Document:-
A/CN.4/SR.1216

Summary record of the 1216th meeting

Topic:
Most-favoured-nation clause

Extract from the Yearbook of the International Law Commission:-
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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 underdevelopment 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.

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

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]

(continued)

ARTICLE 2 (Most-favoured-nation clause) and ARTICLE 3 (Most-favoured-nation treatment) *(continued)*

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

2. Mr. BEDJAOUI said that with the Special Rapporteur's first two reports,[1] the Commission was sufficiently well equipped to take up the examination of the draft articles he had proposed in his third report.

3. He approved of the Special Rapporteur's general method of work. He had been right in stating that the most-favoured-nation clause could be included either in bilateral or in multilateral treaties—that was why he had taken the precaution of using the phrase of "one or more... States" in article 2; he had also been right not to limit the field of application to trade or to commercial policy, but to extend it to all possible spheres of international relations, as indicated in article 3, and to consider, through the general philosophy of the texts he had submitted to the Commission, both the past and the future advantages received by the beneficiary State under the clause.

4. He was grateful to the Special Rapporteur for having dwelt, particularly in his second report, on the questions of multilateralization and institutionalization of the clause—of which GATT was an example—which enlarged the scope of the clause and changed its character. He had also been particularly interested in what the Special Rapporteur had said about trade agreements with developing countries, though that was beyond the scope of the subject under study.

5. With regard to terminology, the expression "most-favoured-nation clause" was incorrect in many ways. First, it was not always just a clause, since there could be treaties whose sole object was to establish privileged treatment. Secondly, apart from the fact that the State was increasingly replacing the "nation" in certain economic systems, there were also organizations that now wished to benefit from the clause. Lastly, even the expression "most favoured" was incorrect, since in fact it was not the third State which was the most favoured, whatever might be said, but the beneficiary State, since the clause itself stipulated that no State might receive more favourable treatment than the beneficiary under it. As the Commission must refer to recognized concepts, however, it was bound to take account of the terminology inherited from the past, and he was therefore prepared to accept it.

6. The most-favoured-nation clause was a procedure that enabled a State to obtain advantages granted to a third State even though there was no legal relationship between the third State and the beneficiary State. A lot had been said about equality and reciprocity being inherent in the clause, but in his opinion, reciprocity was not, and should not be, an element in it; indeed the notion of reciprocity was foreign to the clause. If the treaty containing the clause did not provide for reciprocity, there was no reason to presume it; there would rather be a general presumption of unconditionality.

7. Reciprocity could be ensured in two ways. The first would be for the beneficiary State to offer to the granting State the same advantages as the granting State received from a favoured third State and, if the beneficiary State did not grant the advantages obtained from the third State by the granting State, it could not enjoy them itself. That, however, could not be presumed, since historically reciprocity was tending to disappear. The second way would be to oblige the beneficiary State to conclude a treaty with a third State also to be favoured in the same way as the granting State had been able to favour another third State. But it was obvious that the beneficiary State and the granting State, which were the initial signatories to the clause, were not obliged to behave in the same way with regard to various third States for both of them to benefit from the advantages they both granted to various third States. Reciprocity should therefore be excluded.

8. Article 4 rightly established that the legal obligation created between the beneficiary State and the granting State was justified not by the principle of reciprocity, but by the existence of the clause as expressed by voluntary agreement in the treaty containing it. In reality, equality of treatment was perceptible mainly in the phenomenon of multilateralization and institutionalization of the clause.

9. Although the expression "most-favoured-nation clause" was incorrect, he could accept articles 1, 2 and 3 as definition articles. He wondered, however, whether it would not be preferable to replace the term "*Etat concédant*" ("granting State"), by "*Etat promettant*" ("promising State"), since it was not really a matter of concession.

10. In article 2, the Special Rapporteur defined the clause in terms of the treatment. But the treatment was only defined in article 3 and it would therefore be better to refer, not to something still unknown, but to the treaty provisions by which the granting State undertook to accord present or future advantages to a third State.

11. In article 2, paragraph 2, the words "as in the usual case" should be deleted. The Special Rapporteur had obviously had reciprocity in mind at that point, but as reciprocity was not an essential condition for the application of the clause, it would be better to adopt a definition from which reciprocity was excluded.

12. In article 3, it might be better to say that most-favoured-nation treatment extended to the régime constituted by the advantages accorded by the granting State to any third State.

13. Mr. USTOR (Special Rapporteur), summing up the discussion, said he would like to deal first with

[1] *Yearbook of the International Law Commission, 1969*, vol. II, p. 157, document A/CN.4/213 and *1970*, vol. II, p. 199, document A/CN.4/228 and Add.1.

members' general remarks. Members had implicitly or explicitly confirmed the Commission's 1968 decision that attention should be focused on the legal character of the most-favoured-nation clause and the legal conditions governing its application.[2] Most of them had also endorsed the view that the study of the clause should not be confined to international trade, and that all the major fields of its application should be explored. The feeling that that was perhaps too ambitious an aim had been expressed by Mr. Elias,[3] but he wished to assure him that, as the work proceeded, all those fields would be covered by the draft.

14. It had also been agreed that it was not the Commission's task to pass judgement on the usefulness of the clause. The clause was a neutral institution, like treaties themselves; it could be used by any State, whatever its economic or social system; it could also be used for any purpose.

15. He would certainly proceed with caution, bearing in mind the complexity of the subject—an aspect to which Sir Francis Vallat had drawn attention.[4] The present articles would require particularly careful drafting, but the Commission had a strong Drafting Committee to deal with that problem.

16. It was true that the articles contained essentially dispositive rules that would only come into play if States did not agree otherwise. Sir Francis Vallat had pointed out that most of the articles were of an interpretative character; many were in the nature of presumptions and embodied rules of interpretation. That did not, however, detract from the usefulness of the Commission's work.

17. At that point he would like to draw attention to the passage in his first report in which he had described the work done on the subject of the most-favoured-nation clause by the League of Nations Committee of Experts for the Progressive Codification of International Law.[5] The Committee had entrusted a Sub-Committee of two experts with the study of the subject, one acting as Rapporteur. The Rapporteur had concluded that it was not necessary to frame rules of interpretation in regard to the clause, since the ordinary rules of judicial interpretation "would seem adequate and more desirable". The other member of the Sub-Committee, however, had expressed the opinion that the ordinary rules of judicial interpretation did not suffice to prevent disputes between contracting States; that it was desirable to frame supplementary provisions in a general international convention; and that it would be better to lay down certain general rules for the guidance of States in determining the interpretation of the clause when it was not clearly expressed.

18. The Committee of Experts itself had decided not to place the topic of the most-favoured-nation clause on the agenda of the 1930 Hague Conference. That decision was of course in line with the attitude of States at the time, which was not very positive towards the codification of international law.

19. The important question of the relationship between the most-favoured-nation clause and the principle of non-discrimination had been raised by Sir Francis Vallat. Although there was undoubtedly some overlapping between the clause and that principle, the two were essentially different, and the difference was well illustrated by the provisions of article 47, paragraph 2 (*b*) of the Vienna Convention on Diplomatic Relations, which stated that "discrimination shall not be regarded as taking place" where States extended to each other "more favourable treatment" than was required by the Convention.[6] Thus a State could not invoke the principle of non-discrimination in order to object to a particularly favourable treatment extended to another State if it had itself received the ordinary non-discriminatory treatment on a par with other States. On the other hand, a State invoking a most-favoured-nation clause would be entitled to claim the same favourable treatment as had been extended on a special basis to another State.

20. Another important difference was that the principle of non-discrimination was a general rule which could always be invoked by a State. The position was quite different with regard to most-favoured-nation treatment which, as provided in article 4 of the draft, could only be claimed by one State from another on the strength of a specific clause in force between those two States.

21. Several members had raised the question of preferences in favour of developing countries, which constituted an important exception to the rules on most-favoured-nation treatment. He would deal with that question in detail when preparing articles on the exceptions to the operation of the clause, and he wished to indicate that in the commentary already at the present stage.

22. He also proposed to deal elsewhere in the draft with the question of non-retroactivity, which had been raised by Mr. Tammes.[7]

23. Mr. Pinto had drawn attention to the political overtones of most-favoured-nation clauses, which sometimes led to one-sided results.[8] It was, of course, a feature of all treaty-making that advantages which appeared to be reciprocal could have an unbalanced effect in practice. The problem was not peculiar to the most-favoured-nation clause.

24. Mr. Bedjaoui had suggested that the question of reciprocity should be set aside. No doubt that could be done for the time being, but it was bound to come up again when the Commission came to consider the question of conditional and unconditional clauses. In practice, it was very unusual for a treaty to provide for the unilateral granting of most-favoured-nation treatment. Regardless of the material content of the most-favoured-nation clause, it generally operated reciprocally.

25. A large number of drafting suggestions had been made during the discussion and they would be duly

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[2] *Ibid.*, *1968*, vol. II, p. 223, document A/7209/Rev.1, para. 93.

[3] See 1214th meeting, para. 29.

[4] *Ibid.*, para. 51 *et seq.*

[5] *Yearbook of the International Law Commission, 1969*, vol. II, pp. 170-172.

[6] See United Nations, *Treaty Series*, vol. 500, pp. 122-124.

[7] See previous meeting, para. 34.

[8] See 1214th meeting, para. 66.

taken into consideration by the Drafting Committee. Meanwhile, he would like to comment on some of them.

26. With regard to article 1, there had been general agreement concerning the provisions on the use of terms taken from the Vienna Convention on the Law of Treaties.

27. He understood that the terms "granting State" and "beneficiary State" were in conformity with generally accepted usage. The Drafting Committee would, however, examine Mr. Bedjaoui's suggestion that the term "*Etat promettant*" should be adopted.

28. The objection raised by Mr. Kearney to the use of the term "third State" [9] in the present context was a valid one. In the light of that objection, he suggested deleting sub-paragraph (*f*) of article 1, and replacing it by a provision on the "favoured State"; that term would be defined to mean a State which had received favoured treatment from the granting State.

29. With regard to article 2, it had been pointed out that both the term "clause" and the term "most-favoured-nation" were not entirely accurate. For example, a whole treaty could contain nothing more than provision for most-favoured-nation treatment. In some cases, the text of the treaty would be quite long and set out in great detail the application of the treatment to various matters. Nevertheless, it was convenient to use the expression "most-favoured-nation clause", which was sanctioned by long usage. There was some analogy with the term "international law", which continued to be used although what was now meant was really inter-State law.

30. He would consider the drafting proposal made by Mr. Ushakov in regard to paragraph 1 of article 2,[10] but should point out that the draft was intended to cover both bilateral and multilateral treaties. The complications which arose when an attempt was made to deal with both types of treaties together had been stressed by Mr. Kearney, but he thought it was necessary to cover both in the article.

31. The general language used in paragraph 1 had been contrasted by Mr. Kearney with the more specific language used in the General Agreement on Tariffs and Trade. The Commission's task, however, was to find general language which would cover all specific cases of application of the clause, without going into detail.

32. Attention had been drawn to the case in which the "third State" was one of the parties to the multilateral treaty in which the most-favoured-nation clause had been included. The clause should operate in the same manner in all cases, whether the favoured State was a party to the multilateral treaty or a complete outsider.

33. With regard to paragraph 2 of article 2, he could accept the suggestion that the words "as in the usual case" should be deleted.

34. He would like to retain the remainder of the provision in the article, instead of moving it to the commentary as some members had suggested, because it served to indicate that each of the two States concerned became at the same time a granting State and a beneficiary State.

35. The problem of clauses providing for most-favoured-nation treatment for organizations would be mentioned in the commentary, unless a special provision was included in the draft on the lines of article 3 of the Vienna Convention on the Law of Treaties.[11]

36. In article 3, he was in favour of retaining the expression "most-favoured-nation treatment" as it was the commonly accepted one in English, although it was true that in Russian and Hungarian, the expression "most-favoured treatment" was in current use.

37. In paragraph 1 of article 3, he could accept the suggestion by several members that the word "terms" should not be used. He could also agree to include in the commentary, as proposed by Mr. Bilge,[12] a passage to explain that the word "accorded" covered both treatment already accorded and treatment subsequently accorded.

38. Mr. Pinto had raised the question of the distinction between treatment legally accorded and benefits actually extended.[13] On that point he would draw attention to the passage quoted in his second report from the judgement of the International Court of Justice in the *Case concerning the rights of nationals of the United States in Morocco*.[14] The material question was whether the third State, or favoured State, was entitled to some advantage. The fact that, for some reason or other, it might not be in a position to avail itself of that advantage was irrelevant. Thus, the beneficiary State could invoke the most-favoured-nation clause in respect of an import duty exemption granted to the favoured State and the granting State could not object that, in fact, no goods at all of the category concerned had been imported from the favoured State, so that no actual benefit had been received by it.

39. The words "international relations" in article 3, paragraph 1, had been criticized by Mr. Ushakov.[15] A better expression would certainly have to be found, since it was true that most-favoured-nation treatment applied to matters, such as the treatment of aliens, which went beyond the scope of "international relations".

40. In the same passage, the word "determined", which appeared before the words "persons or things", meant "defined by the treaty". The expression "persons or things" was not sufficiently broad and should be supplemented by a reference to actions or acts.

41. With regard to paragraph 2 of article 3, Mr. Elias had pointed out that no supporting comment had been appended. That omission would be remedied by drawing on the material in paragraph 27 of his 1968 working paper,[16] which stated that "The right of the beneficiary

[9] *Ibid.*, para. 33.

[10] See previous meeting, para. 14.

[11] 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.

[12] See previous meeting, para. 50.

[13] See 1214th meeting, para. 67.

[14] See *Yearbook of the International Law Commission, 1970*, vol. II, p. 207, document A/CN.4/228 and Add.1, para. 45.

[15] See previous meeting, para. 17.

[16] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 169.

to a most-favoured-nation treatment extends to all favours granted by the conceding State to a third State independently of the fact whether the favour granted originated in a treaty, in a mere practice of reciprocity or in the operation of the internal law of the promiser." The views of a number of writers were cited in support of that statement, together with an extract from a 1936 study by the Economic Committee of the League of Nations.

42. In the same paragraph of article 3, the wording "paragraph 1 applies" and "autonomous legislative act" would have to be improved to take into account the valid points made during the discussion.

43. He did not favour Mr. Kearney's suggestion that the enumeration at the end of the paragraph should be replaced by a more general formulation.[17] He would prefer to retain the enumeration and supplement it with a general formula making it clear that the enumeration was not exhaustive.

44. Mr. USHAKOV said he wished to clarify two points. First, there was no denying that the most-favoured-nation clause could be included in multilateral treaties as well as in bilateral treaties, but the idea of multilateralism was not expressed by the words "one or more States". The text of article 2, paragraph 1, would be more correct and clearer if the words "a treaty provision" were replaced by the words "a bilateral or multilateral treaty provision".

45. Secondly, the legal relationship created by the clause was always bilateral. It was always between two States only that it was established, not in a general way between several States at the same time. For the two States in question, all other States were third States, even if they were also beneficiaries under the clause.

46. Mr. KEARNEY said that the Special Rapporteur had explained that the word "accorded" in paragraph 1 of article 3 was intended to cover both treatment accorded at the time of the entry into force of the most-favoured-nation clause and treatment accorded subsequently. Since temporality had been a major problem in the *Anglo-Iranian Oil Company case (jurisdiction)*,[18] which was discussed in connexion with article 5 (A/CN.4/257/Add.1), it would seem reasonable to include in the draft a new provision, which could take the form of a second paragraph in article 5 or of an additional article 5 *bis*, to deal with the temporal nature of the operation of the clause. It would cover the questions of commencement and termination of the clause and of developments during its operation.

47. Sir Francis VALLAT said that, according to article 1, sub-paragraph (*f*), "third State" meant a State "not a party to the treaty in question". The result of reading that definition into paragraphs 1 and 2 of article 3 was that the operation of article 3 was limited to States not a party to the treaty in question. He wondered whether that was really the result intended.

48. Mr. BARTOŠ said that one of the main difficulties to which the most-favoured-nation clause could give rise was that of its territorial scope. It might happen that the clause was restricted to only a part of the territory of the beneficiary State. The question then arose whether third States could claim the benefits of the clause for part of their territory or for the whole of it. It was also necessary to take account of the case in which part of the territory of a State became part of another State, as the Commission had already done in its work on the law of treaties and succession in respect of treaties. Nothing was said about those questions in the draft articles and that was a gap which should be filled by adding a reference to them, either in the commentary or in the Commission's report, so that the General Assembly would know that the Commission had not neglected that aspect of the matter.

49. The CHAIRMAN, speaking as a member of the Commission, said that he fully agreed with the remarks of Mr. Ushakov and Sir Francis Vallat.

50. With regard to article 2, paragraph 1, while it was true that most-favoured-nation treatment could have a multilateral origin, the legal ties to which it gave rise were bilateral.

51. It was also clear that the provisions of article 1, sub-paragraph (*f*), were valid only for bilateral treaties. In the case of multilateral treaties, there was clearly a contradiction between the provisions of that sub-paragraph and those of article 3, paragraph 1.

52. Mr. USTOR (Special Rapporteur), replying to Mr. Ushakov's remarks, sait it would be made clear in the commentary that the provisions of article 1, sub-paragraph (*a*), on the meaning of the word "treaty" were intended to cover both multilateral and bilateral treaties. It was true that the working of the clause was always bilateral, but there were multilateral treaties such as the General Agreement on Tariffs and Trade in which all the parties agreed to grant most-favoured-nation treatment to each other.

53. It was his intention in due course to propose a new article to deal with the point just raised by Mr. Kearney.

54. The comment by Sir Francis Vallat was perfectly valid; it was precisely for that reason that he had himself suggested deleting sub-paragraph (*f*) from article 1 and replacing it by a provision on the use of the term "favoured State", which would replace the term "third State" in the draft articles.

55. He thanked Mr. Bartoš for drawing attention to the problem of territorial scope, which arose sometimes as a result of State succession. It had at one time been suggested that the matter should be dealt with in the draft on succession of States in respect of treaties, but no provision on it had appeared in the draft adopted by the Commission at the previous session. He would therefore consider the possibility of drafting a suitable provision at a later stage.

56. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer articles 2 and 3 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[19]

[17] See 1214th meeting, para. 39.

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

[19] For resumption of the discussion see 1238th meeting, paras. 16 and 21.

ARTICLE 4

57. *Article 4*

Legal basis of most-favoured-nation treatment

A State may claim most-favoured-nation treatment from another State solely on the ground of a most-favoured-nation clause in force between them.

58. The CHAIRMAN invited the Special Rapporteur to introduce article 4 of his draft (A/CN.4/257 and Add.1).

59. Mr. USTOR (Special Rapporteur) said that article 4 embodied a valid rule of international law and qualified the right defined in article 2. The word "solely" meant that the right to such treatment depended on a pledge by the granting State, normally contained in a written agreement between the two parties, but it did not exclude most-favoured-nation treatment promised in other forms of agreement. The article would therefore have to be supplemented by a provision on the lines of article 3 of the Vienna Convention on the Law of Treaties, to the effect that it did not affect the right to most-favoured-nation treatment conferred by promises given orally.

60. The effect of the words "in force", which were not used in article 2 or 3, could perhaps be conveyed by more felicitous drafting.

61. Although no State should be entitled to claim most-favoured-nation treatment unless such treatment had been explicitly promised, all States had an equal right to non-discriminatory treatment. That raised the question whether most-favoured-nation treatment could be claimed, on the basis of the principle of non-discrimination between States, from a State which already accorded such treatment to other States. According to one writer, the denial of most-favoured-nation treatment by a country which accorded such treatment to other countries constituted an unfriendly act. However, that was not strictly speaking a legal issue.

62. Mr. YASSEEN said he supported the idea expressed in article 4, but had some doubts about the need for a provision of that kind. The idea was already expressed in article 2, containing the definition of the most-favoured-nation clause, which was considered to be a treaty provision under which a State was entitled to claim certain treatment.

63. In its present form, article 4 might hinder the formation of a customary rule. At present, there was no customary rule under which a State could claim most-favoured-nation treatment from another State, but it was possible that such a rule might one day be recognized in the name of inter-State solidarity, at the regional or even at the universal level.

64. The Commission should therefore be careful not to freeze international law as it stood at present by affirming that a State could claim most-favoured-nation treatment "solely on the ground of a most-favoured-nation clause", as provided in article 4. Article 2 was drafted in more neutral terms, which did not encroach on the domain of the formation of custom.

65. Mr. HAMBRO said that Mr. Yasseen had raised a valid point, but it was one which would apply to almost any rule of law the Commission might formulate. Such rules were intended for application in the existing legal situation. Article 4 ought not, of course, to preclude the possibility of future development of customary rules on non-discrimination between States, but since subsequent redrafting of the other articles might obviate the need for the present article 4, he preferred to reserve his position on that point.

66. Mr. BARTOŠ said that the most-favoured-nation clause had its origin in the law of treaties, but its development had been such that it was sometimes erected into a veritable institution.

67. He had already raised the question of imposed régimes[20] in connexion with article 3, paragraph 2 and had acknowledged that, as indicated in that provision, most-favoured-nation treatment could either be stipulated in an agreement, promised by an independent legislative act, or instituted by practice, the latter term being used in its widest sense, so as to cover imposed régimes.

68. Article 4 could not hinder the development of international law. The most-favoured-nation clause might indeed have an institutional character resulting from practice, whether that practice was based on custom or resulted from an institutional measure linking certain States at the regional or the world level. The latter tendency was particularly apparent in the Organization of African Unity, the General Agreement on Tariffs and Trade, and specialized agencies such as the World Health Organization and the Universal Postal Union. If it was established that the practice referred to in article 3, paragraph 2, included the practice of institutional régimes, article 4 could not hinder the development of international law.

69. Formerly, the most-favoured-nation clause had not taken the form of an institution or a régime, but had pertained to private international law, the treatment of aliens and Customs questions. With the development of international law, and in order to fight against discrimination, it had been made into a rule of much more general application. It had thus become an institutional clause for the States parties to the General Agreement on Tariffs and Trade and for those which claimed assistance under that Agreement.

70. It could be noted that international law was tending to substitute the idea of equal treatment of States for that of sovereign equality of States. That idea was still only in a crystallization stage, but article 4 could not impair the process in any way. Article 4 certainly had its place in the draft. Whereas article 3 defined most-favoured-nation treatment, article 4 specified that a State was entitled to claim such treatment.

71. Mr. KEARNEY said he supported the thesis of article 4. The manner in which it was expressed was acceptable, although it would be better if either the word "basis" or the word "ground" were used in both the title and the text.

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[20] See previous meeting, paras. 52-54.

72. He was inclined to share Mr. Hambro's reaction to the concern expressed by Mr. Yasseen about the possible inhibiting effect of article 4 on the future development of customary rules on non-discrimination between States. Apprehensions expressed about possible similar adverse effects of the Commission's attempts to draft international instruments had proved unfounded.

73. Mr. YASSEEN said he was well aware that the Commission's task was to codify existing rules of international law. It could in no case hinder the development of the international legal order or, in particular, the formation of a custom. But he thought the wording proposed for article 4 was too absolute and would have the effect of arresting the development of international law. It was clearly provided in article 2, paragraph 1, that most-favoured-nation treatment could be claimed on the basis of a treaty provision. But article 4 went further; it stipulated that a State might claim that treatment solely on the ground of a most-favoured-nation clause, and that gave the existing rule an absolute character which might hinder the development of a custom. Consequently, article 2 appeared to be sufficient and article 4 unnecessary.

74. Mr. USHAKOV said that article 4 stated a very simple rule. The legal consequences of a most-favoured-nation clause could not be invoked without any legal basis; consequently, the clause must be in force.

75. Mr. Yasseen's comments should be applied to article 2 rather than to article 4. Article 2 contained the expression "treaty provision", which implied the existence of a treaty, whereas the rule in article 4 was applicable whether the most-favoured-nation treatment resulted from a treaty or from a custom.

76. The purpose of article 4 was not only to draw attention to the legal foundation of most-favoured-nation treatment, but also to stress that it was always definitely based on relations between two States.

77. He therefore fully approved of the wording of article 4.

78. Mr. ELIAS said that article 4 would be acceptable if its relationship with article 3, paragraph 2, were clarified. The text should indicate that it was not intended to restrict the idea implicit in article 3, paragraph 2; he hoped the Special Rapporteur would explain its implications in his commentary. If article 4 were retained as it stood, the inclusion of the word "practice" in article 3, paragraph 2, might only be justified in the sense of article 31, paragraph 3 (*b*) of the Vienna Convention on the Law of Treaties concerning interpretation.[21] If it were understood in that way, it might be possible to accept article 4 as a basic provision laying down the rule that most-favoured-nation treatment could only be claimed on the basis of a treaty.

The meeting rose at 1 p.m.

[21] 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. 293.

1217th MEETING

Wednesday, 30 May 1973, at 10.15 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, 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.

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]

(continued)

ARTICLE 4 (Legal basis of most-favoured-nation treatment) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of article 4 in the Special Rapporteur's third report (A/CN.4/257 and Add.1).

2. Mr. PINTO said that article 4 seemed to him to be closely related to article 2, paragraph 1; he suggested that the Special Rapporteur might consider the possibility of revising article 2 in the light of article 4 and of article 3, paragraph 2.

3. He would propose, for example, that in article 2, paragraph 1, the words "a treaty provision whereby an obligation is undertaken" be replaced by the words "a specific undertaking". He thought the addition of the word "specific", in particular, would be helpful.

4. With regard to the statement in article 3, paragraph 2, that paragraph 1 of that article should apply "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", he wondered whether there could be such things as unwritten clauses, except possibly a *clausula rebus sic stantibus*.

5. In article 4, some difficulty might be caused by the words "in force between them", though he saw no harm in retaining those words.

6. The CHAIRMAN, speaking as a member of the Commission, said he agreed with the principle underlying article 4, and with the Special Rapporteur's formulation of it; from a technical point of view he considered the article absolutely necessary.

7. Of course, it might be possible to incorporate the substance of article 4 in article 2, but he himself considered it desirable to retain it as a separate article, since that made the basic principle clearer and more emphatic.

8. The question had been raised whether article 4 was really necessary at all, and fears had been expressed that it might in the future prove an obstacle to the progressive development of customary law. He thought that difficulty could be overcome with the help of the explanations