EDITORIAL COMMENT

COMMERCIAL DISCRIMINATION AND INTERNATIONAL LAW

The state traders of Eastern Europe are arguing that the principle of equality of states enshrined in the United Nations Charter must be extended to international commercial intercourse to prevent discrimination. This was the theme of the opening session of a recent conference of scholars gathered in Rome to consider the impact of state trading upon the law governing commercial relations of states.[1]

The issue had been raised by a paper submitted from the American side [2] arguing that since state trading made possible the purchase of goods by state-trading enterprises without thought for such tariffs as might have been established by the state traders themselves for accounting reasons or to tax the parcel-post trade, the traditional most-favored-nation clause had lost its principal value to private merchants seeking to do business in state-trading markets. The clause cannot operate to encourage expansion of trade by opening markets on a non-discriminatory basis to low-cost producers because factors other than cost and tariffs influence the decisions of state-trading buyers. In short, the most-favored-nation clause has proved itself to be no longer a sufficient desideratum for private-enterprise states in their commercial relations with state-trading states to constitute a *quid pro quo* for important tariff concessions by private-enterprise states.

In opposition to the view that the standard most-favored-nation clause has lost its traditional value, it was argued by the state traders at Rome that the clause is the juridical expression in the field of trade of the principle of sovereign equality expressed in Article 2 of the United Nations Charter. Further, it was claimed that the clause is the logical extension of the Charter's Article 1 calling for the development of friendly relations based on respect for the principles of equal rights. To the state traders the clause has value not because it has been traditionally an instrument through which trade has been expanded, but rather because it lays emphasis upon equal treatment, and from equality friendly relations are expected to flow. It becomes in state traders' eyes a contributing factor

[1] The conference was held under the auspices of the International Association of Legal Science under contract with U.N.E.S.C.O., Feb. 24–March 1, 1958. Emil Sandström (Sweden) presided, and Harold J. Berman (U. S. A.) was general reporter. Participants were Tullio Ascarelli (Italy), Rudolph Bystricky (Czechoslovakia), Alexander Goldstajn (Yugoslavia), Richard N. Gardner and John N. Hazard (U. S. A.), Trajan Ionasco (Rumania), Feder Kalinytchev (U.S.S.R.), Clive M. Schmitthoff and Kurt Lipstein (U. K.), Henryk Trammer (Poland), André Tunc (France), Luben Vassiliev (Bulgaria), Paul L. VanReepingen (Belgium), Mario Matteucci (International Institute for the Unification of Private Law), André Bertrand and Samuel Pisar (U.N.E.S.C.O.).

[2] For a summary of the paper, see Martin Domke and John N. Hazard, "State Trading and the Most-Favored-Nation Clause," 52 A.J.I.L. 55 (1958).

to the cause of peace. State traders declare that acceptance of the clause should not be considered a national sacrifice to the state-trading countries, for it contributes to the peaceful conditions essential to flourishing trade.

The value of the most favored-nation-clause even between private-enterprise states was challenged by the state traders in their argument, for they claimed that tariff concessions between such states are made for a *quid pro quo* only to the principal producers of commodities. When such concessions are extended by operation of the clause to other states, it is only with regard to small quantities of marginal-producing states, and trade is expanded only to a small degree. Further the quota restrictions adopted in recent years in much of the world have prevented unhampered operation of the clause.

To explain retention of the clause even in relations between state-trading states in Eastern Europe and Asia in the face of derogatory remarks about its value in expanding trade in its traditional manner, the state traders declared that it was needed to carry into commercial relations of these states the principle of equal treatment which was fundamental to their relationships. The clause appears, therefore, not because of any value it may have had at one time in causing a general reduction of tariffs, but primarily because of its function politically in providing emphasis to the principle of equality of states. Its presence was said to avoid international ill will spawned by tensions evolving from unequal treatment. The state traders did not claim perfection for the clause in its traditional form, but they thought supplementation rather than replacement was called for to eliminate the bad practices.

The Western scholars rose to question the defense of the clause by the state traders. A British scholar asked whether the view expressed did not suggest that a country refusing to grant most-favored-nation treatment was committing a wrong. Such a position, if it were taken, could be questioned, for it was not yet established that most-favored-nation treatment had become merely a reflection of a new standard in customary international law. In reply to this criticism the spokesman for the state traders agreed that he could not demand the granting of most-favored-nation treatment as an international duty, but when it was granted, it was a correct implementation of a principle now enshrined in the United Nations Charter.

A second British scholar held that there are countries not bound by most-favored-nation clauses, yet this does not signify inequality of the participants, for sovereign status is not necessarily tied up with the presence of a most-favored-nation clause in a commercial treaty. To this scholar the clause did not bring in issue equal treatment of states, but it was mainly a device to protect traders, whether private-enterprise firms or state-trading enterprises, and the essence of most-favored-nation treatment is really in the private sphere and without relation to the public-law problem of equality of states. To this comment the state-trading spokesman replied that discrimination against traders in the absence of the clause may affect negatively the relations between states, and in conse-

quence the most-favored-nation clause promotes in an indirect way the relations between states, and it has a public-law feature.

An Italian scholar thought that the most-favored-nation clause has come to have a wider content than the reduction of tariffs or the statement of a principle of equality. It can be made to protect a state against discrimination in shipping or access to courts. It is in these spheres which have become subject to increasing discrimination with the centralization of power over the economy of states that the clause now can be useful. Yet, in some European countries the clause has traditionally been limited to applicability to tariffs. If a new function is to be developed for it, that function should be expressly stated. This would preserve the substance of the clause, although its form would be changed.

From the discussions in Rome it has become clear that the most-favored-nation clause still has vitality for the state-trading states. They want to include it in their treaties among themselves and with private-enterprise states. In spite of what they have said, the clause obviously benefits them in its traditional manner when they offer goods for sale in open markets, for its application causes tariffs against their products to be reduced to the level of favored private-enterprise trading partners. They can sell their manganese, glass, coal and essence of roses in an international market devoid of discrimination against them. It also contributes intangibly to their prestige, and it was evident that they value being treated as equals because of its prestige value. In their relations among themselves the clause has vital political importance. Perhaps this is because there lingers in Eastern Europe a feeling that Russians, because of their number and superior power, seek to dominate their partners. Under such circumstances it becomes of value to the smaller countries to have on record every possible statement of equality with the U.S.S.R., and it is of value to Soviet politicians to restate the principle of non-discrimination to assist them in the continual struggle to retain allegiance to the Soviet leaders. It is only of secondary importance that sophisticated Eastern European intellectuals understand that statements of principle can be no bulwark against intervention when vital interests of the largest partner are at stake.

For the private-enterprise states, whether in their traditional form or as modified in their structure by nationalization of commanding heights in the economy, the most-favored-nation clause has lost its usefulness as a means of assuring sales in a state-trading market when the price is right. It was recognized at Rome that incorporation of the clause in a commercial treaty between state-trading and private-enterprise states may contribute to good will and friendly relations, and such a contribution is not without importance, but the value of the clause has been reduced to that of generalization. It can no longer be a direct *quid pro quo* for the granting by private-enterprise states of most-favored-nation treatment to a state-trading state, for no direct monetary benefits resulting from increased sales can be expected to flow from the grant by a state-trading state. Its value at most may lie in assuring to the private-enterprise state a basis for complaint if its merchants are not permitted to enter the state-trading state

to exhibit their wares, to plead their cases in court or to import their goods in their own vessels without discriminatory port duties or regulations.

Yet, benefits of a character not related to tariffs are not necessarily held to be inherent in a most-favored-nation clause. In several legal systems they must be enumerated to be claimed. It was a general feeling among the scholars from private-enterprise states that to assure protection on the highly practical matters of entry, access to courts, and shipping, the most-favored-nation clause should be redrafted from its generalized form to include specific reference to the matters on which equality of treatment is desired.

Draftsmen of future commercial treaties between state-trading and private-enterprise states will be wise, if the Rome deliberations represent sound thinking, to appreciate that the most-favored-nation clause should not be granted lightly with the feeling that it will facilitate in a state-trading market the expansion of trade which has usually flowed from non-discrimination in a private-enterprise market and that it is not, therefore, a true *quid pro quo* for a grant of the clause by a private-enterprise state to a state-trading partner. Further, it should be redrafted to include specifically the points on which equal treatment in entry, access to courts, shipping and perhaps other matters may ultimately be desired so that it amounts to more than a generalization. It must be in a form capable of serving as the foundation for a diplomatic protest should the occasion require. Such specification is not to imply that unfriendly discrimination can be expected from the hands of state traders. It is but the application of the rule of prudence required of a lawyer called upon to anticipate the quarrels which history indicates can arise even in relationships which start on the friendliest of terms.

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ON SAVING INTERNATIONAL LAW FROM ITS FRIENDS[1]

As Thurman Arnold pointed out some years ago in *Symbols of Government,* those who attack either men or institutions on counts of irrationality or ineffectiveness are immediately met by the rejection-reactions of those attacked. For some centuries now international law has been on guard against its overt attackers. Whether international law has been able adequately to deal with all its detractors[2] remains somewhat in doubt, but

[1] The writer owes this title to George Ward Stocking, thought to be the author of an article called "On Saving the Sherman Act from its Friends." However, Dr. Stocking sets the record straight in this way: He took the title for his presidential address to the Southern Economic Association, "Saving Free Enterprise from its Friends," 19 Southern Economic Journal, No. 4 (April, 1953), from an earlier paper of Thomas E. Sunderland, General Counsel of the Standard Oil Co. of Indiana, "Saving the Sherman Act from Its 'Friends,'" 1950 Institute on Antitrust Laws and Price Regulations, Southwestern Legal Foundation 211–224.

[2] Including certain notable stylists and otherwise persuasive writers, who have the notion that there is an essential disutility to national interest to be found in international law. The classification of notable stylist Dean Acheson in this regard, in