Document:-
A/CN.4/SR.1214

Summary record of the 1214th meeting

Topic:
Most-favoured-nation clause

Extract from the Yearbook of the International Law Commission:-
1973, vol. I

one time the very basis of a State, but once the constitution had come into force, that authority became the legislative power.

59. There could be no doubt that the legislative, executive and judicial branches of a State could commit internationally wrongful acts, but sometimes such acts were committed by one branch against the will of another. The executive power of his own country, for example, had on one occasion wished to abide by a certain international obligation, but had been over-ruled by its own Supreme Court.

60. In his opinion, it was clearly not important whether the functions of the organ were of an international or an internal character. It was likewise irrelevant whether the organ held a superior or a subordinate position in the hierarchy of the State, since sometimes a minor employee, such as a Customs official, could commit an internationally wrongful act of a serious nature.

61. He suggested that the Commission approve article 6 provisionally and refer it to the Drafting Committee.

62. The CHAIRMAN,* speaking as a member of the Commission, said that were it not for differences of opinion on points of detail, it might be considered that article 6 was superfluous and that a fuller commentary to article 5 would suffice. But in view of the differences of opinion to which the application of the rule set out in article 5 had given rise at certain times, it was preferable to retain article 6.

63. Everything stated in article 6 was correct. It was essential to provide, by using the words "or other", for the possible existence of powers other than the constituent, legislative, executive and judicial powers, which might be established by the constitutions of some countries. It was useful to mention the constituent power, since positive law now recognized that the constitution formed an integral part of the internal law of a State, whose responsibility might be engaged if a provision of its constitution was contrary to an international obligation. It was also useful to mention the judicial power, for although people talked about the independence of the courts, there were nevertheless abundant cases on record in which denial of justice appeared as a cause of State responsibility. Lastly, it had to be stated clearly, as was done in article 6, that the international or internal character of the functions of the organ and its position in the hierarchy played no part in the attribution of an act to the State. Borchard's theory was unacceptable and, besides, it was incompatible with the rule in article 5.

64. He therefore approved the substance of article 6 and would leave it to the Drafting Committee to review the wording.

65. Mr. ELIAS said he agreed with other speakers in finding the substance of article 6 acceptable. Like Mr. Kearney, however, he thought that it should be reworded in such a way as to avoid enumerating three characteristics of the organ of the State and then concluding that they were all irrelevant. He himself could not recall any provision in a draft convention which stated a rule of law in quite that way.

66. He proposed that article 6 be revised to read:

> The attribution to a State of the internationally wrongful act of its organ is not affected by the fact that
>
> (*a*) The organ belongs to the constituent, legislative, executive, judicial or other power;
>
> (*b*) Its functions are of an international or internal character; or
>
> (*c*) It holds a superior or a subordinate position within the State.

67. That formulation would avoid the use of the expression "act of the State", which countries with common-law systems might find it difficult to accept. It would also omit the reference to "hierarchy", and perhaps some other word could be found to replace the word "power".

68. The CHAIRMAN suggested that article 6 be referred to the Drafting Committee, on the understanding that the Special Rapporteur would reply at a later meeting to the various points that had been raised and that his remarks would be communicated to the Drafting Committee.

It was so agreed.[3]

The meeting rose at 1.10 p.m.

* Mr. Yasseen.

[3] For resumption of the discussion see 1215th meeting, para. 3.

1214th MEETING

Friday, 25 May 1973, at 10.5 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Most-favoured-nation clause

(A/CN.4/213; A/CN.4/228 and Add.1; A/CN.4/257 and Add.1; A/CN.4/266)

[Item 6 of the agenda]

1. The CHAIRMAN invited the Special Rapporteur to introduce his third and fourth reports on the most-favoured-nation clause (A/CN.4/257 and Add.1; A/CN.4/266).

2. Mr. USTOR (Special Rapporteur) said that the idea that the Commission should study the most-favoured-nation clause had originated in 1964, during the discussion on the law of treaties at the sixteenth session. Mr. Jiménez de Aréchaga had then proposed that a provision on the most-favoured-nation clause should be included in the draft on the law of treaties to ensure that the clause was formally reserved from the operation of the articles dealing with the problem of the effect of

treaties on third States.[1] While recognizing the importance of not prejudicing in any way the operation of most-favoured-nation clauses, the Commission had not considered that those clauses were in any way touched by the articles on the law of treaties and for that reason had decided that there was no need to include a saving clause of the kind proposed.[2]

3. At its nineteenth session, in 1967, after the completion of the articles on the law of treaties, the Commission had noted that several representatives in the Sixth Committee, at the twenty-first session of the General Assembly, had urged that the Commission should deal with the clause as an aspect of the general law of treaties. The Commission had accordingly decided to place on its programme the topic of most-favoured-nation clauses in the law of treaties and had appointed him Special Rapporteur.[3]

4. In 1968, at the Commission's twentieth session, he had submitted a working paper,[4] in which he had taken stock of the problems involved and had pointed out the importance of the most-favoured-nation clause in commercial treaties and its use in other treaties.

5. The Commission had then held a general debate on the topic and had given the Special Rapporteur certain instructions, which were summarized in the report on the work of its twentieth session in the following terms: "While recognizing the fundamental importance of the role of the most-favoured-nation clause in the domain of international trade, the Commission instructed the Special Rapporteur not to confine his studies to that area but to explore the major fields of application of the clause. The Commission considers that it should focus on the legal character of the clause and the legal conditions governing its application. It intends to clarify the scope and effect of the clause as a legal institution in the context of all aspects of its practical application. To this end the Commission wishes to base its studies on the broadest possible foundations without, however, entering into fields outside its functions." In the light of those considerations the Commission had instructed the Special Rapporteur "to consult, through the Secretariat, all organizations and interested agencies which may have particular experience in the application of the most-favoured-nation clause".[5]

6. The Commission had also decided to shorten the title of the topic to "The most-favoured-nation clause".[6]

7. At the Commission's twenty-first session, in 1969, he had presented his first report (A/CN.4/213),[7] which contained a short history of the most-favoured-nation clause up to the time of the Second World War, with particular emphasis on the work on the clause undertaken by the League of Nations or under its aegis. After briefly considering the report, the Commission had accepted his suggestion that he should prepare another report containing an analysis of three cases heard by the International Court of Justice, which had been called by some writers the *sedes materiae* for the problems of the most-favoured-nation clause. Those cases were the *Anglo-Iranian Oil Company case (jurisdiction)*, the *Case concerning rights of nationals of the United States of America in Morocco* and the *Ambatielos* case. The Commission had also asked him to summarize, in his next report, the answers received from interested international organizations.

8. On the basis of those instructions, he had prepared a second report, (A/CN.4/228 and Add.1),[8] which unfortunately made rather difficult reading because the answers of the interested agencies, especially GATT and UNCTAD, were of such a highly technical character that it was not easy for an ordinary lawyer to digest them. That report had not been considered by the Commission.

9. In 1972 and 1973 he had completed his third and fourth reports, which were now before the Commission (A/CN.4/257 and Add.1; A/CN.4/266) and which contained eight draft articles. Meanwhile, work on the topic was being done by the Secretariat, which was preparing a digest of decisions of national courts concerning the most-favoured-nations clause and a survey of treaties containing the clause published in the United Nations Treaty Series.

10. In his third report (A/CN.4/257), article 1, on the use of terms, was, in accordance with the Commission's usual practice, only provisional; the final decision on it could not be taken until the other substantive articles had been considered. He proposed, however, that wherever the draft articles contained a notion which appeared in the Vienna Convention on the Law of Treaties, it should be given the same definition as in that Convention.[9]

11. There were two or three expressions in article 1 which were of a certain importance because they appeared in almost all the articles: in particular, the "granting State" and the "beneficiary State". Other terms had been used in the literature on the subject, but he considered it necessary to accept a uniform definition of those notions.

12. He proposed to introduce articles 2 and 3 together, because they constituted the cornerstone of the whole draft. Paragraph 1 of article 2 was intended to cover both bilateral and multilateral treaties in which a most-favoured-nation clause appeared, while paragraph 2 implied that a most-favoured-nation clause was usually reciprocal, in the sense that both contracting parties to a bilateral treaty and all contracting parties to a multilateral treaty promised to accord each other most-favoured-nation treatment.

13. In exceptional cases, however, it sometimes happened that only one of the parties was a granting State, while the other was a beneficiary State. That occurred

[1] See *Yearbook of the International Law Commission, 1964*, vol. I, pp. 184-188.

[2] *Ibid., 1964*, vol. II, p. 176, para. 21.

[3] *Ibid., 1967*, vol. II, p. 369, para. 48.

[4] *Ibid., 1968*, vol. II, p. 165.

[5] *Ibid.*, p. 223, paras. 93 and 94.

[6] *Ibid., 1968*, vol. I, p. 250, paras. 7-12.

[7] *Ibid., 1969*, vol. II, p. 157.

[8] *Ibid., 1970*, vol. II, p. 199.

[9] 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, article 2.

mostly when the situation was such that only one of the contracting parties was able to give certain advantages to the other, which was unable to reciprocate. For example, when a treaty was concluded between a landlocked and a maritime country, the maritime country would be in a position to grant most-favoured-nation treatment to ships of the landlocked country, but the landlocked country would naturally be unable to reciprocate in kind.

14. The essence of article 2 was that the constituent element of a most-favoured-nation clause was the granting of most-favoured-nation treatment, which meant that when a treaty provision promised most-favoured-nation treatment, that provision was a most-favoured-nation clause. Most-favoured-nation clauses were not uniform and might vary considerably, but their essential element was that they included a stipulation on behalf of the granting State in favour of the beneficiary State to claim most-favoured-nation treatment. It had been rightly said, therefore, that there was no such thing as the most-favoured-nation clause and that every treaty required independent examination. In other words, there were innumerable most-favoured-nation clauses, but there was only one most-favoured-nation treatment or standard.

15. The purpose of article 3 was to define what most-favoured-nation treatment was. The article provided that treatment promised under the most-favoured-nation clause should be on terms not less favourable than the terms of the treatment accorded by the granting State to any third State. In the simplest and most usual construction of the situation, there were two treaties involved: one was a treaty which included a stipulation to grant most-favoured-nation treatment and the other was a collateral treaty concluded by the granting State with a third State. In the latter, the granting State conferred certain advantages on a third State which, on the basis of the stipulation, would have to be accorded to the beneficiary State as well.

16. In drafting that provision, the question arose whether the treatment accorded to the beneficiary State should be the same as that accorded to the third State —whether it should be equal treatment, identical treatment or similar treatment. He had chosen the term "treatment on terms not less favourable" for the following reasons. If the granting State granted a certain advantage to the third State, the same advantage would have to be granted to the beneficiary State. That meant that the beneficiary State could not be in a less advantageous position than the third State; in other words, most-favoured-nation treatment did not exclude the possibility of the granting State according the beneficiary State certain additional advantages which went beyond those conceded to the most-favoured third State. Consequently, while most-favoured-nation treatment excluded the preferential treatment of third States by the granting State, it was fully compatible with preferential treatment of the beneficiary State.

17. It was with some hesitation that he had abandoned the expression "equal treatment". Equal treatment was really an extremely important aspect of the most-favoured-nation clause, but in theory a situation might arise in which greater advantages were accorded to the beneficiary State than to a third State. In practice, however, the result of the most-favoured-nation clause was equality of treatment of the beneficiary State and any third States. In fact, it had often been stated that the most-favoured-nation clause was the instrument of the principle of equality of treatment, not only in the field of foreign trade, but also in all other fields where the clause was applied. One of the problems of contemporary trade, however, was the fact that equality of treatment was not necessarily a just practice in cases where the partners were unequal.

18. In article 3, he had said that most-favoured-nation treatment meant "treatment upon terms not less favourable than the terms of the treatment accorded by the granting State to any third State." The word "accorded" was intended to mean two things: either that the treatment had been accorded previously or that it had been accorded subsequently.

19. Paragraph 1 of article 3 also referred to a "defined sphere of international relations", since it was necessary to define the sphere of application of the most-favoured-nation clause. The need for such a definition was quite obvious at the present time, but in the past there had been most-favoured-nation clauses which had been couched in very general terms and in which the granting State had promised most-favoured-nation treatment in all matters. Today, however, it was almost inconceivable that a clause should be granted in such broad terms, although he had quoted the exception of the treaty concerning the establishment of the Republic of Cyprus, which had provided that that Republic should accord most-favoured-nation treatment to the United Kingdom, Greece and Turkey in connexion with all agreements, whatever their nature (A/CN.4/257, para. (7) of commentary to articles 2 and 3).

20. It was also an essential element of the most-favoured-nation clause that it should describe the persons or things in whose respect most-favoured-nation treatment was granted, as was also provided in paragraph 1.

21. Paragraph 2 of article 3 provided that, unless otherwise agreed, paragraph 1 should apply irrespective of whether the treatment accorded by the granting State to any third State was based upon treaty, other agreement, autonomous legislative act or practice. That meant that, if the treaty did not provide otherwise, the advantages accorded by the granting State to any third State could be claimed by the beneficiary State regardless of whether those advantages were granted to the third State on the basis of a treaty, an oral agreement, independently of any treaty on a unilateral basis, or merely on the basis of practice.

22. Mr. TSURUOKA said he fully supported the first three articles of the Special Rapporteur's draft. The draft had come at an appropriate time, since the world was passing through an economic crisis. The most-favoured-nation clause was based on the two principles of equality and liberty, which should govern States not only in matters of foreign trade, but in the financial and economic spheres in general. The draft was both progressive and imbued with the idea of justice. By its simplicity and the

effect of the two principles on which it was based, it should contribute to the establishment of peace and prosperity in the world.

23. His own experience, after examining the claims made against Japan by certain African States on the basis of the General Agreement on Tariffs and Trade,[10] showed that the study of the most-favoured-nation clause by the Commission would make it possible not only to clarify the legal aspect of that specific problem, but also to facilitate the application of the rules in force in international economic relations in general.

24. Mr. ELIAS said he had been interested by Mr. Tsuruoka's remarks because the African countries had had some difficulties with the more industrialized countries in encouraging a two-way traffic so that the whole trade should not be entirely in favour of one side.

25. The ideas underlying the draft were very acceptable, but the Commission would have to exercise great care in formulating them. He had some misgivings about article 3, paragraph 2; perhaps he had not sufficiently understood the commentary. He had hoped that the Special Rapporteur would give further explanations when he introduced article 3, but he had apparently assumed that the meaning was clear. Unless more explanations were given, he feared that there might be some confusion between article 3, paragraph 2 and article 4.

26. Another problem concerned the Special Rapporteur's logical attempt to emphasize that the most-favoured-nation clause should not be identified with non-discrimination. As the Special Rapporteur had pointed out, the most-favoured-nation clause embodied a broader concept, which covered not only economic and legal, but also political, cultural and other fields.

27. Article 2 contained four main elements which were quite sound in conception, although considerable revision would be called for, especially in paragraph 2. The article attempted to define the most-favoured-nation clause and the Special Rapporteur had stressed, first, that the clause must contain a pledge by a granting State to accord most-favoured-nation treatment to a beneficiary State, not merely a promise of non-discrimination. Secondly, the clause was not normally unilateral, except perhaps in the case of landlocked countries. Thirdly, there was a question of interpretation, namely, whether the pledge was intended to be binding on the granting State. Fourthly, paragraph 1 made it clear that the most-favoured-nation clause was not confined to bilateral treaties, but could also be applied in multilateral treaties.

28. Article 3 contained three major points. First, the granting State could not give preferential treatment to a third State, although it could to a beneficiary State. In practice, however, such cases were rare. The Special Rapporteur had explained that the whole concept was one of equality of treatment, and that was the keynote of the most-favoured-nation clause.

29. The second point was that the clause was not confined to foreign trade, but could be applied to various other fields, such as Customs, transport—especially shipping—and the treatment of aliens. Later, however, the Special Rapporteur seemed to go a little too far when he talked about literary and artistic rights, refugees, consuls and immunities.

30. Article 3 needed considerable pruning, for although he agreed with the Special Rapporteur's explanation of the expression "not less favourable", he thought that in his effort to be clear and concise, he had possibly become slightly obscure. For example, he agreed with the basic idea behind the expression "defined sphere of international relations", but he was not sure that that was the correct formulation. Also, the words "determined persons or things" should perhaps be replaced by the words "specific persons or things".

31. Finally, he would welcome a detailed explanation by the Special Rapporteur of precisely what he meant by the phrase in paragraph 2 of article 3 beginning with the words "irrespective of the fact...".

32. Mr. KEARNEY said he was glad that the draft articles on the most-favoured-nation clause were finally before the Commission. It was interesting to note that legal historians had traced the most-favoured-nation clause back to November 1226, when the Emperor Frederick II had conceded certain privileges to the City of Marseilles which had already been granted to Pisa and Genoa.

33. He agreed with the Special Rapporteur that it was the practice of the Commission not to discuss the article on the use of terms until the substantive articles had been worked out. However, he would already point out that the definition of the term "third State" might require further refinement, since it could be either a State which received most-favoured-nation treatment or one which did not.

34. At the very outset of the discussion, the reference to multilateral treaties in article 2, paragraph 1, raised one of the most difficult questions which would confront the Commission. That problem was discussed by the Special Rapporteur in paragraph (8) of the commentary in connexion with the General Agreement on Tariffs and Trade and the Treaty establishing a Free-Trade Area and instituting the Latin American Free-Trade Association. The same problem would also arise in connexion with article 8 (A/CN.4/266), which was particularly affected by the question of regional organizations.

35. With regard to article 2, he wondered whether paragraph 2 was not expository material which it would be better to put in the commentary. Indeed, it seemed so self-evident that it was hardly necessary.

36. Article 3 was the key article in the series of basic articles at the present stage. He had listened to Mr. Elias's comments on it with some interest and it seemed to him that it was a question of the approach which should be adopted in drafting the article. It would be necessary to decide whether the article should be couched in general language, as was the Commission's normal practice, or whether, owing to the technical nature of the subject, it would be desirable to use more specific language. To illustrate the difference between those approaches, it might be sufficient to quote paragraph 1 of Article I

[10] United Nations, *Treaty Series*, vol. 55, p. 194.

of the General Agreement on Tariffs and Trade which read: "With respect to customs duties and charges of any kind imposed on or in connexion with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connexion with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

37. The expression "defined sphere of international relations" in article 3, paragraph 1, seemed to him somewhat vague in the present context. If it was intended to permit a most-favoured-nation clause to include, for example, all possible international relationships, he was not sure that it was necessary, but if it meant that the most-favoured-nation clause would have to define with a substantial degree of specificity the parameters of the clause, it could be helpful, although the question arose whether that requirement would be subject to a different agreement by the parties.

38. The expression "determined persons or things" might not be sufficiently broad. Article I of the General Agreement on Tariffs and Trade, for example, referred to conduct rather than persons and things. It would be necessary to clarify, also, precisely how those persons or things would be determined. Must it be in the treaty?

39. Lastly, the purpose of article 3, paragraph 2 was to make it clear that the method by which, or the reason why, the third State was accorded preferential treatment was immaterial for the operation of the most-favoured-nation clause. It would be better, therefore, to express that idea more simply, without referring to "treaty, other agreement, autonomous legislative act or practice".

40. Mr. SETTE CÂMARA said that the Special Rapporteur had produced four admirable reports, the first of which contained a valuable historical account and the second an excellent analysis of the relevant judicial precedents and practice of international organizations. The concrete proposals for draft articles with commentaries contained in the Special Rapporteur's third and fourth reports logically followed from the analysis of the subject in the earlier reports.

41. He agreed that, in accordance with the Commission's established practice, consideration of article 1, on the use of terms, should be deferred until a later stage in the work.

42. Article 2 gave a definition of the most-favoured-nation clause in comprehensive terms, which took into account the fact that the Commission was called upon to deal with the general problem of the clause, not only with its operation in connexion with tariffs and trade. That definition thus contrasted with the complex and hermetic formulation embodied in Article I of the General Agreement on Tariffs and Trade, the effect of which was confined to commercial agreements dealing with tariffs and trade.

43. The distinction between the most-favoured-nation clause and most-favoured-nation treatment was an important one and had been clearly expressed in the draft. There were many ways of formulating the clause, but there was only one most-favoured-nation treatment. Subject, therefore, to the examination of drafting aspects, he supported paragraph 1 of article 2.

44. Paragraph 2 of article 2 referred to the usual practice of reciprocity of treatment. The Special Rapporteur had done well to cover that point. The language which he had used rightly did not preclude the possibility of unilateral concession of most-favoured-nation treatment.

45. The suggested removal of paragraph 2 from the text of article 2 to the commentary would simplify the article; he himself had no strong views on the point.

46. He welcomed the use of the formula "not less favourable than" in paragraph 1 of article 3, which made it clear that nothing prevented the granting State from extending to the beneficiary State even better treatment than to the third State. A reference to "equal treatment" or "identical treatment" would not have reflected accurately the present everyday practice.

47. As to the words "in a defined sphere of international relations", in the same paragraph, he thought that a formula of that kind was necessary. It was not the practice for the most-favoured-nation clause to cover all relations between the States concerned; some limitation was normally included. Similarly, it was necessary to refer to the specified persons or things to which most-favoured-nation treatment would be applied.

48. The Special Rapporteur's intention in paragraph 2 of article 3, as he understood it, was to specify that the provisions of paragraph 1 would operate in favour of the beneficiary State regardless of whether the treatment in question was accorded by the granting State to the third State by a treaty, under another type of agreement, by virtue of internal legislation or even by mere practice. He had no difficulty in accepting that principle, which was consistent with State practice, but he agreed with Mr. Elias that some further enlightenment from the Special Rapporteur would be useful.

49. The Commission could hope to achieve concrete results on the basis of the draft articles submitted by the Special Rapporteur. The most-favoured-nation clause was an important instrument of international trade, and its wider use should be encouraged. That use was spreading through the machinery of the General Agreement on Tariffs and Trade, but the clause should not be regarded as a panacea. In particular, the developing nations had to pay close attention to the idea of generalized preferences, which was a cornerstone of the work of UNCTAD on international trade. That fact, however, should not make the Commission hesitate in any way to contribute to the efforts to promote a wider and better use of the most-favoured-nation clause.

50. Sir Francis VALLAT said he associated himself with the previous speaker's tribute to the Special Rapporteur's work. He would make a few general remarks before considering articles 2 and 3.

51. He fully shared the view that the present topic was an important one. It was also one which it was difficult to grasp, because it was not possible to have in mind at the same time all the different kinds of clauses which had a most-favoured-nation aspect. There was a wide variety of most-favoured-nation clauses, which differed very materially from one another. Some of them clearly expressed the idea of treatment no less favourable than that accorded by the granting State to a third State. Others were not so clear, and sometimes it was even difficult to tell whether a particular clause should be classified as a most-favoured-nation clause. The whole subject was full of subtlety and delicacy. As a result, even small changes of wording could have important effects in practice.

52. He had noted the reference, in paragraph (3) of the Special Rapporteur's commentary to article 5 (A/CN.4/257/Add.1), to the two opposing views put to the International Court of Justice in the *Anglo-Iranian Oil Company case (jurisdiction)* [11] in 1952, and to the distinction between the content of the clause and its legal effect. It was not, however, at all easy to relate to those arguments the short extract from the Court's decision given in paragraph (4) of the commentary. The fact was that, in that case, the International Court of Justice had had to deal essentially with a question of the interpretation of a particular treaty rather than with the character of the most-favoured-nation clause in general.

53. It was therefore clear that the Commission should exercise even more than its usual care when drafting articles on the topics; that was particularly necessary in a specialist's field like the present one. He hoped that the Commission would be able to adopt satisfactory articles on the most-favoured-nation clause, but would urge it to proceed with great caution.

54. With regard to the principles underlying the work of the Commission and of the Special Rapporteur, he fully supported the idea of extending the consideration of the clause into fields other than international trade. In 1969, he had noted with concern the different approach adopted by the Institute of International Law, which had largely centred its attention on clauses in the commercial field and on the relationship between the General Agreement on Tariffs and Trade and Customs unions. He sincerely hoped that the Commission would keep its work on a more general level.

55. The topic had been rightly placed within the framework of treaty law. The application of the most-favoured-nation clause in a treaty was *par excellence* a question of the interpretation of the particular clause in the particular treaty. Undoubtedly, general principles could be developed, but in any particular case an adjudicating body would have to deal basically with a question of treaty interpretation. That fact was bound to have an influence on the Commission's treatment of the topic.

56. The standard of treatment to be accorded under the most-favoured-nation clause was an essential point. The Special Rapporteur proposed the appropriate formula that the treatment should be not less favourable than that accorded to any other State.

57. His last general remark concerned the very real problem arising from the relationship of the topic with the principle of non-discrimination. He supported the view that the most-favoured-nation clause should be studied separately from the principle of non-discrimination. No exhaustive study of that principle should be attempted, but it was necessary to recognize that the two subjects overlapped to some extent.

58. With regard to the text of the articles, he agreed that articles 2 and 3 tended to some extent to state the obvious. The topic, however, was one in which it was often necessary to state the obvious in order to be able to formulate any rules at all.

59. He had some misgivings about the words "as in the usual case", in paragraph 2 of article 2; it was difficult to see what obligation was implied by that type of provision. The paragraph was perhaps more suitable for inclusion in the commentary.

60. With regard to article 3, he agreed with many of the remarks of previous speakers. In addition, he wished to draw attention to the difficulty that could be created by the use of the word "term". There was a difference between the granting of a standard treatment and the granting of certain terms, such as an undertaking to extend a certain treatment.

61. Mr. HAMBRO said he associated himself with the tributes to the Special Rapporteur and was in agreement with most of the previous speaker's comments.

62. He had no quarrel with the contents of the articles under discussion, but thought they appeared to look too much to the past. They were largely based on the experience of the League of Nations period, when the most-favoured-nation clause had been particularly prominent.

63. Looking into the future, two important points would have to be borne in mind. The first was the relationship between the most-favoured-nation clause and the treatment to be given to developing countries in the general framework of the promotion of development. The Commission would be out of touch with reality if it made no reference in its work to that important question.

64. The second was the relationship between the most-favoured-nation clause and the new forms of customs and economic unions. The question of that relationship had preoccupied GATT to some extent and could be expected to do so increasingly. As far as the Commission was concerned, it should bear the question in mind in its work, but should at the same time be careful not to include in the draft anything that might create difficulties in the future.

65. Mr. PINTO said that in the performance of his duties in his country, which was a developing country, he had often encountered the problem of most-favoured-nation treatment. He had therefore been particularly impressed by the masterly treatment of the subject by the Special Rapporteur in his four reports.

66. With regard to articles 2 and 3, he largely agreed with the comments of Sir Francis Vallat. There were many difficulties inherent in the subject itself, mainly

[11] *I.C.J. Reports 1952*, p. 93.

because of the political overtones that accompanied the inclusion of most-favoured-nation clauses in treaties. In his own country, most-favoured-nation clauses were included in treaties as a mark of cordial relations between the signatories. For example, in a number of shipping agreements signed by Sri Lanka, a clause had been included granting reciprocal most-favoured-nation treatment to the ships of the States parties. That clause was essentially a political one, since Sri Lanka had little or no shipping. The great variety of most-favoured-nation clauses was also explained by the fact that political relations varied.

67. With regard to the text of article 3, paragraph 1, the meaning of the words "the treatment accorded" needed to be clarified. They could mean the actual treatment given in a particular case, but they could also be taken to refer to the treatment which a State was under an obligation to accord under a treaty. The question was essentially one of interpretation of the particular agreement in each case. It would therefore be difficult to formulate a general principle in the matter.

68. He had doubts about the words "as in the usual case", in article 2, paragraph 2, which could be construed to mean that reciprocity was almost compulsory. In fact, reciprocity was not feasible between countries which, although equal in sovereignty, were grossly unequal in all other respects.

69. If the words "the treatment accorded" in article 3, paragraph 1 were taken to mean the actual treatment extended by the granting State to any third State, the provisions of article 2, paragraph 2 would impose reciprocity of actual treatment.

70. With regard to the drafting, an attempt should be made to find a clearer formulation for the idea expressed in the words "in a defined sphere of international relations", in article 3, paragraph 1. In paragraph 2 of the same article, the words "autonomous legislative act" might perhaps be replaced by the words "unilateral act", which would cover acts that did not constitute legislation.

The meeting rose at 12.50 p.m.

1215th MEETING

Monday, 28 May 1973, at 3.5 p.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Welcome to Mr. Martínez Moreno

1. The CHAIRMAN welcomed Mr. Martínez Moreno, who had been elected a member of the Commission to fill one one of the casual vacancies which had occurred since the last session.

2. Mr. MARTÍNEZ MORENO thanked the members for electing him to the Commission and pledged his best efforts to contribute to the accomplishment of its important tasks.

State responsibility

(A/CN.4/217 and Add.1; A/CN.4/233; A/CN.4/246 and Add.1 to 3; A/CN.4/264 and Add.1)

[Item 2 of the agenda]

(resumed from the 1213th meeting)

ARTICLE 6 (Irrelevance of the position of an organ of the State in the distribution of powers and in the internal hierarchy) *(continued)*

3. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 6 in his third report (A/CN.4/246 and Add.1-3).

4. Mr. AGO (Special Rapporteur) said he noted from the discussion that none of the members of the Commission had challenged the principle stated in article 6 and that the criticisms made related only to the drafting. He saw no objection to stating the principle more directly, as several members had suggested, provided that article 6 did not merely repeat what was said in article 5, which, on the contrary, it should supplement.

5. Mr. Kearney had asked whether the categories listed were sufficiently inclusive.[1] It could be said that they were, except that the expression "or other" covered the possibility that certain particular elements of the structure of a State might not fall within any of them.

6. Since it was made clear, both in the commentary and in the text of the article, that it referred to organs of the State, the organization of the State and the power of the State, he did not think it was necessary to express, in the article, the idea of "public" power, as Mr. Ushakov had suggested.[2] Nor did he think that the word "power" should be replaced by "branch", as suggested by Mr. Sette Câmara;[3] one could not speak of a "constituent branch", and it was essential to mention the constituent power.

7. On the other hand he was quite willing to replace the word "*nature*" by "*caractère*" in the French version, as Mr. Ushakov[4] and Mr. Ramangasoavina[5] had proposed. Some members had been in favour of deleting the reference to the international or internal character of the functions of the organ. He did not think that advisable, since it had a purpose, which was to eliminate the false idea, long dominant in the literature of the subject, that only organs responsible for external affairs were capable of committing wrongful acts.

---

[1] See 1213th meeting, para. 49.

[2] *Ibid.*, para. 52.

[3] *Ibid.*, paras. 58 and 59.

[4] *Ibid.*, para. 53.

[5] *Ibid.*, para. 54.