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Summary record of the 1380th meeting

Topic:
Most-favoured-nation clause

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1380th MEETING

Monday, 31 May 1976, at 3.10 p.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, M. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, 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 D. (Freedom of the parties to draft the clause and restrict its operation)¹ (*concluded*)

1. Mr. USHAKOV drew attention to article 4,² which defined the most-favoured-nation clause as “a treaty provision whereby a State undertakes to accord most-favoured-nation treatment to another State in an agreed sphere of relations”. That meant that, *ratione materiae*, States were free to specify the sphere of relations in which they undertook to grant most-favoured-nation treatment. Thus a State could grant another State most-favoured-nation treatment in respect of certain goods only, to the exclusion of others, without thereby making any provision that could be called an exception to the application of the most-favoured-nation clause.

2. The definition of the most-favoured-nation clause given in article 4 was linked with article 5, which defined most-favoured-nation treatment as “treatment by the granting State of the beneficiary State... not less favourable than treatment by the granting State of a third State...”. And the expression “third State” was defined, in article 2 (*d*), as “any State other than the granting State or the beneficiary State”. Hence the most favoured-nation clause should not make any exception in regard to the third State: if a single third State was excluded from the application of the clause, it could no longer be called a “most-favoured-nation clause”. Under article D, however, the granting State and the beneficiary State could exclude certain third States from the benefits of the clause. It was wrong to speak of most-favoured-nation treatment in such a case, for the treatment accorded would in fact cover discrimination against certain States.

3. The Special Rapporteur had said that in practice there might not, perhaps, be a single true most-favoured-nation clause in the whole world. He himself was con-

vinced that the true most-favoured-nation clause, as defined in articles 4 and 5 and in article 2 (*d*), had a role to play in the future of international trade. A clause could not be described as a “most-favoured-nation clause” when it was not. The Commission should either abandon the draft articles on the most-favoured-nation clause and work on another clause—which, in his view, would be a discriminatory clause—or else keep to the true most-favoured-nation clause, which should be regarded as the real basis of international trade. He considered that article D was incompatible with the definition of the most-favoured-nation clause given in articles 4 and 5 and in article 2 (*d*). The clause which resulted from article D would, in fact, be a least-favoured-nation clause disguised as a most-favoured-nation clause. States were entirely free to conclude any kind of clause, but it would be unacceptable to describe any kind of clause, however discriminatory it might be, as a “most-favoured-nation clause”.

4. Mr. ŠAHOVIĆ thought that the first sentence of article D corresponded to a general principle which must be accepted. There was room for doubt, however, as to the precise effect of the second sentence, which raised very thorny problems. It had been said that that sentence provided for exceptions to the application of the most-favoured-nation clause. He was more inclined to think that it pointed to the possibility of making restrictions. The commentary was perhaps not very clear on that point and might have caused a misunderstanding. The Special Rapporteur should explain the link between the second sentence of article D and article 14. For his part, he would prefer the Commission to retain only the first sentence of article D, because the situation referred to in the second sentence was already covered by other articles.

5. Mr. TAMMES said it was clear from the Commission's discussions that, although article D would not add a great deal to the articles already adopted, it would do much to make the draft as a whole acceptable to States. It had been maintained that article D would have a psychological effect on States, but it should not be assumed that States were unduly naïve. The draft articles comprised certain presumptions, models and definitions, and only very few rules, none of which was mandatory to the extent of not permitting any contracting out. In his opinion, therefore, the best way to indicate the flexible nature of the draft articles was to do so in the preamble, not to add another article at the present late stage. Although that course might not be consistent with the Commission's usual practice, it would make all the work done on the draft articles better understood.

6. The CHAIRMAN, speaking as a member of the Commission, said that article D was intended as an expository provision and had been included in accordance with the Commission's practice of incorporating provisions which, although not strictly essential from the legal standpoint, served a useful expository purpose. The legal rationale of the article was the contractual freedom of the parties to conclude treaties, provided that such treaties did not derogate from any peremptory norm of international law.

7. Although draft article D simply reflected the varied practice of States with regard to most-favoured-nation

¹ For text, see 1379th meeting, para. 7.

² For the text of the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, p. 120, document A/10010/Rev.1, chap. IV, sect. B.

clauses, its wording had given rise to difficulties. Since those difficulties related to modalities, however, it might be preferable to refer in the title of the article to the freedom of the parties to define the modalities of the clause, and not to speak of restrictions. States did in fact exercise their contractual freedom for different purposes, one of which was to conclude regional arrangements, which were sanctioned by Article 52 of the Charter of the United Nations, and article D reflected that practice.

8. Article D could not be viewed in isolation. It was not only related to article 14, as Mr. Šahović had pointed out, but also represented an elaboration of article 11, in that it extended the scope of rights to combine rights *ratione materiae* and rights *ratione personae*.

9. Article 21 was also relevant to article D, since it was generally recognized that the situation of developing countries should be taken into account in certain rules of international law, as the Commission had already done in the case of State succession.

10. He was therefore in favour of retaining article D, which was a useful elaboration on previous provisions. He wished to suggest that consideration might be given to the possibility of combining article D with article 11 and that the point raised by Mr. Ushakov should be given careful attention.

11. Mr. USTOR (Special Rapporteur), referring to a question asked by Mr. Calle y Calle concerning the relationship between article D and article 15,³ said that when drafting the clause the granting State and the beneficiary State would agree to exclude from the scope of most-favoured-nation treatment advantages given under certain precisely or indirectly indicated agreements.

12. Mr. Ushakov's remarks had placed him in a difficult position, because the draft articles related to clauses concluded by States and the Commission did not yet have before it the Secretariat study which would provide a complete picture of all the clauses contained in the treaties published in the United Nations *Treaty Series*. It was well known that many of those clauses contained provisions which would seem to restrict their operation either *ratione materiae* or *ratione personae*. It was certainly true that certain benefits granted to third States did not accrue to the beneficiary State, and the view could be taken that in such cases the clause was no longer a most-favoured-nation clause as defined in articles 4, 5 and 2 (d). Thus if an exception *ratione personae* was embodied in a clause, it could not be said to be completely non-discriminatory.

13. In that connexion, he referred to article 47 of the Vienna Convention on Diplomatic Relations,⁴ which provided that the receiving State should not discriminate as between sending States, but that discrimination should not be regarded as taking place where, by custom or agreement, States extended to each other more favourable treatment than was required by the provisions of the

Convention. Similarly, article D on the most-favoured-nation clause related to a situation in which a general rule of non-discrimination existed, but discrimination was tolerated in accordance with practical requirements.

14. He was perfectly willing to take account of Mr. Ushakov's point, but he was concerned lest, if all clauses embodying an exception *ratione personae* were excluded, the Commission might be accused in the General Assembly of failing to fulfil its obligations. He was sure that it would be possible to find several cases in which States had concluded treaties which contained, first, a most-favoured-nation clause, and second, a number of exceptions thereto. There were even some treaties concerning most-favoured-nation treatment which contained exceptions *ratione personae*. In those circumstances, he asked the members of the Commission to study the problem and to devise a solution on which it would be possible to reach a consensus.

15. Mr. USHAKOV observed that States were not obliged to conclude agreements containing most-favoured-nation clauses: they were free to conclude any kind of agreement and to choose whatever formula they wished. In the sphere of diplomatic relations, for example, two States might conclude an agreement to extend more or less favourable treatment to each other, but the term "most-favoured-nation treatment" could not be applied indiscriminately to any and every treatment. He still believed that the most-favoured-nation clause did not admit of any exceptions, and that if there were exceptions it could no longer be called a most-favoured-nation clause. In that respect, article D was incompatible with the definition of a most-favoured-nation clause given in article 4 and the definition of a third State given in article 2 (d).

16. The Special Rapporteur had tried to take account of all the possible situations in international life. But it was impossible to take into account all the international economic situations that might arise and call them "most-favoured-nation clauses". There was an enormous variety of situations in international practice and it was impossible to prepare draft articles that would cover them all.

17. Mr. USTOR (Special Rapporteur) drew attention to the lengthy commentaries he had submitted at the twenty-seventh session, concerning the implied exception of a Customs union.⁵ He had argued that a Customs union did not constitute an implicit exception and had maintained that States were free to agree on exceptions involving a Customs union—a course which they frequently followed in bilateral treaties and had adopted in the General Agreement on Tariffs and Trade. His view, which he had clearly expressed at the previous session, continued to be that an explicit exception in a treaty containing a most-favoured-nation clause did not in itself destroy the nature of the clause. He had said that such exceptions were often made both in the East and in the West, and that the Commission must take account of existing practice.

³ See 1319th meeting, para. 42.

⁴ United Nations, *Treaty Series*, vol. 500, pp. 122 and 124.

⁵ See *Yearbook... 1975*, vol. II, pp. 9 *et seq.*, document A/CN.4/286, paras. 9-13.

18. Sir Francis VALLAT noted that the Commission was confronted with two questions, one of form and one of substance. The first related to the bearing of the draft definitions on the question under consideration; the second was whether the draft articles should be confined to pure most-favoured-nation clauses with no restrictions *ratione personae*, or whether they should apply even when the clauses included restrictions of that type.

19. On the first question, he thought the Commission should not allow itself to be tied by prematurely adopted definitions. Normally, definitions should be adopted at the end of the work on a particular text. Hence he was not impressed by the arguments adduced on the basis of the draft definitions. On the second question, the Commission had to make a simple choice. In his opinion, the rules adopted should be viable and useful and should reflect the practice of States, which should not have to modify their practice in order to conform to those rules.

20. Mr. SETTE CÂMARA said that, while he appreciated Mr. Ushakov's views on the purity of most-favoured-nation clauses, he thought the issue was simply one of terminology. He drew attention to paragraph 42 of the Special Rapporteur's report (A/CN.4/293 and Add.1), which referred to the devaluation of the meaning of the term "most-favoured-nation". The Special Rapporteur was dealing with the inescapable reality of the contemporary world: many exceptions to most-favoured-nation clauses existed, and they constituted a form of discrimination. Such cases would be dealt with by the interplay of articles C and D.

21. In his opinion article D should be retained, though the second sentence might perhaps be deleted.

22. Mr. REUTER said that, like Sir Francis Vallat, he was in favour of sending article D to the Drafting Committee, but he did not think the Committee would be able to solve the problem with which the Commission was now faced. That problem had been foreseeable from the outset, and the Special Rapporteur had done what he could to avoid it. He did not subscribe to all the positions the Special Rapporteur had taken in that regard. In particular, the thesis that a most-favoured-nation clause normally enabled a State to claim the favourable treatment extended to the members of a Customs union was, in his opinion, a thesis fraught with consequences and one which was not generally accepted.

23. In fact, the problem which the Commission now had to face was one of codification. In undertaking the preparation of draft articles on the most-favoured-nation clause, the Commission had not had the intention of drawing up rules of *jus cogens*. It had simply wished to define, for the benefit of Governments, an over-all régime for the future. As Mr. Ushakov had clearly shown, the problem of terminology was very important. For if the most-favoured-nation clause was defined as a "pure" clause, the Commission would furnish arguments to governments, which would interpret the clause in the light of the articles. On the other hand, if the clause was defined as an "impure" clause, it would, as Mr. Ushakov had rightly emphasized, be difficult to see how far its impurity could extend.

24. The problem presented an analogy with that of security. For it could be argued that in order to be absolute, security must be world-wide. But the Charter provided for limited regional security, and practice showed that the relationships between general security and regional security were difficult to define. The problem now confronting the Commission was not merely an economic one: it concerned not only trade, but also questions of establishment and human rights. One could therefore appreciate the value of the "purity" invoked by Mr. Ushakov and affirm the need for an absolute world minimum. But it might also be asked, as the Special Rapporteur had done, what would be the reaction of Governments. All the agreements in favour of the third world, and particularly the Convention of Lomé, provided for exceptions in favour of the third world and spoke in that respect of derogations from the most-favoured-nation clause. A system which did not include differential relations in favour of the developing countries would be unimaginable in the world of tomorrow. It could also be accepted that there were different conceptions of human rights in different parts of the world.

25. A balance must therefore be established between universality and differentiation. It would be difficult to achieve, for it meant reconciling two extremes. If the régime chosen was that of the absolute clause, Governments would probably reject it; but, on the other hand, Mr. Ushakov was right in saying that if exceptions were permitted, the most-favoured-nation clause would no longer justify its name. It was a problem of substance, not of wording, and he doubted whether the Drafting Committee would be able to solve it. Perhaps the number of articles could be reduced or alternative versions proposed. In fact, it was the whole constitution of the world's economic and social organization that was at stake.

26. Mr. KEARNEY said that, in his view, the most-favoured-nation clause was simply a useful mechanism for States to use in dealing with certain problems, such as those of international trade, establishment and consular relations. In dealing with those problems, States were entitled to make whatever arrangements they deemed appropriate. It was also true that, in subsequent arrangements with other States, they might find it necessary to exclude particular kinds of treatment from the scope of the most-favoured-nation clause.

27. Canada and the United States of America had, because of the special relationship between their motor-vehicle industries and other factors, entered into an arrangement concerning the manufacture of motor-vehicle parts. One of the results of that arrangement had been a substantial reversal in the balance of payments as between the two countries. It was highly unlikely that the same sort of arrangement would be considered as appropriately falling under most-favoured-nation clauses in subsequent trade agreements with third States. It was special problems of that character which required States to remain free to enter into whatever commitments they thought necessary in the light of, for example, their geographical situation, political organization or financial and economic structure. Otherwise, they would not accept the draft articles.

28. Mr. MARTÍNEZ MORENO said that, to some extent, he sympathized with the views of Mr. Ushakov. Nevertheless, the draft being prepared by the Commission should be based on the realities of State practice. He had often participated in negotiations on treaties containing a most-favoured-nation clause and they had, in every case, involved an exception: for instance, the Central American exclusion clause; it simply was not possible for third States to be granted the special treatment accorded to the members of the Central American Common Market. On one occasion, he had argued that, under an existing treaty between El Salvador and France, El Salvador had been entitled, in the coffee trade, to treatment similar to that being extended by France to its former colonies in Africa. However, the French negotiators had very convincingly shown the particular reasons why that should not be the case. If the "purity" of the most-favoured-nation clause was to be maintained, the Commission would encounter strong criticism in the Sixth Committee, which would affirm that the draft failed to take account of the realities of international affairs.

29. He endorsed article D in its entirety, but would be prepared to accept the deletion of the second sentence if that would help to achieve a consensus. On the other hand, as Mr. Reuter had pointed out, the matter was one of substance, so it would be preferable for the Commission to find an acceptable formula before referring the text to the Drafting Committee.

30. Mr. AGO said he thought the divergence of views in the Commission was such that it would be better to continue the discussion rather than refer article D to the Drafting Committee. If that divergence had related only to the second sentence, the Drafting Committee could doubtless have found a solution. The examples contained in that provision should show the most frequent practice of States.

31. Mr. Ushakov's concerns were justified, since the second sentence could give the impression of suggesting to States exceptions to the application of the most-favoured-nation clause. In fact, that sentence was no way normative; its only purpose was to indicate what States could possibly do. In those circumstances, it would probably suffice to state the principle in the first sentence and mention the practice in the commentary.

32. In fact, it was the first sentence that was the stumbling-block. In that provision, the Special Rapporteur had tried to show that it was the Commission's intention that the rules set out in the future convention should not be preemptory rules. If they were adopted by States as preemptory rules, which was most unlikely, the following situation might arise. When States had concluded a particular agreement containing an "impure" most-favoured-nation clause—that was to say, one with exceptions—the beneficiary State could claim that, in order to conform to the future convention, the clause must be interpreted as not admitting of any exception; the exceptions specified would then be void. The granting State could then maintain that the whole clause or the whole of the treaty containing the clause was void. To avoid such situations, now that the problem had been

raised, it was essential to state that the rules of the draft were not preemptory rules.

33. Mr. USHAKOV said he agreed both with Mr. Calle y Calle that the articles under consideration were without prejudice to any agreement between the granting State and the beneficiary State, and with Mr. Ago that the articles did not contain preemptory rules. Nevertheless, he found it strange that a most-favoured-nation clause could subsist despite all the possible exceptions.

34. Mr. ŠAHOVIĆ reminded the Commission that in the report on its twenty-seventh session it had pointed out that as far back as 1973 it had stated that whether a given treaty provision fell within the purview of a most-favoured-nation clause was a matter of interpretation. In 1975, it had added "Hence, the draft articles are in general without prejudice to the provisions which the parties may agree to in the treaty containing the clause or otherwise".⁶ It had stated that it could emphasize that residual character either by introducing in each individual article a preliminary reservation (such as "Unless the treaty otherwise provides or it is otherwise agreed"), or by drafting an article expressly recognizing the residual character of all the provisions of the draft. The Commission had expressed its intention of opting for one of those two approaches at its 1976 session.⁷ It was now clear from the Special Rapporteur's seventh report that he had opted for the second approach.

35. The CHAIRMAN said he fully appreciated Mr. Reuter's view that the problem was one of substance, and also Mr. Ago's view that it should be solved by the Commission. On the other hand, the Drafting Committee's mandate had broadened in recent years and the Commission had in the past referred questions to it that had not been purely of a drafting character. The Commission operated on the basis of consensus and the value of its work lay precisely in that fact, which made it possible for the Commission's drafts to be approved by the great majority of Governments.

36. If there were no further comments, he would take it that the Commission agreed to refer article D to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁸

EXCEPTIONS TO THE OPERATION OF THE CLAUSE

37. The CHAIRMAN invited the Special Rapporteur to introduce section 10 of chapter I of his draft, entitled "Exceptions to the operation of the clause" (A/CN.4/293 and Add.1, paras. 31-39).

38. Mr. USTOR (Special Rapporteur) said that the term "customary exception" could mean two things: an exception which was customarily included in the clause or the treaty containing it or an exception which, by

⁶ *Yearbook... 1975*, vol. II, pp. 119-120, document A/10010/Rev.1, para. 117.

⁷ *Ibid.*

⁸ For consideration of the text proposed by the Drafting Committee, see 1404th meeting, paras. 47-62.

virtue of the rules of customary international law, excepted certain favours from the operation of the most-favoured-nation clause without explicit stipulation. The former might be called a conventional exception and the latter an implied exception.

39. It could safely be said that no implied exception, based on customary international law, precluded all favours from all kinds of most-favoured-nation clauses, whether they applied to consular immunities, to intellectual property or to anything else. It was alleged by some that, in the field of international trade, there were certain exceptions so frequently specified in treaties that they had become part of customary international law and therefore applied without express stipulation in a treaty. The principal problem in that regard was the so-called implied exception of Customs unions and similar groups of States. It might be advisable, however, to discuss the frontier traffic exception first.

40. It had been asserted, in particular by the Institute of International Law in its 1936 resolution (*ibid.*, para. 35), that the frontier traffic exception was incorporated so often in treaties that it operated without necessity of specific stipulation. To his mind, the matter did not raise any difficulties. So far as he was aware, no contentious cases had arisen in connexion with that exception, and it was common practice to include it in international trade treaties. States appeared to be satisfied with that particular situation. Moreover, it was difficult, if not impossible, to adopt a rule which would encompass all the different conventional exceptions in such treaties. The draft already contained the basic rules relating to treaties containing most-favoured-nation clauses, and it was not necessary to formulate extremely complicated rules on the frontier traffic exception. Consequently, he was not proposing any text dealing with that exception. The Commission might perhaps take note of the position, which could be discussed in the commentary.

41. Mr. BILGE said he understood the Special Rapporteur's desire to maintain the integrity of the most-favoured-nation clause as far as possible and, hence, not to introduce exceptions for frontier traffic or Customs unions. In the case of frontier traffic, however, it might be questioned whether the fact that States were satisfied with the present situation was a sufficient reason for not dealing with it. In his view, the commentary should stress the Commission's concern to maintain the integrity of the most-favoured-nation clause.

42. Where Customs unions were concerned, it seemed that the Special Rapporteur had taken into consideration only unions formed between developed States and the diversionary effects such unions could have on trade. But the developing countries were also interested in Customs unions and might one day form such unions among themselves. Hence the Commission should not consider only the negative effects which Customs unions between developed States could have on international trade. In his report, moreover, the Special Rapporteur had mentioned not only the trade diversion which could result from such unions, but also the new trade to which they might give rise. For his part, he was concerned not only with the negative effects which Customs unions

might have in the short term, but also with the positive repercussions they might have in the future. If developing countries which did not at present have a large enough market to produce a certain consumer good joined together in a Customs union, they might be able to make their production competitive. That aspect of the matter should be dealt with in the commentary.

43. Mr. AGO said that he, too, doubted whether the mere fact that States were satisfied with the present situation justified the Commission in not making any provision for the frontier traffic exception. At present, that exception raised no difficulties, probably because there were some customary principles, such as, perhaps, the principle that the facilities accorded to frontier traffic did not extend to the beneficiary State unless otherwise agreed. But at a time when the Commission was codifying the rules on the most-favoured-nation clause, silence on that point might be interpreted as meaning that the most-favoured-nation clause automatically implied that the frontier traffic facilities granted to a third State extended to the beneficiary State. Obviously, that question deserved consideration.

44. Mr. USHAKOV said that he was not sure whether it was better to consider that the exception for frontier traffic was so widely accepted that no special provision was needed, or to decide that there should be an article dealing with that exception.

The meeting rose at 6 p.m.

1381st MEETING

Tuesday, 1 June 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. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, 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]

EXCEPTIONS TO THE OPERATION OF THE CLAUSE (*concluded*)

1. Mr. TABIBI said that the Special Rapporteur had done well to consider (A/CN.4/293 and Add.1, para. 31) the question, which had been raised in the Sixth Committee, whether the Commission's draft covered all the customary exceptions to the application of the most-favoured-nation clause. Frontier traffic was, in his opinion, an extremely important matter. Although States appeared to be satisfied with the present situation it would do no harm to state the obvious and include in the