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Summary record of the 1215th meeting

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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.

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

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

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

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

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

8. Lastly, the words "in the hierarchy of", to which Mr. Elias had objected,[6] could perhaps be replaced simply by "in".

9. In the light of those considerations he proposed to the Drafting Committee that article 6 be redrafted to read: "The consideration of the conduct of an organ of the State as an act of the State in international law is independent of the questions whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the organization of the State".

10. The CHAIRMAN said that, as already agreed at a previous meeting, article 6 would be referred to the Drafting Committee.[7]

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]

(resumed from the previous meeting)

ARTICLES 2 and 3

11.

Article 2

Most-favoured-nation clause

1. Most-favoured-nation clause means a treaty provision whereby an obligation is undertaken by one or more granting States to accord most-favoured-nation treatment to one or more beneficiary States.

2. When, as in the usual case, the contracting States undertake to accord most-favoured-nation treatment to each other, each of them becomes thereby a granting and a beneficiary State simultaneously.

Article 3

Most-favoured-nation treatment

1. Most-favoured-nation treatment means treatment upon terms not less favourable than the terms of the treatment accorded by the granting State to any third State in a defined sphere of international relations with respect to determined persons or things.

2. Unless otherwise agreed, paragraph 1 applies irrespective of the fact whether the treatment accorded by the granting State to any third State is based upon treaty, other agreement, autonomous legislative act or practice.

12. The CHAIRMAN invited the Commission to resume consideration of item 6 of the agenda, beginning with articles 2 and 3 in the Special Rapporteur's third report (A/CN.4/257 and Add.1).

13. Mr. USHAKOV said that although the subject dealt with came under public international law, it was nevertheless closely linked with private international law. The Special Rapporteur had duly taken that into account in the excellent report he had submitted to the Commission. He (Mr. Ushakov) had no criticism of the substance of articles 2 and 3 and the comments he was about to make related solely to the drafting.

[6] *Ibid.*, paras. 66 and 67.

[7] For resumption of the discussion see 1226th meeting, para. 20.

14. In article 2, paragraph 1, it would be preferable to replace the words "one or more granting States" by the words "a State" and the words "one or more beneficiary States" by the words "another State". At that stage, there was not yet either a granting State or a beneficiary State.

15. In paragraph 2, the expression "as in the usual case", which had no legal effect, should be deleted; the words "becomes thereby" should be replaced by the words "may be"; and the word "simultaneously" should be deleted.

16. With regard to article 3, in Russian terminology two synonymous expressions could equally well be used: "most-favoured-nation treatment" and "most favourable treatment"; he himself preferred the latter.

17. The expression "international relations", in article 3, paragraph 1, did not perhaps correspond exactly to the idea it was desired to express, for in the strict sense it applied to relations between States. In the context of the article, however, it had a wider sense, for although it was States which concluded agreements, the most-favoured-nation clause which those agreements might contain governed relations between persons and things coming under private law. He would not propose replacing the expression "international relations", which was clear, but he wished to draw attention to the two meanings it could have: the restricted meaning of relations between States and the wider meaning of relations between subjects of international law.

18. Articles 2 and 3 could be referred to the Drafting Committee, with a request to take particular care to see that the French and Russian translations accorded with the original.

19. Mr. YASSEEN said that the most-favoured-nation clause represented the complete application of the general principles of the law of treaties. The Commission was not required to take a position on the political or economic aspects of the clause, but to draft the clearest possible text on its legal régime.

20. He did not agree with the Special Rapporteur that reciprocity was the essence of the most-favoured-nation clause; for the reciprocity provided for by the clause might be only formal and even the equality it was sought to obtain by the effects of the clause could be merely apparent.

21. It would be a mistake to leave aside the question of the most-favoured-nation clause in multilateral treaties. The development of international relations might make it necessary to apply the clause for the benefit of certain classes of State or of an indeterminate number of States having a common characteristic: for example, the developing countries. On the other hand, it was sometimes difficult to grant general and absolute equality of treatment, as intended in article 3, paragraph 1. Certain exceptions based on the realities of international life might be justified if they were dictated by political, geographical or cultural similarities between States. That applied, for example, to the solidarity between the Arab and the Scandinavian countries.

22. He approved of the definitions given in article 1 and commended the Special Rapporteur particularly

for having referred to the Vienna Convention on the Law of Treaties, thus ensuring the continuity of the Commission's work.

23. With regard to article 2, like other members he was in favour of deleting from paragraph 2 the words "as in the usual case", which might not always correspond to the facts.

24. In article 3, paragraph 1, there was no need to refer to the "terms of the treatment accorded", since the terms were an integral part of the treatment. It would be enough to say "treatment not less favourable than that accorded...".

25. Mr. BARTOŠ said that in general he approved of articles 1, 2 and 3 as proposed by the Special Rapporteur, but wished to draw attention to certain points which should be dealt with in the commentary.

26. First, it was no longer possible to speak of the most-favoured-"nation" clause, since the field of application of the clause had recently been extended to other subjects of international law, in particular, international organizations.

27. Secondly, the most-favoured-nation clause had two aspects: the positive aspect defined by the Special Rapporteur, and the negative aspect of not less favourable treatment. What it was desired to achieve through the effect of the clause was, basically, equality of treatment, which was sometimes obtained by other means. It was the League of Nations which had first sought to establish a general régime of equality, the scope of which the United Nations had then undertaken to enlarge. Equality of treatment would be ensured by prohibiting the application of less favourable treatment. The General Agreement on Tariffs and Trade and the Treaty of Rome were examples of that.

28. In the present state of the law, the clause did not yet represent a general régime of equality, but it came close to a non-discrimination clause. It was already ripe for codification, although some points called for very great caution.

29. Articles 2 and 3 should be referred to the Drafting Committee.

30. Mr. TAMMES said that the Special Rapporteur had produced a number of excellent reports and draft articles. The articles had the merit of simplicity, which could only be attained by a long and difficult process of sifting the various confusing elements involved. As a result, the Commission had now before it a draft containing the essentials of the topic.

31. The guidelines laid down by the Commission in its report on the work of its twentieth session [8] were adequately reflected in the Special Rapporteur's set of draft articles. Its instruction to the Special Rapporteur not to confine his studies to the area of international trade, but to explore the major fields of application of the clause, was duly recognized in paragraph 1 of article 3, which spoke of treatment accorded "in a defined sphere of international relations with respect to determined persons or things".

[8] See *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 223, para. 93.

32. It had been the Commission's understanding that the final results of its work on the present topic would be closely connected with, and not go beyond, the law of treaties; the Special Rapporteur's articles remained scrupulously within the spirit of the 1969 Vienna Convention on the Law of Treaties. In fact, the Special Rapporteur, particularly in his exposition of article 8 (A/CN.4/266), had shown himself a staunch defender of the acquired rights of the beneficiary States of most-favoured-nation treaty provisions against restrictive tendencies.

33. He entirely agreed with Sir Francis Vallat, in emphasizing the importance of interpreting each particular clause in each particular context. The draft itself did not lay down any general directives for interpretation of the most-favoured-nation clause, except perhaps the presumption set out in article 6. Indeed, a set of rules of that type could only afford limited opportunities for laying down guidelines.

34. To begin with, it could not have any retrospective effect. And since the clause was not expected to have the same wide application in the future as it had had in the past, the draft would not be relevant to the bulk of the clauses—a fact which constituted a very real limitation. Moreover, the autonomous will of the contracting parties, and its interpretation, would always prevail over any general rules relating to the clause. There were no *jus cogens* rules on the topic.

35. Finally, cases could occur in which the extent of any specific most-favoured-nation treatment would not be established on the basis of the interpretation of the clause alone. If the collateral treaty had been concluded prior to the undertaking to grant most-favoured-nation treatment, the intention of the parties to the first commitment would often have become indirectly and implicitly part of the consent of the parties to the second commitment. That intention would have to be taken into account in a complex process of cumulative interpretation.

36. As to the drafting of articles 2 and 3, he associated himself with much that had been said by previous speakers and had nothing to add at the present stage.

37. Mr. AGO said the Special Rapporteur was to be commended for having expressed himself strictly in terms of legal technique. The Commission was not required to pronounce on the desirability of most-favoured-nation treatment or on its development, since the justification of that treatment depended on historical, geographical and other circumstances.

38. Most-favoured-nation treatment was not necessarily a consequence of the principle of non-discrimination and equality of States. That equality was not affected by the existence or non-existence of the most-favoured-nation clause. If a country treated aliens differently from its own nationals within its jurisdiction, that was discrimination; but if a State maintained closer relations with one particular State than with others and granted that State more favourable treatment than it accorded to others, it could not be said to be discriminating. In that sphere, the autonomy of States was sovereign.

39. With regard to the drafting, he wondered whether the word "clause" also covered the case of a treaty concluded solely in order to accord more favourable treatment. Was there not a more appropriate term for that case?

40. Like other members of the Commission, he was in favour of deleting the words "as in the usual case" from article 2, paragraph 2.

41. With regard to article 3, it would seem more logical for paragraph 1, which defined what was meant by most-favoured-nation treatment, to follow immediately after paragraph 1 of article 2, which spoke of according that treatment. In order to remove from paragraph 1 of article 3 the reference to the terms of the treatment accorded, perhaps the paragraph could be re-drafted to read: "Most-favoured-nation treatment means treatment granted by one State to another, in a defined sphere of international relations with respect to determined persons or things, not less favourable than the treatment accorded by the granting State to a third State".

42. It would appear that paragraph 2 of article 3 could also be attached to article 2, since it dealt with the effect of the obligation created by the most-favoured-nation clause. What it was intended to express was that the obligation provided for by the clause subsisted only if the treatment accorded by the granting State to any third State was based upon a treaty, other agreement, etc. It was thus a limitation on the operation of the clause rather than on the treatment accorded to the beneficiary State. Perhaps articles 2 and 3 could be merged in a single article.

43. Mr. BILGE said it was thanks to the work of the Special Rapporteur that the Commission was in a position to undertake the codification of a very old topic, which would satisfactorily complete the codification of the law of treaties.

44. In considering the most-favoured-nation clause as a legal institution, the Special Rapporteur had complied in every way with the instructions given him by the Commission. He was particularly grateful to the Special Rapporteur for having taken the needs of developing countries into consideration.

45. The Commission should consider whether it was not advisable to include in the draft, before articles 2 and 3, a general article defining the scope of the legal instrument it was drawing up.

46. It should also consider whether it would not be better to define the most-favoured-nation clause in two separate provisions, one dealing with bilateral treaties and the other with multilateral treaties, instead of dealing with both cases in a single provision, as the Special Rapporteur had done in article 2, paragraph 1. The Special Rapporteur had, indeed, pointed out in his second report that the operation of the GATT clause, for example, differed from that of a usual bilateral most-favoured-nation clause.[9]

[9] *Ibid., 1970*, vol. II, p. 223, document A/CN.4/228 and Add.1, para. 157.

47. In addition, a more general definition should be found to cover the case referred to by Mr. Ago, in which a treaty was concluded solely for the purpose of granting favourable treatment.

48. He endorsed the Special Rapporteur's comments, in paragraph (7) of his commentary, on the unilateral granting of most-favoured-nation treatment. The granting was not unilateral, in that compensation of another kind was generally provided for.

49. He agreed with other members of the Commission that paragraph 2 of article 2 would be better placed in the commentary.

50. In article 3, the Special Rapporteur had been right to use the phrase "not less favourable", which better reflected the essential object of the most-favoured-nation clause, namely, basic equality. He had also been right to use the word "accorded" rather than "granted". It should, however, be made clear that what was meant was treatment already accorded or to be accorded in the future.

51. Lastly, he asked whether article 3, paragraph 1 also applied to multilateral treaties.

52. Mr. BARTOŠ said that according to article 3, most-favoured-nation treatment was based "upon treaty, other agreement, autonomous legislative act or practice". According to the theory of the nature of unilateral legislative acts, it was difficult to take such acts into consideration unless they were converted into agreements. That occurred when unilateral declarations were accepted by the other party and became genuine treaty rules.

53. It was also important to mention cases in which the most-favoured-nation clause was applied by certain régimes recognized by international practice. One example was the Allied High Command in Germany, after the Second World War, whose decisions had not reflected the will of Germany and had not subsequently been accepted by it either. A basis for that régime might perhaps be found in the German treaty of surrender. In fact, the most-favoured-nation régime had been established in favour of the former allied States. It might therefore be asked whether the term "practice" meant practice pure and simple or whether it also covered the practice of an imposed régime.

54. In order to avoid disputes in a given sphere, particularly shipping, States had sometimes accepted the most-favoured-nation clause without being sure that it was the result of an autonomous legislative act or of practice. That was why, in his opinion, the expression "autonomous legislative act" should not be understood to mean only a unilateral act which had been accepted by the other party so that it became a genuine agreement.

55. Mr. RAMANGASOAVINA said that the Special Rapporteur had made good use of all the information at his disposal on a topic which was particularly arid from the legal standpoint. He had been duly guided in his work by the spirit of the Vienna Convention on the Law of Treaties—even in the working of the articles he proposed.

56. Articles 2 and 3 constituted an attempt to define the concepts of the most-favoured-nation clause and most-favoured-nation treatment. Those concepts covered a wide variety of situations. The articles proposed gave some idea of that variety and he fully supported their substance.

57. With regard to the drafting, it might be asked whether the expression "as in the usual case", used in article 2, paragraph 2, was not an invitation to States to grant each other most-favoured-nation treatment on a reciprocal basis. In the absence of such reciprocity, most-favoured-nation clauses could lead to a certain lack of balance and take on the appearance of leonine clauses. The Special Rapporteur's intention had certainly been to include in the definition of the clause any supplementary clauses that might be conceived.

58. Similarly, in article 3, the expression "not less favourable" was felicitous, even if rather indirect. The Special Rapporteur had used it in order to avoid saying "more favourable" or "equal". It covered, in particular, the case in which, when a treaty was concluded, the beneficiary State specified that any subsequent treaties should not be concluded on terms as favourable as those on which the parties to the treaty in question had agreed.

59. Lastly, the word "practice", though it had the advantage of being elastic, should nevertheless be defined, since it was somewhat vague.

60. Mr. MARTÍNEZ MORENO congratulated the Special Rapporteur on his skilful treatment of the topic dealt with in his report.

61. The point raised by Mr. Ushakov, that most-favoured-nation treatment could be accorded not only to States, but also to other subjects of international law, should be taken into account; but it was necessary to specify what kind of subjects of international law were referred to, since it would obviously be difficult to accord such treatment to individuals, and it was well known that in the opinion of Georges Scelle the human being was the subject of international law *par excellence.* Although such treatment had usually been the subject of a particular clause in a treaty of broader scope, it was conceivable that a treaty might relate solely to the question of most-favoured-nation treatment, and the expression "most-favoured-nation clause" might perhaps be replaced by some other term, as suggested by Mr. Ago.

62. The definition of most-favoured-nation treatment should take account of the exceptions for special situations between countries with special economic or other links. For example, the treaty establishing the Central American Common Market contained an "exception clause" laying down that the treatment accorded to the Central American countries which were uniting for historical, geographical and economic reasons could not be accorded to other countries.[10] Economic integration measures, such as the establishment of customs unions, common markets and other economic associations intended to raise the standard of living of the countries concerned, entailed exceptions to the most-favoured-nation clause, in particular, to assist less developed countries. It was an exception of that kind that the Mexican delegation to the Latin American Free Trade Association (LAFTA) had recently requested when it had sought permission to grant even more favourable treatment to Central American countries, which were in a worse state of under-development than the members of LAFTA. A treaty granting most-favoured-nation treatment which did not provide for such exceptions in special situations was unlikely to be ratified by the members of organizations or groups established for purposes of economic integration.

63. The CHAIRMAN, speaking as a member of the Commission, congratulated the Special Rapporteur on his general conception of the topic and the manner in which he had reflected it in the draft articles, of which he himself fully approved.

64. The definitions given were in exclusively legal terms, and all economic and political considerations had been left aside, although the Special Rapporteur had stated in paragraph (8) of his commentary to articles 2 and 3 that it was "obviously desirable that any definition of most-favoured-nation clauses should embrace also those inserted in multilateral treaties". The question of exceptions, however, especially in the case of developing countries, should be mentioned, if not in the articles themselves, at least in the commentary.

65. In article 2, paragraph 2, the words "as in the usual case" appeared to be superfluous.

66. The definition of most-favoured-nation treatment, given in article 3, paragraph 1, should be supplemented. The words "the terms of" before "the treatment" could be deleted.

67. Since paragraph 1 of article 3 contained a definition, not a rule of international law, the words "paragraph 1 applies", in paragraph 2, seemed inappropriate.

68. Mr. AGO said he wondered whether the expression "not less favourable" was appropriate, since it would permit treatment on more favourable terms, which would obviously constitute a different situation. It might perhaps be preferable to say "equally favourable" or "as favourable as".

The meeting rose at 6 p.m.

1216th MEETING

Tuesday, 29 May 1973, at 10.5 a.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. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

[10] See United Nations, *Treaty Series,* vol. 455, p. 90, article XXV.