

Document:-  
**A/CN.4/SR.1217**

**Summary record of the 1217th meeting**

Topic:  
**Most-favoured-nation clause**

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

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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.<sup>21</sup> 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.

## 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

<sup>21</sup> 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.

given by the Special Rapporteur, and possibly by including a saving clause, as in the Vienna Convention on the Law of Treaties.<sup>1</sup>

9. There was an increasing tendency to admit exceptions in the application of the most-favoured-nation clause, as had been done with respect to generalized preferences in article I of the General Agreement on Tariffs and Trade.<sup>2</sup> He believed that most-favoured-nation treatment was an exception to the general principle of the sovereign equality of States and that it could only be claimed on the basis of a written text.

10. Sir Francis VALLAT said that the few comments he wished to make on article 4 related to its presentation rather than to its substance. In the strict context of the article, he agreed with its principle and wording; but he found in it, and in the presentation generally, a tendency to lay down what looked like absolute rules of international law, though the situation was saved, from the technical point of view, by the very careful drafting of the articles.

11. Article 4 spoke of "a most-favoured-nation clause", and that went back to the definition in article 2, paragraph 1: "most-favoured-nation clause means a treaty provision, etc.". There, the word "treaty" was absolutely vital and went back to the definition in article 1 (a), which referred to "an international agreement concluded between States", so that the system was limited to States parties to certain particular treaties. The self-contained character of the early articles of the Special Rapporteur's draft was not, however, as clear as that of the introductory articles of the Vienna Convention on the Law of Treaties.

12. As a matter of general presentation, he would like to see something included in the early part of the articles, perhaps as an introduction, which would clarify the position and soften the apparently absolute way in which the articles were stated.

13. Mr. MARTÍNEZ MORENO said he was in complete agreement with article 4 as drafted by the Special Rapporteur. However, the article might give rise to some opposition on the part of third States which had not signed a most-favoured-nation clause with the granting State, but to which that State had traditionally granted certain "historic" preferential rights, such as fishing rights.

14. Mr. SETTE CÂMARA said he did not think there could be any quarrel in the Commission about the content of article 4, although it might be questioned whether it was altogether necessary. Some speakers had pointed out that the wording of article 2 sufficed to make it clear that no State could claim most-favoured-nation treatment unless there was a pledge to grant it contained in a treaty provision, namely, the most-favoured-nation clause.

15. He himself submitted that the point of article 4 was also covered by article 5 (A/CN.4/257/Add.1). In fact, the titles of the two articles already showed some degree

of overlapping, since the "legal basis of most-favoured-nation treatment" and the "source of the right of the beneficiary State" were two bases of the same kind. Indeed, who, in any event, could claim most-favoured-treatment but the beneficiary State? Certainly not the granting State or the so-called "third State".

16. While agreeing fully with Sir Francis Vallat's acute observations that the use of the expression "third State", as defined in article 1, sub-paragraph (f), was incompatible with the inclusion of the most-favoured-nation clause in multilateral conventions, he had some misgivings about the Special Rapporteur's suggestion that it be replaced by the term "favoured State".

17. In practice, the State which would normally claim most-favoured-nation treatment could be no other than the beneficiary State. Consequently, he thought that article 4 could be deleted without changing the spirit of the Special Rapporteur's draft. If it were considered necessary to emphasize the thesis underlying the article, the word "solely" could be added in article 5 after the word "arises".

18. It did not escape him that article 5 was intended to deal with problems of time and was based on the judgement of the International Court of Justice in the *Anglo-Iranian Oil Company case (jurisdiction)*.<sup>3</sup> In practical terms, however, the field of the two articles was the same; the Special Rapporteur himself recognized in his commentary to article 4 that there was no evidence of any customary international law whereby most-favoured-nation treatment might have some foundation other than the treaty clause. And in the treaty context, which implied a relationship between two States, as Mr. Ushakov had rightly emphasized, the only State which could claim most-favoured-nation treatment was the beneficiary State.

19. He agreed with Mr. Yasseen that there was no advantage whatsoever in freezing the possible progressive development of international law by including in the draft a rigid statement, which, as the Special Rapporteur recognized, was a point of principle—the defence of a thesis. As Mr. Kearney had said, the Commission's major task was codification, but he thought Mr. Yasseen had made it very clear that he was not pleading against codification. If he had understood him correctly, Mr. Yasseen's misgivings concerned only the desirability of an article which would close the door to the development of customary international law in an area in which there had already been some dispute in the Economic Committee of the League of Nations.

20. Mr. BEDJAOUÏ said he thought article 4 should be read in conjunction with articles 2 and 3. Those provisions had the merit of stating two conditions failing which a State could not claim most-favoured-nation treatment. The first condition was stated in article 3, paragraph 2: a favoured third State must have obtained certain treatment from the granting State. The second condition was in article 4: a State claiming most-favoured-nation treatment must have concluded with the granting

<sup>1</sup> 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 3.

<sup>2</sup> United Nations, *Treaty Series*, vol. 55, p. 196.

<sup>3</sup> *I.C.J. Reports 1952*, p. 93.

State an agreement containing the most-favoured-nation clause.

21. At the previous meeting Mr. Yasseen had said that article 4 would have the effect of freezing international law and hindering the formation of a customary rule establishing the equality of States. He himself hesitated to support that argument, since, if a general customary rule of non-discrimination came into existence, it would affect not only the beneficiary State, but all third States concerned. It might therefore be asked whether the draft as a whole might not be liable to freeze international law.

22. Unlike Mr. Yasseen, who feared that article 4 might prevent the formation of a customary rule guaranteeing equal treatment to all States, which would be a maximum safeguard, he thought that article 4 was not drafted in sufficiently explicit terms to provide a minimum safeguard for a State which claimed most-favoured-nation treatment. Article 4 should include the idea of an obligation to accord most-favoured-nation treatment, as it appeared in article 2, paragraph 1. Drafting on those lines could dispel the doubts expressed by Mr. Yasseen.

23. Mr. TSURUOKA said he was in favour of retaining article 4, the purpose of which was to facilitate the application of the most-favoured-nation régime.

24. Generally speaking, Mr. Yasseen's fears were pertinent, because, although it was the Commission's duty to codify international law, it must take care not to hinder the development of customary law, which should operate naturally and in the interests of justice.

25. Nevertheless, as far as the specific question of the most-favoured-nation régime was concerned, it should be adapted to precise application, because the economic relations of States were passing through a crisis at the present time and it was essential to clarify a confused situation.

26. If the clause were to evolve in such a way that all countries were one day obliged to grant most-favoured-nation treatment, it would no longer come within the sphere of independent will, but within that of a mandatory régime. For that reason the inclusion of article 4 in the draft was justified.

27. Mr. USHAKOV said the Commission had to concern itself with general international law, and under article 38 of the Statute of the International Court of Justice, international custom was to be considered as "evidence of a general practice accepted as law". In the case of the most-favoured-nation clause, a general custom would be the negation of the very idea of that clause. In practice, however, commercial relations between States were passing through a crisis, and it could not be expected that a general custom would be formed which would have the effect of obliging States to grant most-favoured-nation treatment to all other States. Hence there was no need to consider the effects which article 4 might have on the formation of a general custom.

28. Mr. RAMANGASOAVINA said he thought the idea expressed in article 4 should be included in the draft, because it was essential to state the legal basis of the right of a State which claimed most-favoured-nation treatment. That idea was already expressed in article 2,

which stated that the most-favoured-nation clause was a "treaty provision" binding the granting State and the beneficiary State.

29. In article 3, paragraph 2, the Special Rapporteur had enumerated the different ways in which a granting State could bind itself to a third State, namely, by treaty, other agreement, autonomous legislative act or practice. In his opinion, the mention of practice among the means of becoming bound by the most-favoured-nation clause did not open the way for customs which might be established in inter-State relations. The Special Rapporteur had merely wished not to limit the possibilities.

30. The purpose of article 4 was to stress the need to invoke a most-favoured-nation clause and thus to restrict the rather wide scope of article 3. As had already been pointed out, articles 4 and 5 contained restrictions on the preceding provisions. He therefore believed that article 4 was justified.

31. Mr. YASSEEN, referring to his remarks of the previous day, said that Mr. Sette Câmara had confirmed his doubts about the need for article 4, by showing that the idea expressed in it already appeared not only in article 2, but also in article 5.

32. Moreover, the terms in which article 4 was drafted were too categorical. To assert that a State could claim most-favoured-nation treatment solely on the ground of a most-favoured-nation clause was to require the presence of such a clause in a "treaty", as defined in article 1. Stated in that form, the rule could be harmful to the formation of a custom and exclude the possibility of an oral clause. Although the possibility of a general custom on the subject must be excluded, it was quite possible to envisage a local custom.

33. As to oral clauses, it could be imagined that States belonging to a group might be bound by a clause of that kind. In such a case, article 4 would be invoked against every State which could not rely on a clause in writing.

34. He hoped that the draft would be made sufficiently flexible not to mortgage the future, in case justifiable situations arose. The deletion of article 4 would not harm the draft in any way; on the contrary, it would make it more flexible.

35. If article 4 was to be retained, it should perhaps be drafted in positive form to read: "A State may claim most-favoured-nation treatment from another State on the ground of a most-favoured-nation clause". That formula would at least make it possible to overcome the difficulties to which practice might give rise.

36. Mr. AGO said he thought it was necessary to state the rule contained in article 4. If it was repeated in article 5, that article might possibly be deleted. Article 2 dealt with a different situation. A State might approach another State with a request for most-favoured-nation treatment, which might lead the two States to conclude a treaty containing a most-favoured-nation clause. The purpose of article 4 was to specify when a State could claim the right to most-favoured-nation treatment. Under the terms of that article there must be a clause in force between the granting State and the beneficiary State.

37. It remained to be seen whether the Commission wished to be more liberal and to include the existence of a regional custom or an oral agreement, but States must be protected against unjustified claims by States demanding most-favoured-nation treatment for purely political reasons and without any legal basis.

38. In the complex field of trade relations, it was impossible to imagine a single régime applicable to all States. Such a régime would impede progress without in any way guaranteeing the equality of States. Only special rules could be suitable for differential trade relations. Moreover, if a general custom establishing a uniform régime were one day to be accepted, it would not entail "most-favoured-nation" treatment, since there would no longer be any favoured nation. There was therefore no need to be concerned about the formation of a general custom in the matter. So long as States entertained differential trade relations, most-favoured-nation treatment would continue.

39. Article 4 was therefore necessary, but its drafting might be made more flexible to allay the fears of certain members of the Commission.

40. Mr. KEARNEY said it was impossible for the Commission to divorce itself from the general economic framework that was developing in the contemporary world. If it adopted the thesis that a general customary rule concerning the most-favoured-nation was in process of formation, that would make it extremely complicated to carry on the development of a system of preferences for developing countries, which was one of the aims of UNCTAD and was in effect in a number of regional arrangements. Such a system of preferences would obviously be an exception to the most-favoured-nation rule and would have to be worked out on the basis of treaty arrangements which balanced the demands between preferential treatment for selected States and most-favoured-nation treatment.

41. Mr. BILGE said he doubted whether it was necessary to retain article 4 as a separate provision. Members all seemed to accept the idea it expressed, but their opinions differed as to the nature of the provision. Did it supplement and explain the preceding provisions or did it state a condition for application of the clause? In the former case it could be attached to article 2, which defined the most-favoured-nation clause.

42. Furthermore the title did not reflect the substance of the article. The only new element the article contained was the statement that the clause must be "in force" between the granting State and the beneficiary State. That statement alone would not seem to justify an article, especially as the content of article 5 brought it very close to article 4. If the purpose of article 4 was simply to provide an explanation, that could be given in the commentary.

43. Mr. PINTO said he was in complete sympathy with the position taken by Mr. Yasseen; his own remarks had been without prejudice to the question of exceptions for developing countries, which would be considered at a later date. Some exceptions might, indeed, already have assumed the character of customary law, and he was

confident that the Commission would not be closing the door to that possibility by adopting article 4.

44. Mr. SETTE CÂMARA, referring to the comments of Mr. Ushakov and Mr. Tsuruoka, said he did not think there was much incompatibility between the idea of a general custom with respect to the application of most-favoured-nation treatment and the idea of a general custom of international law. The practice of the last decade had shown that a very important international instrument, such as the General Agreement on Tariffs and Trade, which was based on the application of the most-favoured-nation clause, as well as on the principle of reciprocity, could be expressed not only in terms of general custom, but also in terms of treaty law. That was certainly one proof that it was possible to aim at generalization of the most-favoured-nation clause.

45. The point made by Mr. Yasseen was that for certain matters, such as tariffs, Customs and trade, some custom might develop in the future and the Commission should not close the door to that possibility. He himself, however, thought that the problem could be fully covered by article 5—a very important article which dealt with concrete problems of immediate practical relevance.

46. The CHAIRMAN, speaking as a member of the Commission, said that the exception did not consist in granting most-favoured-nation treatment to all developing countries, but rather in the fact that developing countries themselves were not obliged to grant most-favoured-nation treatment to other countries. The question of exceptions, however, was one which the Commission would discuss at a later stage.

47. Mr. USHAKOV said it would be necessary to specify, later on, the exceptions made in favour of developing countries. There was no customary or treaty rule laying down that all developing countries were entitled to most-favoured-nation treatment. There were, however, exceptions, which the Special Rapporteur had mentioned. Nevertheless, if a developed State gave exceptional preferences to a developing country, other States must not believe that it was under an obligation to grant the same preferences to them.

48. Mr. RAMANGASOAVINA said that all the members of the Commission supported the idea expressed in article 4, but some of them thought the article merely limited the scope of article 3. He therefore proposed the addition of the words "contained in a treaty, other agreement, autonomous legislative act or practice", taken from article 3, paragraph 2.

49. Mr. MARTÍNEZ MORENO said that the problem of the exceptions to the most-favoured-nation clause should have its proper place in the draft; he could think of at least two cases that should be mentioned. The first was that of certain exceptional preferences or advantages extended by a developed country to a developing country with which it had special ties; those ties often resulted from the developed country's former position as the metropolitan power. It was clear that another developed country could not invoke the most-favoured-nation clause to claim similar privileges. The second was that of the advantages granted to each other by the member

States of an economic union or common market such as the European Economic Community and the Central American Common Market. It was obvious that those member States would not extend the same advantages to an outside State, even if it were in a position to invoke a most-favoured-nation clause.

50. He hoped the Special Rapporteur would later submit an article dealing with such exceptions, so as to take into account the important contemporary problem of the developing countries. Without such an article, the draft was unlikely to prove generally acceptable.

51. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 4.

52. Mr. USTOR (Special Rapporteur) said that much of the discussion had centred on the question whether article 4 should be retained.

53. Some speakers had thought that its contents clearly followed from the provisions of articles 2 and 3. It was true that, from a purely legal point of view, article 4 was not essential. Nevertheless, the discussion had shown that it was by no means superfluous and that it was worth stating expressly that most-favoured-nation treatment could only be claimed on the basis of a most-favoured-nation clause contained in a treaty. He agreed, however, that the wording of the article should be carefully reviewed by the Drafting Committee in order to ensure that it stated the intended meaning clearly.

54. He accepted Sir Francis Vallat's suggestion that, bearing in mind the fact that the provisions of article 1, sub-paragraph (a) had been taken from the Vienna Convention on the Law of Treaties, a new article should be included on the lines of article 3 of that Convention. The new article would specify that the exclusion from the scope of the draft of international agreements other than those coming within the definition in article 1 sub-paragraph (a) did not affect the legal force of such agreements or the clauses in them. He would submit a draft of the article to the Drafting Committee.

55. Several speakers had dealt with the question of the future of most-favoured-nation treatment and Mr. Ushakov had pointed out that, if such treatment were ever to become general, it would no longer deserve its name, since it would apply in a uniform manner to all States.

56. In the field of international trade, there was the General Agreement on Tariffs and Trade (GATT) whereby the eighty States parties granted each other reciprocal most-favoured-nation treatment. There were at present in the international community some sixty States which were not parties to that Agreement, and they included the bulk of the developing countries, which were unable to enter into an undertaking to grant most-favoured-nation treatment to all the contracting parties.

57. Recently, however, a huge exception to most-favoured-nation treatment had been introduced into that system, when GATT had adopted the generalized system of preferences in favour of the developing countries. It was therefore possible that in the not too distant future the membership of GATT might become nearly universal. Nevertheless, the granting of most-favoured-nation treatment would still be based on the provisions of the General Agreement, not on any custom. It would certainly

be a very long time before a custom would emerge, so that the treatment could be said to apply independently of the operation of the Agreement. It was difficult to visualize a process similar to that which had led to the acceptance of the laws of war embodied in the Hague Conventions as the expression of customary rules of international law.

58. In any case, the developments which were taking place in GATT related only to international trade and the Commission was called upon to study the most-favoured-nation clause in all its applications. The clause was used in such matters as the treatment of aliens, the abolition of visas and co-operation in judicial matters, where nothing resembling a custom was ever likely to develop. Accordingly, the framing of the rule in article 4 would not hamper in any way the development of customary international law.

59. In reply to a point raised by Mr. Elias,<sup>4</sup> he wished to make it clear that there was no connexion between the provisions of article 4 and those of article 3, paragraph 2. The latter concerned the manner in which the favourable treatment was accorded to the third or favoured State by the granting State: that treatment could be extended by a treaty or agreement, but it could also be extended unilaterally, through municipal legislation or by mere practice. Article 4 stated that the beneficiary State could not claim the same treatment unless it was in a position to invoke an express treaty provision containing the most-favoured-nation clause.

60. He suggested that article 4 be referred to the Drafting Committee, on the understanding that the Committee would consider the possibility of merging it with article 5, for the reasons given by Mr. Sette Câmara.

61. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 4 to the Drafting Committee for consideration in the light of the discussion and on the understanding mentioned by the Special Rapporteur.

*It was so agreed.*<sup>5</sup>

#### ARTICLE 5

62.

##### *Article 5*

##### *The source of the right of the beneficiary State*

The right of the beneficiary State to claim the treatment accorded by the granting State to a third State under a treaty, other agreement, autonomous legislative act or practice arises from the most-favoured-nation clause: the treaty containing the clause creates the legal bond between the granting State and the beneficiary State.

63. The CHAIRMAN invited the Special Rapporteur to introduce article 5 in his third report (A/CN.4/257 and Add.1).

64. Mr. USTOR (Special Rapporteur) said he had made a few changes to the text given in his report. The word "advantages" had been replaced by the word "treatment" and the words "under a collateral treaty

<sup>4</sup> See previous meeting, para. 78.

<sup>5</sup> For resumption of the discussion see 1238th meeting, para. 30.

or by autonomous action” by the words “under a treaty, other agreement, autonomous legislative act or practice”.

65. It had been suggested during the discussion on the previous article that the contents of articles 4 and 5 were virtually the same. In fact, the two articles served different purposes. Article 4 set out the rule that most-favoured-nation treatment could not be claimed unless it was possible to invoke a most-favoured-nation clause in a treaty. Article 5 stated that, where such a clause existed, the source of the right of the beneficiary State was the treaty which contained that clause and not the “collateral” treaty binding the granting State and the third, or favoured, State. The two articles were thus intended to express two distinct ideas and there was obvious merit in keeping those two ideas separate.

66. The idea embodied in article 5 had ample support both in judicial opinion and in legal writings. It had been argued during the *Anglo-Iranian Oil Company case (jurisdiction)*, in 1952, that when a beneficiary State invoked the most-favoured-nation clause to request the benefit of a treaty between the granting State and another—favoured—State, the right of the beneficiary State arose from that “collateral” treaty. That view had also been expressed in the dissenting opinion of Judge Hackworth,<sup>6</sup> but not in the judgement of the Court.

67. The idea expressed in article 5 was borne out by the decision of the Vienna Conference on the Law of Treaties that the provisions of article 36 (Treaties providing for rights for third States)<sup>7</sup> did not detract from the operation of the most-favoured-nation clause. Paragraph 1 of that article stated that “A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right to the third State or to a group of States to which it belongs. . .”.

68. The second session of the Vienna Conference had had before it a draft article submitted by the Drafting Committee in terms identical with those which now appeared in article 36 of the Vienna Convention on the Law of Treaties. The fear had then been expressed that the provisions of the article might be invoked to impair the operation of the most-favoured-nation clause since, when a beneficiary State invoked that clause, it could not be said that the parties to the collateral treaty had intended to accord a right to the beneficiary State.

69. An amendment had accordingly been proposed, to insert in the article an additional paragraph stating that “The provisions of paragraph 1 shall not affect the rights of States which enjoy most-favoured-nation treatment”.<sup>8</sup> The discussion on that amendment showed that representatives had been unanimous in recognizing that the provisions of the article did not affect the interests of States under the most-favoured-nation system and the amendment had been withdrawn.<sup>9</sup> Article 36 of the

Vienna Convention on the Law of Treaties had then been adopted without change on the clear understanding that paragraph 1 did not affect the interests of States under the most-favoured-nation system. The Conference had thus recognized that a beneficiary State’s claim to most-favoured-nation treatment was based, not on the collateral treaty, but on the treaty containing the most-favoured-nation clause.

70. That was the position where the treatment was accorded by the granting State under a treaty. The position would, of course, be even clearer where the treatment was accorded by the granting State to a third State by autonomous legislative action or mere practice; there could then be no question but that the right of the beneficiary State had its source in the treaty containing the most-favoured-nation clause.

71. Mr. TAMMES said that although, as the Special Rapporteur had pointed out, articles 4 and 5 were different in purpose, they both dealt with the source of the obligation to accord most-favoured-nation treatment.

72. The language used in the two articles was different, however. The title of article 5 referred to the “source” of the right of the beneficiary State and the text stated that the clause “creates the legal bond” between that State and the granting State. In article 4, the corresponding terms were “legal basis” in the title and “ground” in the text.

73. The commentaries to those articles and the earlier reports of the Special Rapporteur showed that article 4 dealt with the material nature of the source, whereas article 5 was intended to emphasize the temporal aspect—the time at which the rights and obligations relating to most-favoured-nation treatment came into existence.

74. That difference of function between the two articles was not entirely conveyed to a reader who had not studied the Special Rapporteur’s commentaries and particularly the judgement in the *Anglo-Iranian Oil Company case (jurisdiction)*. Article 5 should say something more than that the clause created the legal bond between the granting State and the beneficiary State. The text should make it clear that it dealt with temporal matters, such as termination and succession.

75. There was a choice between two possibilities, both of them logically and legally admissible. The legal bond could be taken as coming into existence either at the time of entry into force of the clause or at the date of the conditioning event. He was not quite convinced that the judgement in the *Anglo-Iranian Oil Company case (jurisdiction)* was decisive on that point. In that very special case, it would have been unreasonable to confront Iran, which had explicitly wished to exclude past treaties from the compulsory jurisdiction of the Court, with precisely such treaties, concluded in the distant past. Nevertheless, it seemed to him that the choice made by the Special Rapporteur in order to prevent future uncertainties was a sound one, though the provision could be expressed in clearer language.

76. He suggested that the Special Rapporteur should submit a note to the Commission setting out the problems with which he proposed to deal in future articles. That would save discussion on what appeared to be gaps in

<sup>6</sup> *I.C.J. Reports 1952*, pp. 137 *et seq.*

<sup>7</sup> 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. 294.

<sup>8</sup> *Ibid.*, document A/CONF.39/L.22, p. 268.

<sup>9</sup> See *Official Records of the United Nations Conference on the Law of Treaties, Second Session* (United Nations publication, Sales No. E.70.V.6), pp. 60-63.

the articles, but in fact were not. A document of that type had been submitted by Mr. Ago some years previously in connexion with State responsibility and had proved very useful to the Commission.

The meeting rose at 1 p.m.

## 1218th MEETING

Friday, 1 June 1973, at 10.20 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, 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 5 (The source of the right of the beneficiary State) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 5 in the Special Rapporteur's third report (A/CN.4/257 and Add.1).
2. Mr. YASSEEN said that article 5 stated a very important rule of the institution known as the most-favoured-nation clause. When the Commission had been studying the law of treaties and, more particularly, the rules relating to the principle of relativity treaties, he and some other members had opposed the idea of treating the most-favoured-nation clause as an exception to that principle.<sup>1</sup> He remained convinced that it was purely and simply the application of the provisions of the law of treaties.
3. There was no denying that the right of the beneficiary State had its source in the original treaty. The other event—agreement, law, practice, etc.—was merely an act fulfilling a condition, which created in favour of a third State, a certain potential status provided for in the original treaty.
4. Moreover, the principle remained the same whatever the nature of the act fulfilling the condition—internal practice, legislative or administrative rule of internal law, or treaty. The mechanics were the same. Of course, the most-favoured-nation clause did not specify the scope of the treatment to be granted; that would be determined by the future event, which might define the scope of the original obligation contained in the clause.

5. It was a potential obligation whose origin was not the act fulfilling the condition, but the clause containing it. That was a general question which was not confined to the most-favoured-nation clause alone. There were many cases of conditional obligations. It was not the fulfilment of the conditions which was the source of the obligation, but the provision establishing the condition. He therefore supported the rule stated in article 5 which, legally, was the only possible rule.

6. With regard to the drafting, the enumeration of acts fulfilling the condition was not exhaustive and should either be amplified to include administrative acts and regulations, or be replaced by a formula of wider scope, such as "by virtue of internal law". That comment also applied to article 3.

7. In view of those considerations he was in favour of retaining article 5 and proposed that it be referred to the Drafting Committee.

8. Mr. SETTE CÂMARA said that, despite the explanations given during the discussion by Mr. Ago and Mr. Tammes,<sup>2</sup> he still had doubts about the practical difference between the fields covered by articles 4 and 5 respectively.

9. Article 4 laid down that a State could claim most-favoured-nation treatment only on the ground of a most-favoured-nation clause. *A contrario sensu*, a beneficiary State could not invoke such treatment on the basis of some other agreement, a legislative act or a practice.

10. Article 5 provided that the beneficiary State's right to claim the treatment granted to the favoured State arose from the treaty containing the most-favoured-nation clause. There appeared to be no difference between that proposition and the one in article 4.

11. Mr. Tammes had referred to the temporal problem, which had arisen in the *Anglo-Iranian Oil Company case (jurisdiction)*,<sup>3</sup> and had suggested that article 5 was intended to deal in part with that problem. Once the rule had been laid down, however, that no other basis could be invoked for most-favoured-nation treatment than the most-favoured-nation clause, the temporal problem was excluded. There was only one possible source, which could only operate at one moment.

12. For those reasons, he wished to repeat his suggestion that the Drafting Committee should consider the possibility of merging articles 4 and 5. If the Commission decided to retain article 5 as a separate article, however, he would propose the deletion of the last phrase: "the treaty containing the clause creates the legal bond between the granting State and the beneficiary State". That phrase did not state a legal norm; it was in the nature of a justification of the norm contained in the previous phrase and should therefore be transferred to the commentary.

13. Mr. AGO said that one of the difficulties pointed out by Mr. Sette Câmara arose from the fact that the titles of articles 4 and 5 were confusing, since they appeared to say the same thing in different ways, whereas they really dealt with two entirely different things.

<sup>1</sup> See *Yearbook of the International Law Commission, 1964*, vol. I, pp. 184-188.

<sup>2</sup> See previous meeting, paras. 36-39 and 71-76.

<sup>3</sup> *I.C.J. Reports 1952*, p. 93.