advantage equitable benefits and the exchange of most-favoured-nation treatment.

Admittedly, the Commission was not considering the clause exclusively in relation to international trade, but in a more general context. Nevertheless, international trade was an extremely important field in which the clause was commonly used, and the provision he had quoted from the Charter of Economic Rights and Duties of States attested to the fact that the most-favoured-nation clause was not an obsolete institution.

4. Thus the Commission was considering a matter of great current interest, and it would be useful to codify the rules pertaining to the clause, for two reasons. First, codification of the rules would be instructive and helpful to legal departments and foreign ministries in developing countries, since new States sometimes experienced difficulties in concluding treaties containing a most-favoured-nation clause. Secondly, the Commission now had an opportunity of examining the question whether, and to what extent, exceptions in respect of developing countries had become, or should become, general rules of international law—a matter that would encompass some aspects of what was considered to be a new branch of international law, namely, the international law of development.

5. The Commission was not called upon the judge the utility of the most-favoured-nation clause, but to determine the rules applicable when the clause was stipulated in a treaty. The principal rules governing all treaties were embodied in the Vienna Convention on the Law of

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[1] For the text of the articles adopted, see *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev.1, chap. IV, sect. B.

[2] *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, paras. 120-164.

[3] General Assembly resolution 3281 (XXIX).

Treaties,[4] and the Commission had always considered that its task in regard to the most-favoured-nation clause was to draft a supplement to that Convention. He had therefore prepared an article which would recall that fact.

Draft articles submitted by the Special Rapporteur

ARTICLE A (Relationship of the present articles to the Vienna Convention on the Law of Treaties)

6. Mr. USTOR (Special Rapporteur) introduced draft article A, which read:

Article A. Relationship of the present articles to the Vienna Convention on the Law of Treaties

The present articles are intended to supplement the Vienna Convention on the Law of Treaties done at Vienna on 23 May 1969. The provisions of these articles shall not affect those of the said Convention.

7. Mr. HAMBRO said that, in his opinion, article A presented no difficulties and could be referred to the Drafting Committee at once.

8. Mr. KEARNEY said it was possible to affirm that, if the most-favoured-nation clause did not exist, it would be necessary to invent it. The reason was simply that, generally speaking, developing States could not afford to maintain large and well-staffed treaty sections in their foreign ministries. Without the device of the most-favoured-nation clause, the only way they could keep their treaties up to date would be to conduct a continuous review and, whenever any changes occurred, to enter into a process of re-negotiation to secure new benefits. The clause did not always produce the best results in every case, but no institution devised by human beings ever did. Consequently, he endorsed the Special Rapporteur's views regarding the necessity for the clause.

9. The omission of article A from the draft would not, in general, change the legal situation. As the Special Rapporteur noted in his commentary, there was no real conflict between the provisions of the draft articles and the provisions of the Vienna Convention on the Law of Treaties. Nevertheless, it was a sound idea to include the article, for the Commission was rounding out the Vienna Convention and filling in a number of the gaps in it by preparing a series of draft conventions in the field of treaties.

10. With regard to drafting, the first sentence would be more positive if the words "are intended to", were deleted. In the second sentence, it would be helpful to find a better formulation than the words "shall not affect". Like Mr. Hambro, he thought the article could be referred to the Drafting Committee.

11. Mr. YASSEEN, after congratulating the Special Rapporteur on the clarity of his statement and the details he had given of the attitude adopted by certain representatives in the Sixth Committee, said that the time was past for asking whether the study of the most-favoured-nation clause was of any use. The subject was on the Commission's agenda and a number of articles on it had already been formulated. The reason why the Commission had undertaken the study was, in particular, that the subject must be examined in the light of the new realities of international life. Even if it was thought that the question was covered by the 1969 Vienna Convention on the Law of Treaties, it had to be re-examined in view of the changes which had occurred in the sphere of development and international trade, particularly in regard to the preferential treatment given to developing countries.

12. Article A was perhaps not indispensable, but it was useful, not so much for the first sentence, which stated that the future convention was intended to supplement the 1969 Vienna Convention, as for the second, which stated that the provisions of the future convention would not affect those of the 1969 Vienna Convention. It was, indeed, permissible, when concluding a treaty, to define its effects on earlier or later treaties. Article A made it clear that the provisions of the draft convention could not be considered as being incompatible with those of the 1969 Convention.

13. The first sentence of article A was intended to answer the questions of interpretation which could arise as a result of the co-existence of the future convention and the 1969 Convention. To state that the future convention would supplement the 1969 Convention meant that it would have to be interpreted in the light of the latter instrument. It would, in particular, be necessary to apply the general rule of interpretation contained in article 31 of the 1969 Convention, according to which a treaty must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context", and taking into account "any relevant rules of international law applicable in the relations between the parties". The first sentence of article A was therefore justified, since it settled a problem of interpretation.

14. The second sentence was justified because it constituted an application of article 30, paragraph 2, of the 1969 Vienna Convention, which provided that "when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail". The purpose of the second sentence of article A was, therefore, to avoid any misunderstanding and to prevent the articles of the draft from being considered as constituting special law derogating from the 1969 Convention.

15. Mr. USHAKOV observed that the first sentence of article A did not state a rule of law and might be more appropriate in the preamble to the future convention. Furthermore, while it was true that the draft articles were intended to supplement the 1969 Convention, it should be noted that they went further, since they contained provisions relating to the content of the most-favoured-nation clause. The 1969 Convention, on the other hand, concerned treaties and their provisions,

[4] For the text of the Convention 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.

exclusive of their content. He therefore suggested that it should be stated in the preamble that the articles on the most-favoured-nation clause were intended "in particular" to supplement the 1969 Convention.

16. The second sentence of the article under study contained a real rule of law, modelled on article 30 of the 1958 Convention on the High Seas, which provided that "The provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them".[5] However, article A did not state the provisions of the future convention would not affect those of the 1969 Vienna Convention "in force, as between States Parties to it". The omission of that phrase considerably broadened the scope of article A, for the situation would differ, depending on whether or not the States concerned were parties to the 1969 Vienna Convention. Moreover, he wondered why article A referred only to the 1969 Convention and not to the other conventions or international agreements in force between the States to which it was addressed. In that respect, the scope of article 30 of the Convention on the High Seas was far broader. It was quite possible that States parties to the future convention might have concluded a special agreement on the content, scope or interpretation of a most-favoured-nation clause, and there was no reason why they should not be bound by such an agreement.

17. To sum up, article A raised little more than questions of wording, which it should be possible to settle in the Drafting Committee.

18. Mr. AGO, referring to Mr. Ushakov's suggestion that the first sentence of article A should be placed in the preamble to the future convention, pointed out that that change of position would completely alter the nature of the provision. Placed in the preamble, it would simply mean that the Commission intended to supplement the 1969 Vienna Convention by dealing with a question not covered by that instrument. If the sentence formed part of an article, on the other hand, it would constitute a rule of the future convention. He wondered whether it was really the Commission's intention to draft a supplement to the 1969 Vienna Convention which would be linked to that instrument. Would the sentence in question then mean that States which henceforth acceded to the 1969 Vienna Convention would automatically accede to the future convention? What would be the position of States already parties to the 1969 Convention, which did not become parties to the future convention? Those questions needed precise answers. In his view, States should be free to be parties to one of the conventions without being parties to the other.

19. The second sentence of article A might perhaps be the result of excessive caution on the part of the Special Rapporteur. He himself was not sure how the provisions of the future convention could affect those of the 1969 Vienna Convention. By accepting the provision, States would to some extent bind themselves, where there were two possible interpretations of the future convention, to choose the one which was not incompatible with the Vienna Convention of 1969. If the provision was to be retained in an article, its precise meaning should be explained in the commentary.

20. Mr. ŠAHOVIĆ said that he agreed to a large extent with the views of Mr. Ushakov and Mr. Ago. It would be difficult to see whether article A met a real need until the text of all the articles of the draft had been formulated. It was because of the technique by which most-favoured nation clauses were concluded that the draft articles were based on the 1969 Vienna Convention. None the less, the Commission had certainly also formulated substantive rules concerning the content of most-favoured-nation clauses. Hence the scope of article A should perhaps be extended. The Drafting Committee would probably be able to improve the wording of the article by using more precise terms.

21. Both the recent developments in economic affairs and certain statements made in the Sixth Committee had demonstrated the usefulness of codifying the rules relating to the most-favoured-nation clause.

22. Mr. CALLE Y CALLE observed that the Commission was continuing to deal with matters whose origin lay in the work done on the law of treaties. It was precisely because of the importance of the most-favoured-nation clause in international life that it was necessary to determine the rules governing that clause. In his introduction, the Special Rapporteur had explained that it was not the Commission's task to decide whether certain economic or commercial relations in the new law of development should be based on treaties which contained or did not contain a most-favoured-nation clause. The arguments advanced had already been heard in connexion with article 0 proposed at the twenty-seventh session.[6] Article 0 had sought to enunciate one of the possible exceptions, already announced in a working paper submitted by the Special Rapporteur, which had discussed customary and conventional exceptions to the operation of the clause (Customs unions, frontier traffic, interests of developing countries, interests of public policy and security of the contracting parties, etc).[7] At a later stage, the Special Rapporteur had spoken of the duality of treatment accorded in the light of the differences in the economic situations of countries—a principle that was no longer in the process of crystallization but had already made great headway. Accordingly, if the Commission failed to advance in the same direction, it would have to offer very convincing justification in the commentary.

23. He fully agreed with the view that the most-favoured-nation clause was a matter of the greatest current interest. Paragraph 1 of the report (A/CN.4/293 and Add.1) referred to the Final Act of the Helsinki Conference on Security and Co-operation in Europe, in which the participating States had recognized the beneficial effects which could result for the development of trade from the application of most-favoured-nation treatment. Moreover, mention could have been made at Helsinki

[5] United Nations, *Treaty Series*, vol. 450, p. 98.

[6] See *Yearbook... 1975*, vol. I, p. 190, 1341st meeting, para. 1.

[7] *Yearbook... 1968*, vol. II, p. 165, document A/CN.4/L.127, sect. XII.

not only of trade but also of a whole series of areas in which non-discriminatory treatment was highly beneficial. Everybody was aware that there were political problems, caused sometimes by a hesitancy to recognize one of the fundamental principles of international ethics, namely, most-favoured-nation treatment.

24. It was true that the articles under consideration supplemented the Vienna Convention on the Law of Treaties, and the juridical link with that Convention posed some problems regarding the precedence of the relevant provisions in cases where a State subscribed to the articles, but was not a party to the Vienna Convention, or vice versa. The idea embodied in article A was explicit, but the structure of the article did not represent the most effective method of stating the purpose of a rule. It had already been pointed out that a convention on the most-favoured-nation clause could state, in the preamble, that the States Parties wished to supplement a specific aspect of the provisions of the Vienna Convention. It would be preferable for the second sentence of the article to include a general safeguard, under which Customs unions and regional economic groups, for example, would not form the subject of a special exception.

25. The CHAIRMAN, speaking as a member of the Commission, said that with regard to the scope of the saving clause in article A, he agreed with Mr. Ushakov that consideration should be given to using the language of article 30 of the Convention on the High Seas.

26. As to the suggestion that the idea embodied in the first sentence should be transferred to the preamble, he reserved his position until he had heard the views of the Special Rapporteur on that point. He wished to draw attention, however, to the fact that the proposed method had been resorted to in the preambles to the Vienna Convention on Consular Relations,[8] the Convention on Special Missions[9] and the Convention on the Representation of States in their Relations with International Organizations of a Universal Character.[10] The preambles to each of those Conventions contained a paragraph indicating that they were intended to supplement the Vienna Convention on Diplomatic Relations,[11] and each other, with a view to completing the codification of diplomatic law.

27. If, in the light of the comments made during the discussion and of the Special Rapporteur's response to them, the Commission were inclined to retain article A, it should bear in mind that no article on those lines had been included either in its draft articles on succession of States in respect of treaties, or in its draft articles on the question of treaties concluded between States and international organizations or between two or more international organizations.

28. In dealing with the second of those two topics, the Commission, at its twenty-sixth session, had included, in its general remarks concerning the draft articles, a section on the relationship between the draft articles and the Vienna Convention.[12] If it decided in the present instance that it was not necessary to retain article A in the draft itself, he would suggest to the Special Rapporteur that he should adopt the same method and deal with the matter in the introduction.

29. Should the Commission decide to retain article A, it would of course be appropriate to consider the suggestion by Mr. Ushakov that the article should refer to the general law of treaties and not only to the 1969 Vienna Convention. Furthermore, he would suggest that the words "done at Vienna on 23 May 1969" should be dropped in any case; the reference to the "Vienna Convention on the Law of Treaties" was sufficient.

30. Another delicate point of drafting was the use, in the first sentence of the article, of the verb "to supplement" which raised the problems to which Mr. Ago had drawn attention. The use of that verb could give the impression that the present draft articles were intended to become an additional protocol to the 1969 Convention or an instrument forming an integral part of that Convention. He therefore urged the Special Rapporteur to replace that verb by a more suitable one.

31. In conclusion, he doubted the necessity of including an article on the lines of article A, since no such article had been included in the Commission's other two drafts to which he had referred and which also related to the law of treaties. If the Commission decided to retain article A, however, the wording should be adjusted to take account of the comments made during the discussion.

32. Mr. USTOR (Special Rapporteur) said that article A contained two ideas, expressed in its two separate sentences. He agreed that the first of those sentences was not really a legal rule, but an expository statement. Such statements, however, had already been introduced by the Commission into some of its earlier drafts and it might well prove useful to adopt the same approach in the present set of draft articles.

33. It was true that the statement in the first sentence had not been included in the two drafts to which the Chairman had referred. There was, however, a notable difference between those two drafts and the present draft articles. The draft on the most-favoured-nation clause dealt with clauses or provisions contained in treaties and those clauses or provisions were governed in the first place by the law of treaties. That law was to be found in the 1969 Vienna Convention, as far as the States parties to it were concerned; in other cases, the general law of treaties applied. It was therefore appropriate to state expressly that the present articles were intended to supplement the law of treaties. The same arguments did not apply to the topic of succession of States in respect of treaties or to that of treaties concluded between States

[8] For the text of the Convention, see United Nations, *Treaty Series*, vol. 596, p. 261.

[9] General Assembly resolution 2530 (XXIV), annex.

[10] See *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 201.

[11] See United Nations, *Treaty Series*, vol. 500, p. 95.

[12] See *Yearbook... 1974*, vol. II (Part One), p. 292, document A/9610/Rev.1, chap. IV, part A.

and international organizations or between two or more international organizations; the draft articles on those two topics were autonomous and applied to matters which were not governed by the Vienna Convention; in fact, those matters had been expressly excluded from the scope of that Convention. A treaty containing a most-favoured-nation clause, on the other hand, would be governed first and foremost by the law of treaties and the purpose of the present draft articles was to set forth in detail the rules governing that clause.

34. The question of the relationship between the present draft articles and the Vienna Convention also raised other problems, as the Commission would be able to note when it came to consider article C (Non-retroactivity of the present draft articles).

35. He appreciated the difficulties involved in the provision contained in the first sentence of article A. The problems which had been raised during the discussion were closely connected with the later part of the draft and with the question whether it should include an article providing that the future convention would be open for signature only by States parties to the Vienna Convention. It would, of course, be possible to open the future convention to States not parties to the Vienna Convention, to which it was perhaps better not to link the draft articles too closely.

36. He intended to give full consideration to the points raised during the discussion and to examine further the question whether to retain the idea embodied in the first sentence of article A or to transfer it to the commentary or possibly to reserve it for the preamble of the future convention.

37. If it were decided not to include the second sentence of Article A, on the relationship between the articles on the most-favoured-nation clause and those of the Vienna Convention on the Law of Treaties, the situation would be governed by the rules set out in article 30 (Application of successive treaties relating to the same subject-matter) of the Vienna Convention. The rules embodied in that article constituted the codification of existing rules of international law. That being so, the second sentence of article A might well not be necessary.

38. He welcomed the wise suggestion by Mr. Šahović that the ultimate decision on article A should be taken after the Commission had examined all the other draft articles; it could then see whether the statement in the second sentence of article A was true of all the articles of the draft. He would accordingly suggest that the article should be referred to the Drafting Committee with instructions to submit a text only after the adoption of the last part of the draft articles.

39. Mr. KEARNEY said he was not at all convinced of the wisdom of dropping the first sentence of article A. Bearing in mind the Commission's mandate as set out in Article 13, paragraph 1 (*a*) of the United Nations Charter, he thought the Commission should regard codification as meaning something more than the preparation of separate draft conventions without consideration of their effects on each other. Codification called for a conscious and deliberate effort to create an over-all body of law to cover a particular subject, not a series of disparate pieces of legislation. It would be a very grave decision for the Commission to conclude that it could not achieve the codification of a topic in that sense.

40. Mr. HAMBRO urged that the Drafting Committee, when it came to examine article A, should not attach too much importance to the question whether its contents would be retained as an article of the draft or as part of the preamble to the future convention. The preamble to an international convention was just a binding as any other part of its contents.

41. Mr. REUTER reminded the Commission that in the case of the draft articles on treaties concluded between States and international organizations or between two or more international organizations, it had decided to draw up a series of articles which would be independent of the Vienna Convention on the Law of Treaties, so that if those articles were embodied in a convention, it would be applicable to States which were not parties to the Vienna Convention. It was true that that decision gave rise to very difficult drafting problems. But since the course followed by the Commission so far had been to prepare draft articles which could be made into conventions, it was preferable for those draft articles to be autonomous. Hence, if the draft articles on the most-favoured-nation clause were to become a convention, steps must be taken to ensure that it could enter into force whatever the fate of the Vienna Convention. Otherwise, the Commission would be renouncing the policy it had followed since the Vienna Convention, which was to prepare draft articles that could be made into conventions.

42. Mr. AGO endorsed the comments made by Mr. Kearney, Mr. Hambro and Mr. Reuter, and said that he, too, thought the Commission should take a decision on article A. Mr. Hambro had observed that to include the first sentence of that article in the preamble would not solve the problem, for the preamble would be just as binding as an article. In fact, the sentence in question showed that the draft articles were intended to be something new in relation to the Vienna Convention. It was therefore necessary to ensure that the draft articles were autonomous, for they could bind States which were not bound by that Convention.

43. He agreed with the Special Rapporteur that the principle stated in the second sentence of article A could be the subject of a real rule which would link the interpretation of the future convention to that of the Vienna Convention by laying down that interpretation of the new articles must not affect the normal interpretation of the rules of the Vienna Convention. The Commission would thus establish a link between the various parts of the mosaic of codification of international law it was piecing together.

44. Mr. USTOR (Special Rapporteur) said he welcomed Mr. Reuter's remarks on the difference between the draft articles on treaties concluded between States and international organizations or between two or more international organizations and those on the most-favoured-nation clause. The former constituted an autonomous set of articles on a matter which was not governed by the Vienna Convention on the Law of Treaties, whereas

treaties concluded exclusively between States were governed by that Convention. The topic of the most-favoured-nation clause would be governed not only by the draft articles under consideration, but also—first and foremost—by the rules on the law of treaties contained in the Vienna Convention and in the general law of treaties.

45. The idea expressed in the first sentence of article A was that while the articles on the most-favoured-nation clause were intended to serve for purposes of the formulation, interpretation and application of most-favoured-nation clauses, the matters regulated by them were still governed by the law of treaties. Those matters were subject to the Vienna Convention for States parties to that Convention and to the general law of treaties for States which were not parties to that Convention.

46. He suggested that he should prepare a modified text for the Drafting Committee dealing with the two separate ideas expressed in article A and that the Commission should not take a definite stand on that article until it had dealt with the rest of the draft.

46. The CHAIRMAN, speaking as a member of the Commission, said that the remarks made by Mr. Hambro and Mr. Ago on the binding force of the preamble to a treaty brought to mind the discussion that had taken place in the Sixth Committee on the principle of self-determination, in the course of which it had been argued that that principle was not a binding rule of international law because it was stated only in the Preamble to the Charter. He and others had successfully asserted the legally binding force of the Preamble to the Charter, relying, among other authorities, on a book on the Charter of the United Nations of which Mr. Hambro was one of the joint authors.[13]

48. Speaking as Chairman, he said that, if there were no further comments, he would take it that the Commission agreed to accept the Special Rapporteur's suggestion that he should prepare a revised draft of article A and submit it to the Drafting Committee, which would decide on the appropriate time for taking up the article.

It was so agreed.

The meeting rose at 12.55 p.m.

[13] L. M. Goodrich, E. Hambro and A. P. Simons, *Charter of the United Nations: Commentary and Documents*, 3rd ed. (rev.) (New York, Columbia University Press, 1969).

1378th MEETING

Thursday, 27 May 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

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

Most-favoured-nation clause (*continued*) (A/CN.4/293 and Add.1)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 2 (Use of terms), subparagraph (*e*) ("material reciprocity")

1. The CHAIRMAN invited the Special Rapporteur to introduce his proposal for a new subparagraph (*e*) in article 2:

Article 2. Use of terms

[For the purposes of the present articles:

...]

(*e*) "material reciprocity" means the extension by one State to another State or to persons or things in a determined relationship with that State of the same treatment in kind as the treatment extended by the latter State to the former or to persons or things in the same relationship with that former State.

2. Mr. USTOR (Special Rapporteur) said that the purpose of the new provision was to define the meaning in which the term "material reciprocity" was used in the draft and thus to solve a drafting problem. He had already discussed the question of material reciprocity in his fourth report.[1] A good illustration of the concept was to be found in article 46 of the 1958 Consular Convention between Poland and Yugoslavia, whereby the contracting parties accorded most-favoured-nation treatment to each other, with the proviso:

> However, neither Contracting Party may invoke the most-favoured-nation clause for the purpose of requesting privileges, immunities and rights other or more extensive than those which it itself accords to the consuls and consular staff of the other Contracting Party.[2]

3. The purpose of combining the most-favoured-nation clause with the condition of material reciprocity was not to secure in a foreign country treatment equal to that of nationals or institutions of other countries, but rather to secure equal treatment by the Contracting States of each other's nationals or institutions. Equality with competitors was of great importance in matters of trade, particularly Customs duties, and the condition of material reciprocity was therefore practically never to be found in treaties dealing with those matters.

4. His proposed subparagraph was intended to express the idea that the two contracting parties concerned would grant substantially the same advantages to each other's nationals, ships, establishments or institutions. In the light of that explanation, the expression "the same treatment" perhaps went rather too far.

5. He had received from Mr. Ushakov an informal written suggestion redrafting subparagraph (*e*) to state

[1] See *Yearbook... 1973*, vol. II, pp. 98-102, document A/CN.4/266, commentary to article 6.

[2] United Nations, *Treaty Series*, vol. 432, p. 322.