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Summary record of the 1385th meeting

Topic:
Most-favoured-nation clause

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principle that would apply. That comparison would be more valid, but such comparisons should be distrusted.

33. Mr. USTOR (Special Rapporteur) drew attention to article C, concerning the non-retroactivity of the present draft articles (A/CN.4/293 and Add.1, para.29), which had been intended to dispel the concern of members who strongly advocated recognition of an implied exception for Customs unions. The article had been submitted in the light of Mr. Tsuruoka's suggestion at the twenty-seventh session that the insertion of such a provision would show that the draft related exclusively to treaties containing most-favoured-nation clauses concluded after its entry into force.[7] That would make it easier for the supporters of an implied Customs-union exception to adopt the draft articles in their present form, since future granting States would be in a position to include in their treaties a provision excluding benefits or advantages deriving from a Customs union.

34. The CHAIRMAN said that the Special Rapporteur was to be commended for bringing the whole problem to the attention of the Commission. Mr. Hambro was submitting written suggestions to the Drafting Committee, which could discuss the problem and advise the Commission on whether to include a provision in the draft or to insert an appropriate paragraph in its report. If there were no further comments, he would take it that the Commission agreed to that procedure.

It was so agreed.[8]

The meeting rose at 12.55 p.m.

[7] See *Yearbook... 1975*, vol. I, p. 204, 1343rd meeting, para. 25.

[8] For the decision of the Drafting Committee, see 1404th meeting, paras. 34-36.

1385th MEETING

Tuesday, 8 June 1976, at 3.15 p.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Most-favoured-nation clause (*continued*) (A/CN.4/293 and Add.1, A/CN.4/L.242)

[Item 4 of the agenda]

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

ARTICLE E (Most-favoured-nation clauses in relation to treatment extended to land-locked States)

1. The CHAIRMAN invited the Special Rapporteur to introduce article E, in his seventh report (A/CN.4/293 and Add.1, para. 82), which read:

Article E. — Most-favoured-nation clauses in relation to treatment extended to land-locked States

A beneficiary State, unless it is a land-locked State, is not entitled under a most-favoured-nation clause to any treatment extended by a granting State to a land-locked third State if that treatment serves the purpose of facilitating the exercise of the right of access to and from the sea of that third State on account of its special geographical position.

2. Mr. USTOR (Special Rapporteur) said that the question of an implied exception in respect of special treatment granted to land-locked States because of their special situation had first been raised at the United Nations Conference on the Law of the Sea, in 1958. In 1964, when dealing with the transit trade of land-locked countries, the United Nations Conference on Trade and Development had adopted a text which stated that the facilities and special rights accorded to land-locked countries in view of their special geographical position were excluded from the operation of the most-favoured-nation clause.[1] That principle had been reaffirmed in the preamble to the 1965 Convention on Transit Trade of Land-locked States of 8 July 1965,[2] article 10 of which specified that the facilities and special rights accorded by the Convention to land-locked States were excluded from the operation of the most-favoured-nation clause.

3. During the Third United Nations Conference on the Law of the Sea, an informal single negotiating text had been prepared to provide a further basis for negotiation of the special rights of land-locked States. Article 110 of that text stated that

> Provisions of the present Convention, as well as special agreements which regulate the exercise of the right of access to and from the sea, establishing rights and facilities on account of the special geographical position of land-locked States, are excluded from the application of the most-favoured-nation clause.[3]

That provision was now embodied in article 111 (Exclusion of application of the most-favoured-nation clause) of a revised single negotiating text drawn up for the fourth session of the Conference.[4] It was evident that there was wide agreement among States that such an exception should be adopted.

4. Article E was simply a translation of the proposed provision into the language employed by the Commission; it broadened the scope of article 10 of the 1965 Convention. The number of land-locked States now stood at 29, of which 20 were developing countries. The principle stated in article E could be regarded as a consolidation of the agreement emerging within the international community and as progressive development of international law.

[1] See *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No. E.64.II.B.11), p. 25, annex A.I.2, principle VII.

[2] United Nations, *Treaty Series*, vol. 597, p. 3.

[3] See *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. IV (United Nations publication, Sales No. E.75.V.10), p. 168, document A/CONF.62/WP.8, document A/CONF.62/WP.8/Rev.1/Part II.

[4] *Ibid.*, vol. V (United Nations publication, Sales No. E.76.V.8), p. 170, document A/CONF.62/WP.8/Rev.1, document A/CONF.62 WP.8/Rev.1/Part II.

5. Mr. PINTO said he noted that article E related to the right of access to and from the sea; but article 58 of the revised single negotiating text dealt with the possibly more important matter of the participation, as of right, of land-locked States in the exclusive economic zones of coastal States. If the Commission decided to deal with that problem in the draft articles, the wording of article E might need to be changed in order to reflect the distinction drawn, in article 58 of the revised single negotiating text, between developing and developed land-locked States. In his view, it might be preferable to incorporate in the draft a general article on the rights of land-locked States.

6. Mr. AGO stressed the special nature and diversity of the agreements by which some maritime States granted land-locked States facilities for access to the sea and for shipping. Such agreements were not normally based on reciprocity. One could thus imagine Switzerland, a land-locked State, concluding an agreement with Italy by which Italy undertook to provide a dock in the port of Genoa for Swiss merchant ships and Switzerland undertook to supply itself with oil brought through a pipeline from Genoa. He asked the Special Rapporteur whether article E should be interpreted to mean that any other European land-locked State could invoke a most-favoured-nation clause to claim dock facilities for its fleet in the port of Genoa without the balancing consideration provided for in the Italian-Swiss agreement.

7. Mr. USHAKOV said that he approved of article E in principle, but feared that it might raise practical difficulties. He asked the Special Rapporteur whether article E related to the special obligations which a maritime State could assume towards a land-locked State or to the general obligations of maritime States towards land-locked States imposed by international customary law or treaty law. Obligations of the second kind were the same for all maritime States; land-locked States could assert their corresponding rights on the basis not of a most-favoured-nation clause, but of generally accepted international law. As to the special treatment which a maritime State undertook to grant to a particular land-locked State, it was treatment on a higher level than the treatment which was mandatory under general international law.

8. He also asked the Special Rapporteur whether a granting State which had granted a land-locked State better treatment than that generally required by international law, was bound by the most-favoured-nation clause to grant the same treatment to other land-locked States. For example, if the Soviet Union had granted special treatment to Afghanistan, a land-locked State, must it grant the same treatment, under a most-favoured-nation clause, to a land-locked Latin American State? Two land-locked States, even if they were neighbours, could be in very different situations.

9. Mr. USTOR (Special Rapporteur), replying to the question asked by Mr. Ago, said that if Italy agreed to grant most-favoured-nation treatment for transit purposes to Switzerland, for example, Italy would necessarily have to take account of such an unconditional most-favoured-nation pledge if it decided, subsequently, to conclude treaties which granted advantages to other land-locked States. In agreeing upon a special advantage, earlier most-favoured-nation commitments always had to be borne in mind.

10. As to Mr. Ushakov's question, he did not think that Bolivia, for instance, could claim transit facilities from the USSR because the USSR was granting such facilities to Czechoslovakia. It was evident that article E should be more precise and that the phrase "unless it is a land-locked State" should be amplified.

11. With regard to Mr. Pinto's comment, it was true that rights to fishing and exploitation of the economic zone were also very important to land-locked States. At present, however, in regard to the most-favoured-nation clause, the revised single negotiating text referred only to transit rights.

12. Mr. AGO observed that, in reply to his question, the Special Rapporteur had referred to the transit of goods, but he himself had referred to the granting of special advantages going beyond what was required by general international law. It seemed that article E would have the effect of obliging Italy, if it reserved a dock in the port of Genoa for Swiss shipping, to open that port to the ships of all the other land-locked States to which it was bound by a most-favoured-nation clause.

13. Mr. USTOR (Special Rapporteur) replied that if Italy had given most-favoured-nation pledges to central European land-locked States before entering into an agreement with Switzerland on the establishment of port facilities, it would have to determine in what respects it was bound by its pledges to those other States. If the pledges were *ejusdem generis*, Italy, by granting special facilities, would be bound to grant similar port facilities to all of the countries concerned. If the pledges were more restricted, that situation would not arise. Mr. Ago had referred to special advantages, but it was precisely the role of the most-favoured-nation clause to generalize such special advantages.

14. Mr. USHAKOV said that the Special Rapporteur had not replied to his first question. If article E was to apply not only to special treatment granted by a maritime State to a land-locked State, but also to the minimum treatment that was mandatory under international law, the Commission would run the risk of infringing general international law. It was not for the Commission to determine the obligations of any maritime State towards any land-locked State under international law. The article must deal only with treatment which was more favourable than the mandatory treatment. It was only if a maritime State granted a land-locked State more favourable treatment than the mandatory treatment that the question arose of the extension of that treatment to another land-locked State under the most-favoured-nation clause.

15. Mr. PINTO said that if article E singled out the important matter of transit rights, but failed to establish an exclusion in the case of fishing rights (which was potentially an extremely difficult problem), the draft might lend support to the idea that fishing rights in the exclusive economic zone could in fact be transferred through the mechanism of the most-favoured-nation

clause. Such a result would be unfortunate, for the participation of land-locked States in the exploitation of the exclusive economic zone was opposed by many countries. The best course would be to draft a more general clause of principle, which did not refer solely to access to the sea. It must be remembered that in regard to fishing rights it was not possible to refer to land-locked as a whole, because a clear distinction was made between the rights of developing land-locked States and those of developed land-locked States.

16. Mr. TABIBI said that the Commission appeared to have lost sight of the original purpose of the article proposed by the Special Rapporteur. Admittedly, the Conference on the Law of the Sea had discussed fishing rights and exploitation of the economic zone, but the main problem was that of free access to the sea. Without such access, it would be impossible for land-locked States to engage in fishing in the economic zone or in its exploitation. The Commission should now deal with the question of access to the sea which, in his opinion, was already settled in international law, for it was covered in many bilateral and multilateral treaties, in the 1958 Convention on the High Seas [5] and in the 1965 Convention on Transit Trade of Land-locked States.

17. He did not see why Mr. Ago had posed the problem of the facilities granted by Italy to Switzerland; plainly, not all land-locked States would claim such facilities from Italy. In article E, the Special Rapporteur was simply proposing recognition of the treatment that land-locked States were entitled to claim by virtue of the fundamental principle of the freedom of the high seas and because of their special geographical position. The main point was that such treatment related exclusively to land-locked States and could not be claimed by other States under a most-favoured-nation clause. If Governments wished to extend more privileged treatment to land-locked States, there was nothing to prevent them from doing so. A revised text of the article could clarify that point.

18. The Special Rapporteur was to be congratulated on a report which dealt ably with contemporary State practice in regard to restrictions on international trade, as reflected in articles XX and XXI of the General Agreement on Tariffs and Trade,[6] and to be commended for complying with the unanimous request of the representatives of the land-locked countries in the Sixth Committee of the General Assembly that the Commission should deal with the matter.

19. The text of article 10 of the 1965 Convention on Transit Trade of Land-locked States was now embodied in the revised single negotiating text and there had been absolutely no controversy about it. Moreover, the principle had been adopted by the United Nations Conference on Trade and Development and was reflected in the preamble to the 1965 Convention. In his view, the preamble and the main body of a treaty, as well as any annexes thereto, were all equally important. In effect, the Special Rapporteur had merely stated a principle that was entirely acceptable to the community of nations. Article E would indirectly assist the land-locked States, which represented one fifth of the international community and included countries that were among the least economically developed. It must always be remembered that the situation of European land-locked countries was completely different from that of land-locked States in the developing world—in Africa, in Asia and in Latin America.

20. Mr. YASSEEN said that the problem of land-locked States was one which arose in all spheres and must be taken into account in the codification of international law. A provision in favour of those States should therefore be included in the draft articles on the most-favoured-nation clause. The international conscience was prepared to take into consideration the problems of land-locked States—owing to the untiring efforts of the representatives of those States, in particular Mr. Tabibi—in numerous international forums. He himself fully understood those problems since he came from a country that was almost land-locked - Iraq had only about 30 kilometres of coast line.

21. The article to be formulated should take the true situation and real needs of land-locked States into account. The subject should first be confined to the problem of the classical freedom of the high seas—in other words, the right of access to and from the sea—since only land-locked States were deprived of that right. To speak of other privileges which land-locked States might hope for—such as the freedom to fish in certain zones and the right to exploit the living and non-living resources of the sea—the land-locked States would no longer be the only States concerned: there would be no reason not to extend those privileges to the other "geographically disadvantaged" countries.

22. The Special Rapporteur had rightly pointed out that, in making an exception to the general principle of the most-favoured-nation clause in favour of land-locked States, the Commission would be applying a well-established general rule concerning those countries. As Mr. Ushakov had quite rightly emphasized, the real problem was raised by the words "unless it is a land-locked State", for land-locked States were not all in the same situation and, as the Special Rapporteur had pointed out, it was difficult to imagine that Bolivia, for example, would claim the advantages granted by the Soviet Union or China to countries contiguous to them. The absolute nature of the wording of article E should therefore be amended so as to bring out the very precise notion of the exception from which land-locked countries were to benefit. Above all, it should be remembered that the point at issue was not a minimum to which those countries were entitled under general international law, but generous treatment under a specific agreement.

23. Mr. HAMBRO said he was entirely in favour of including in the draft a special provision for the benefit of the land-locked States. He did not believe, however, that it would serve much purpose to consider the matter in terms of an injustice done by nature to countries without a sea coast. Nature was not always just and the

[5] United Nations, *Treaty Series*, vol. 450, p. 82.

[6] GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), pp. 37-39.

position of the land-locked States was not unique in that respect.

24. He could not agree with Mr. Tabibi that article E was a simple text. The principle involved was certainly simple, but its formulation would undoubtedly prove very difficult. He did not think that the debate so far had shed much light on the issues involved and he would refrain from adding his own speculations. He would confine himself to expressing the hope and the conviction that the Drafting Committee would be able to extract all the useful material from the debate and refer back to the Commission a text that would meet with general approval.

25. Mr. USHAKOV said he was convinced of the need to make exceptions in favour of land-locked States: that was a generally accepted principle which should not be called in question. But the Commission was not required to establish that principle in its draft articles on the most-favoured-nation clause. Matters relating to land-locked States should be settled in the convention on the law of the sea which was in process of preparation. In its draft articles, the Commission should not concern itself with the generally accepted rules in favour of land-locked countries.

26. In paragraph 79 of his report (A/CN.4/293 and Add.1), the Special Rapporteur had quoted the articles on land-locked States proposed by the Second Committee on the Third United Nations Conference on the Law of the Sea at its third session. Those articles reflected the generally accepted position in regard to the rights of land-locked States and the duties of maritime States. The Commission's task was not to establish those rights and duties, some of which had already been defined in other conventions. The question of the mandatory treatment to be granted to land-locked States did not fall within the scope of the draft articles under consideration, since land-locked States were already entitled to certain treatment by maritime States under existing rules. It would therefore be very dangerous for land-locked States if the Commission were to touch on the question of the mandatory treatment reserved for them. That mandatory treatment did not fall within the scope of the draft articles: they were concerned with treatment that was more favourable.

27. If a maritime State had granted a land-locked State more favourable treatment than that to which it already was entitled, it was obvious that the maritime State was not required to grant the same treatment to another maritime State. But the question arose whether it was required to grant the same treatment to another land-locked State. The Special Rapporteur had given an affirmative answer to that question, maintaining that any land-locked State could claim the same treatment. He himself considered that no general rule of that kind could be laid down. In his view, if a granting State granted a land-locked State more favourable treatment than the mandatory treatment, it was not required to grant the same treatment to another land-locked State, for as Mr. Yasseen had pointed out, land-locked States were not all in the same situation. Consequently, no general obligation should be imposed and the question of the operation of the clause in relation to land-locked States and to other maritime States should be raised. He thought a suitable article could be drafted on the basis of the Special Rapporteur's proposal.

28. He therefore proposed that article E should be referred to the Drafting Committee.

29. Mr. ŠAHOVIĆ supported the inclusion of an article on the treatment to be granted to land-locked States. It was clear from the comments made by the Special Rapporteur and Mr. Tabibi that an article of that kind met the requirements of international law and of economic relations between States. But some problems still had to be solved in order to arrive at a draft which would satisfy the wishes of the international community, the requirements of land-locked States and the general rules of international law.

30. In the article proposed by the Special Rapporteur he saw an attempt to include two rules in the same clause by formulating, first, an exception to the application of the most-favoured-nation clause and, second, a positive rule on the operation of the clause in the relations between granting States and land-locked beneficiary States. In his view, those were two separate problems which should be dealt with separately. He was prepared to accept the principle of an exception because, as the Special Rapporteur had shown, it involved a rule which derived from customary law and was well established in international treaty law. On the other hand, he wondered whether the positive rule contained in the words "unless it is a land-locked State" should be expressly stated in the draft. In his view, it was not necessary to state that rule, since it was not an exception, but the positive application of a principle. Article 109 of the informal single negociating text proposed at the third session of the Third United Nations Conference on the Law on the Sea, showed that the privileges granted to land-locked States derived from agreements concluded between those States and maritime States.

31. He therefore supported the solution suggested by Mr. Ushakov, namely, that those two problems should be separated and that a separate article should be drafted to deal with the problem raised by the words "unless it is a land-locked State". But it would also be possible to retain the article with those words deleted.

32. Mr. MARTÍNEZ MORENO said that he strongly supported not only the principle of the exception in favour of land-locked States, but also the inclusion in the draft articles of an explicit provision on that exception. International instruments were sometimes the expression of an awareness of the international community and sometimes the result of international negotiations. From both points of view, he believed it desirable to include in the draft the text of article E as proposed by the Special Rapporteur.

33. When the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction had been considering the agenda for the Third United Nations Conference on the Law of the Sea, it had been faced with a number of extremely difficult problems, two of which had attracted particular

attention. The first had been that of the right of innocent passage, which countries bordering on straits wished to maintain in a strict form, and freedom of transit, which was of particular interest to the large maritime powers, partly for reasons connected with the safeguarding of world peace. The second major problem had been that of the land-locked States, some of which had taken an extreme position and had advocated that the proposed 200-mile economic zone should be neither exclusive nor preferential, but should constitute a sort of condominium for the exploitation of the living and non-living resources of the sea. A less radical position had emerged from the negotiations, however, and was reflected in the formula now under discussion, which recognized the indisputable right of the land-locked States to access to the sea.

34. It was thus clear that, in international negotiations, an agreement along those lines was close at hand. The right in question, however, was also supported by strong arguments of equity and justice. The freedom of the high seas and recognition that they constituted a *res communis* had been upheld even before Grotius, by his forerunners Vitoria and Vásquez de Menchaca. The sea-bed and the ocean floor beyond the limits of national jurisdiction had now been recognized by the General Assembly as the common heritage of mankind, and it was therefore logical to acknowledge the right of the land-locked States to have access to the sea and thus be able to enjoy their share of that common heritage.

35. He was in favour of recognizing that principle, which had behind it the conscience of the world community, and he believed that it should not be weakened in any way by the adoption of language which might make it more acceptable to the majority, but which could have the effect of nullifying it. The drafting of article E could, of course, be improved, but it should be noted that it was close to the wording of article 110 of the informal single negotiating text prepared at the 1975 session of the Third United Nations Conference on the Law of the Sea. He urged that the wording adopted should not weaken in any way a rule which constituted progressive development of international law and related to a matter of major contemporary interest.

36. Mr. SETTE CÂMARA said he fully agreed with Mr. Yasseen that in the last 10 or 15 years the international community had become increasingly aware of the problem of the land-locked States. To that awareness an outstanding contribution had been made by Mr. Tabibi, who had been a crusader on behalf of the land-locked States.

37. The Special Rapporteur was to be commended for including the provisions of article E in the draft articles. The exception made in that article for the benefit of the land-locked States was necessary, and corresponded to the realities of contemporary life. Moreover, it already formed part of existing treaty law, since the 1965 Convention on Transit Trade of Land-Locked States was now in force. The preamble and article 10 of that Convention contained the principle which had since been incorporated in the text of article 110 of the informal single negotiating text prepared for the third session of the Third United Nations Conference on the Law of the Sea. All those developments confirmed that the principle underlying article E had the support of the international community.

38. Unlike some other members, he believed that the Special Rapporteur's text of article E was well-balanced. As Mr. Šahović had pointed out, it contained a negative part and a positive part, but he did not believe that the latter could have the effect of extending to any and every land-locked State, anywhere in the world, the right to invoke the benefit of the article. The words "unless it is a land-locked State" had to be read together with the remainder of the article, in particular its last part, which referred to treatment facilitating the exercise of the right of access to and from the sea of the land-locked third State concerned.

39. Special attention should be paid to the concluding words "on account of its special geographical position". For example, it was clearly out of the question for Czechoslovakia or Switzerland to invoke benefits accorded by Brazil to Bolivia and Paraguay. Nevertheless, two land-locked States could benefit from a similar treatment because of their special geographical position: in fact, Bolivia and Paraguay had treaties with Brazil concerning access to and from the sea, and one of those countries might well invoke a most-favoured-nation clause in order to claim benefits accorded to the other. That being so, he found the drafting of article E very ingenious.

40. He could accept the suggestion by Mr. Šahović that the words "unless it is a land-locked State" might be deleted, but he saw no objection to their being retained. He was entirely in favour of including an article on the lines of article E and felt certain that the Drafting Committee would be able to solve the problems raised during the discussion.

The meeting rose at 6.00 p.m.

1386th MEETING

Wednesday, 9 June 1976, at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Welcome to Mr. Njenga

1. The CHAIRMAN welcomed Mr. Njenga among the members of the Commission and congratulated him on his election.

2. Mr. NJENGA thanked the members of the Commission for the honour they had done to him. As a representative in the Sixth Committee of the General Assembly at its recent sessions, he had been much impressed by