Document:-
A/CN.4/SR.976

Summary record of the 976th meeting

Topic:
Most-favoured-nation clause

Extract from the Yearbook of the International Law Commission:-
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78. For the time being he could not say whether any other problems should be examined though perhaps it would be advisable to consider what types of treaty the clause could apply to. A concrete example was provided by a treaty concluded between Switzerland and Italy on taxation questions. When Italy had signed the Peace Treaty, special treatment had been reserved for nationals of the signatory States, and Switzerland had then invoked the most-favoured-nation clause; but the Conciliation Commission had decided that the clause could not apply to the Peace Treaty.

79. It was perhaps rather too early to say what form the work should take (question 4). He was generally in favour of dealing with such matters in conventions, but it was possible that some other form would be more appropriate and the Special Rapporteur would certainly be able to give advice on that point.

80. With regard to question 6, it would be advisable for the Special Rapporteur to consult all the bodies that were familiar with the application of the clause.

81. Mr. ROSENNE said that the Special Rapporteur had produced an extremely useful working paper in which he had not taken a definite position, but had given a few hints as to what line he might wish to take. He (Mr. Rosenne) would also refrain from taking a position on the substance of the matter.

82. His answer to questions 1 and 2 of the questionnaire was that the clause should be analyzed as a legal institution; that would reveal the way in which it was applied. During earlier discussions on the subject, attention had been drawn to the fact that the clause was applied in widely different circumstances. The Special Rapporteur should not confine himself to its application to international trade. In fact, he fully agreed with the last sentence in paragraph 16 of the working paper.

83. His answer to question 3 was in the affirmative, but some thought should also be given to what was being done on the subject, at least by other United Nations bodies or specialized agencies. He had been surprised that the Special Rapporteur had not mentioned GATT in that connexion.

84. His answer to question 4 was the same as that of Mr. Ago.

85. Question 5 dealt with a matter that should be left to the Special Rapporteur's discretion.

86. Question 6 he would answer in the affirmative, with the proviso that the Commission should take care not to come into conflict with other organizations that might have special responsibilities in the field. It was unnecessary for the Commission to give the Special Rapporteur formal instructions as to what contacts should be made with scientific organizations. A few years previously the Commission had decided to exchange papers with the International Law Association and the Institute of International Law.

87. The CHAIRMAN,* speaking as a member of the Commission, said that his answer to question 1 was in the affirmative. Trade questions were the most important in connexion with the most-favoured-nation clause.

* Mr. Castrén.

88. His answer to question 2 was that the study of the clause should be confined to the legal aspects, with the reservation set out in the working paper, namely, without departing from the context of realities.

89. As to question 3, the Special Rapporteur's report should be based on the outline set out in the working paper.

90. It was too soon to give an answer to question 4. Question 5 must be answered in the affirmative, except that diplomatic protection was a separate question, with which it would be better not to deal—at least not in detail.

91. His answer to question 6 was that the Special Rapporteur should consult interested agencies; it could be left to him to decide which were the most appropriate.

The meeting rose at 6 p.m.

976th MEETING

Tuesday, 16 July 1968, at 10 a.m.

Chairman: Mr. José María RUDA

Present: Mr. Ago, Mr. Albónico, Mr. Amado, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Ramangasoavina, Mr. Rosenne, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Most-favoured-nation clause

(A/CN.4/L.127)

[Item 3 of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue its consideration of item 3 of the agenda.

2. Mr. TAMMES said that the Special Rapporteur's valuable working paper (A/CN.4/L.127) on what was a comparatively unexplored subject showed that it had a great many facets. He supported the Special Rapporteur's approach of dealing with the topic essentially from the standpoint of its legal and formal aspects, and also his suggestion that the problems of the most-favoured-nation clause should be dealt with primarily from the point of view of its role in international trade.

3. The concluding paragraphs of the working paper rightly stressed the basic ideas in the matter; the section on the application of the clause to individuals was of particular importance. The Special Rapporteur correctly pointed out that the object of most-favoured-nation treatment was "not a State but its nationals, inhabitants, juristic persons and groups of individuals", who were in the final analysis the beneficiaries of the clause.

4. In the section dealing with customary and conventional exceptions to the operation of the clause, and

more especially the exception made in the interests of developing countries, particularly significant was General Principle Eight of the first session of UNCTAD,[1] cited by the Special Rapporteur in footnote 34, which read: "New preferential concessions, both tariff and non-tariff, should be made to developing countries as a whole and such preferences should not be extended to developed countries. Developing countries need not extend to developed countries preferential treatment in operation amongst them".

5. An UNCTAD secretariat report on preferences had elaborated on that principle in the following terms: "The traditional most-favoured-nation principle is designed to establish equality of treatment ... but it ... does not take account of the fact that there are in the world inequalities in economic structure and levels of development; to treat equally countries that are economically unequal constitutes equality of treatment only from a formal point of view but amounts actually to inequality of treatment".[2]

6. That conclusion was reminiscent of the Aristotelian definition of equality as requiring that the unequal should be treated unequally: "there will be the same equality between the shares as between the persons, since the ratio between the shares will be equal to the ratio between the persons; for if the persons are not equal, they will not have equal shares; it is when equals possess or are allotted unequal shares, or persons not equal equal shares, that quarrels and complaints arise".[3]

7. Mr. KEARNEY said that the Special Rapporteur's working paper constituted an excellent summary of the problems involved in the topic of the most-favoured-nation clause in the law of treaties.

8. Paragraph 10 of the paper referred to the shift of the United States of America from the conditional to the unconditional type of most-favoured-nation clause. That departure from previous practice related to commercial relations and had not been accompanied by a similar shift with regard to consular relations.

9. He fully agreed with the statement in paragraph 18 that the most-favoured-nation system "does not and cannot affect the economic system of the States". That statement reflected a basic proposition which, even if it did not ultimately prove suitable for expression as a specific legal rule, should nevertheless constitute a principle underlying the whole draft.

10. The statement in paragraph 26 that "the clause begins to operate when the third State becomes entitled to claim a certain treatment whether or not it actually claims the treatment" required clarification; it should specifically cover rights of the third State existing at the time when the most-favoured-nation clause became effective.

11. The proposition in the next paragraph that "the operation of the clause extends also to preferential treatment granted by multilateral treaties" could not be universally accepted as an expression of the current legal position. As early as 1934, the Government of the United States had given expression, in connexion with an agreement for the non-application of the most-favoured-nation clause in respect of certain multilateral economic conventions opened for signature in the Pan-American Union, to the following view: "Certainly the Government of the United States, which has entered into numerous bilateral most-favoured-nation engagements for the purpose of protecting its trade from discrimination, does not wish to be obligated to extend the benefits of such multilateral trade or similar conventions as it may adhere to, unless the countries claiming such benefits are willing to assume corresponding obligations. Nor does it wish to claim such benefits in respect of multilateral conventions in which it does not participate. The most-favoured-nation clause was not designed for such purposes. It was developed for the purpose of preventing discrimination under exclusive bilateral treaties to which third countries cannot of their own motion become parties".[4] To the best of his knowledge, that statement still represented the United States position, and that of a great many other countries.

12. He noted the statement in the same paragraph that the right of the beneficiary to a most-favoured-nation treatment "is created by the treaty embodying the most-favoured-nation clause and not by the treaty between the conceding State and the third State, which is a *res inter alios acta* for the beneficiary". That statement did not reflect a generally accepted principle; in particular, the dissenting opinion of Judge Hackworth in the *Anglo-Iranian Oil Co. case* [5] set forth a substantial body of law in support of the opposite view. The point therefore required careful consideration.

13. In paragraph 28, listing the exceptions to the operation of the clause, the Special Rapporteur mentioned "customs unions". It was essential in that connexion to refer also to free-trade areas. Particularly relevant in that respect was article XXIV, paragraph 5, of the General Agreement on Tariffs and Trade,[6] which read: "Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area". Since free-trade areas were thus equated by GATT with customs unions, they should form an exception to the operation of the most-favoured-nation clause, in the same way as customs unions.

14. In item (v) of that list of exceptions, "other exceptions" should be expanded to cover specifically exceptions that were basically political, such as those arising from the existence of the Commonwealth and the French Union; those political exceptions were referred to in

[1] See *Proceedings of the United Nations Conference on Trade and Development*, vol. I, Final Act and Report (United Nations publication, Sales No.: 64.II.B.11), p. 20.

[2] See document TD/12/Supp.1, printed in *Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. III, *Problems and Policies of Trade in Manufactures and Semi-Manufactures* (United Nations Publication, Sales No.: E.68.II.D.16).

[3] See Aristotle, Nicomachean Ethics, V, iii, 6.

[4] Secretary of State Cordell Hull to President Roosevelt, 10 May 1935, MS Department of State, File 710.G, Commercial Agreement/108.

[5] See *I.C.J. Reports 1952*, pp. 136-141.

[6] See General Agreement on Tariffs and Trade, *Basic Instruments and Selected Documents*, vol. III (Sales No.: GATT/1958-5), p. 48.

annexes A-F of the General Agreement.[7] The same item should also refer to such economic exceptions as discriminatory retaliation, which was permitted by article XIX, paragraph 3 (*a*), and article XXIII, paragraph 2, of the General Agreement.[8]

15. In paragraph 29 the Special Rapporteur had given some examples of exceptions resulting from treaties. Another example was that of the 1934 Inter-American Agreement,[9] although it had only three parties.

16. His reply to question 1 of the questionnaire was that international trade should form the centre of the study of the topic. That question dealt with the field of application of the clause and the scope of the report; paragraph 14 of the working paper listed international trade and problems of transport as the first and second of six specific fields of application. In view, however, of such important developments as the use of containers, much more information would be required on the effects of the clause on matters of transport before the Commission could make a reasoned decision on whether to cover that aspect.

17. He doubted the advisability of dealing with the other four fields of application mentioned in the paper before more information was available. In particular, the matter of the privileges and immunities of consular and trade missions appeared to be dealt with reasonably well under existing arrangements. With regard to intellectual property, there was not enough information available on the problems created by the impact of the clause; as for the recognition and execution of foreign judgments and arbitral awards, he was not aware that there had been any substantial use of the clause in that area of the law.

18. His reply to question 2 was that although the clause had its economic, political and social aspects, any rules formulated would have to be based on legal principles. The Commission could naturally not embark on the consideration of such economic matters as those referred to in the passages quoted from UNCTAD documents to which Mr. Tammes had referred. Clearly, no body or conference was able to repeal economic laws.

19. With regard to question 3, he agreed that the Special Rapporteur's report should be based on the outline set out in the paper, though much additional information would be needed before any decision could be taken by the Commission as to the best kind of full report.

20. He also agreed with the approach suggested in question 4, that a group of articles should be prepared as a sequel to the draft articles on the law of treaties, the precise form of the work to be decided later. In view, however, of the specialized nature of the topic and of its relationship with such international agreements as the General Agreement on Tariffs and Trade, the draft should initially be couched in the form of articles, without prejudice to the final form which the work would take.

21. His reply to question 5 was that parts VIII - XIII of the working paper could provide an outline of the subjects which could be developed as the source of the draft articles. Of course, there were many ideas in those parts which needed to be studied before a decision could be reached that they should form the basis of draft articles. One example was the question, mentioned in paragraph 21, whether the collateral agreement ought to be in written form. Another was the question, mentioned in the next paragraph, whether it was possible to exclude the consideration of the application of the clause to individuals; in view of the effect of the clause on individuals, any approach which considered all problems from the angle of inter-State relations was bound to lead to wrong conclusions. Another example was the question of the nationality of companies. That certainly could not be excluded from a study of the clause, since it was a problem that arose constantly in connexion with the application of the clause.

22. The Special Rapporteur asked whether members wished to suggest other problems. He would suggest countervailing duties, which were intended to offset subsidization in the country of export, and anti-dumping duties, which were intended to offset certain price-cutting practices. Those duties, on the face of it, conflicted with the most-favoured-nation principle but they were considered as implicit exceptions under article VI of the General Agreement.

23. Another problem he would suggest was that of the application of the most-favoured-nation clause to flexible import fees, such as those imposed by the European Economic Community on a number of agricultural products, duties which in some cases varied according to the source of the imports.

24. Yet another was the problem of quotas. There was a division of opinion on the question whether quotas were a breach of the most-favoured-nation rule, but in fact, there were ways of applying most-favoured-nation treatment to the special problems created by quotas. Quotas were covered generally by article I of the General Agreement; article XIII provided more specific rules. Differing conditions in different exporting countries might almost require the allocation of quotas. United States courts had upheld the allocation of a tariff quota—duty reduction applicable to a limited quantity of a product—as consistent with the most-favoured-nation provisions of United States legislation enacted pursuant to international trade agreements.

25. Again, paragraph 31 of the working paper referred to problems of sub-classification for duty purposes. A further somewhat similar problem of abuse was the difference in the treatment of the contacts with a foreign country which gave rise to the most-favoured-nation rights and those which gave rise to the treatment accorded to a third country. One aspect of that problem was the more favourable treatment given to articles purchased in a country by tourists. Although the contact with the foreign country was somewhat different from that under the most-favoured-nation clause, most of the products to which those varying contacts applied would be the same,

[7] *Ibid.*, pp. 60-62.

[8] *Ibid.*, pp. 42 and 45.

[9] Agreement between the United States of America, the Economic Union of Belgium and Luxemburg, Colombia, etc., to refrain from invoking the obligations of the most-favoured-nation clause for the purpose of obtaining the advantages or benefits established by certain economic multilateral conventions. See League of Nations, *Treaty Series*, vol. 165, p. 10.

giving rise to a conflict with the most-favoured-nation clause.

26. Still another problem was whether a separate customs territory under the jurisdiction of a country should, for the purpose of applying the most-favoured-nation clause, be treated as if it were a third country. Article XXIV, paragraph 1, of the General Agreement on Tariffs and Trade embodied that concept, and there was some support for the proposition that it was implicit in other agreements containing most-favoured-nation clauses.

27. His answer to question 6 was that it was not only desirable but also necessary that the Special Rapporteur should consult such interested agencies as GATT, through the Secretariat. A great deal of technical information would be needed before the Commission could reach proper conclusions on the articles, let alone on the manner in which they should be framed. In fact, the enormous task which the Special Rapporteur would have to face in order to obtain the necessary material and digest it for submission to the Commission raised very forcibly the general question of the need for research assistants to help special rapporteurs in their work.

28. Mr. YASSEEN said he thought that the working paper prepared by the Special Rapporteur might provide a useful basis for a preliminary discussion.

29. With regard to the Special Rapporteur's terms of reference, he should not keep too strictly to the future convention on the law of treaties, which was not quite the same thing as the law of treaties.

30. Some questions had not been dealt with in the convention on the law of treaties, and if the Special Rapporteur were to limit his draft to treaties as defined in the convention, he would have to exclude oral agreements. But there were such agreements, and there was no reason why they should not be dealt with in the draft. The Commission had been on the point of reaching agreement on the question of the application of the most-favoured-nation clause to individuals, but in order to avoid discussing doctrinal problems, it had preferred not to include an article on it in the general draft on the law of treaties. The position with regard to the present topic was quite different, since the machinery for the application of the most-favoured-nation clause to individuals was an essential aspect of the study. The question whether an individual could demand rights or benefits direct or only through a political organization was one that should be clarified. If it was to be complete, a draft on the most-favoured-nation clause should include that question, which was a tangible reality. The machinery could be studied without touching on the doctrinal problems which divided the various schools of thought.

31. His reply to question 1 was that he saw no reason why the problems of the clause should be dealt with primarily from the viewpoint of its role in international trade. Admittedly, the clause was applied more frequently in international trade, but that was not sufficient reason for not studying it from all viewpoints.

32. His answer to question 2 was that the Commission's task was to study problems of international law, but those problems could not be divorced from the realities of international life. The exceptions quoted in paragraph 28 of the working paper included the interests of developing countries. But development was an economic notion and that exception was becoming increasingly frequent. Organizations, like UNCTAD, were studying that problem, including general and non-reciprocal preferences, so that it was an exception based on economic factors and on the work of certain international organizations.

33. His answer to question 3 was that the report to be submitted by the Special Rapporteur should be based on the outline set out in the working paper.

34. With regard to question 4, the report might contain a group of articles as a sequel to the draft articles on the law of treaties, but it would be advisable to wait until the work had progressed before taking a decision.

35. His answer to question 6 was that it was not only useful but necessary that the Special Rapporteur should consult interested agencies.

36. Mr. AMADO said he congratulated the Special Rapporteur on having brought out clearly the main problems of the most-favoured-nation clause. It was apparent from Mr. Kearney's statement, however, that he had not dealt with all of them. He himself had come to realize the capital importance which the United States attached to the question of the most-favoured-nation clause when he had attended the Conference of American States at Montevideo in 1933. The United States representative at that Conference, Mr. Cordell Hull, had emphasized his country's keen interest in the question, but it had not proved possible to settle it during the Conference because so many of the participants had considered the question of non-intervention more important at the time.

37. The most-favoured-nation clause was a legal phenomenon with economic implications, and he endorsed Mr. Yasseen's views concerning its application to individuals.

38. The Special Rapporteur's working paper illustrated the complexity of the problem of the most-favoured-nation clause. The draft dealing with the question should not be confined within the limits set by the draft convention on the law of treaties, but should take as its basis the law of treaties itself.

39. To deal briefly with the Special Rapporteur's questionnaire, his answer to question 1 was that international trade could not be excluded from the study of a subject which was essentially economic in scope, but it should be dealt with from every viewpoint. His answer to question 2 was that there was no need to confine the study of the clause to the legal aspects, since the draft would have to be complete in order to serve as a basis for the formulation of articles. His answer to question 3 was that the Special Rapporteur's report should be based on the very broad outline set out in the working paper. His answer to question 4 was that the possibility of formulating articles as a sequel to the draft articles on the law of treaties could not be considered until after a great many documents had been studied. His answer to question 5 was that the articles should contain rules whose basic ideas were indicated in parts VIII - XIII of the working paper, and to question 6 that the interested agencies should be consulted.

40. Sir Humphrey WALDOCK said that the Special Rapporteur's working paper set out clearly the problems before the Commission and was admirably suited for the purpose of obtaining its reaction to those problems.

41. As he understood it, the Special Rapporteur's decision to treat the topic initially as a sequel to the law of treaties did not mean that the draft would be prepared as a mere protocol to the law of treaties. The topic was a very special one and it was for that very reason that it had not been dealt with in the general law of treaties.

42. The Special Rapporteur's working paper and the penetrating remarks of Mr. Kearney showed the wisdom of giving independent treatment to the topic of the most-favoured-nation clause. The Special Rapporteur would no doubt work on the basis that the topic was essentially an autonomous subject, while assuming the completion of the codification of the general law of treaties for such relevance as it might have to his work.

43. To turn to the Special Rapporteur's questionnaire, he would begin by answering question 2 very definitely in the affirmative. Every effort should be made to clarify the clause as a legal institution and he was glad to note that such was precisely the Special Rapporteur's probable intention. It was the legal character of the clause and the legal conditions governing its application that should receive attention; the Commission should always avoid entering too far into fields that were outside its functions.

44. The interesting examples given by Mr. Kearney showed some of the pitfalls which the Commission would have to avoid. In addition, the Commission might find itself encountering difficulties arising from differences in the political and economic philosophies of States. Those differences might have an impact on the ideas underlying the application of the clause, but the Commission should focus its attention primarily on isolating the legal aspects of that application and resist the temptation to digress too far into an examination of the economic and political aspects of the clause.

45. He hoped the Special Rapporteur would regard any decisions taken at that stage on the scope of the study as in the nature of general guidelines. Personally, he shared the view of those who had said that it might not be possible to exclude the study of the application of the clause to individuals, as was proposed in paragraph 22 of the working paper. In the draft on the law of treaties, he had favoured the inclusion of a modest article on individuals but had dropped the idea when it became clear that it would not meet with the acceptance of a substantial minority. But in the case of the most-favoured-nation clause, which had large implications for individuals, it might be found that a broader view should be taken.

46. In view of his answer to question 2, his answer to question 1 was that the study could not be confined exclusively, or even primarily, to the role of the clause in international trade. No doubt the commentaries to the future draft articles would draw largely on trade questions, but the legal problems of the clause should receive general treatment in the draft articles themselves.

47. With regard to question 4, he would be inclined to leave it to the Special Rapporteur to decide whether the report should be cast in the form of a group of articles, although personally he felt that that form constituted a useful discipline.

48. The question of documentation, which was the basis of question 6, was crucial in a subject like the present one which was of such a specialized character. The Secretariat would have an important role to play in securing the valuable and not very well-known material relating to the most-favoured-nation clause which was to be found among the voluminous publications of such bodies as GATT and UNCTAD.

49. The topic was a delicate one which the Commission should approach with caution. The legal nature and operation of the most-favoured-nation clause were subjects still surrounded by uncertainty, and some of the problems involved, he had no doubt, were puzzling even to the legal advisers to foreign ministries. The Commission would therefore be doing very useful work in endeavouring to elucidate those problems.

50. Mr. USHAKOV said that the Special Rapporteur's working paper dealt with the main questions pertaining to the most-favoured-nation clause. Section X raised by implication an important question, that of the application of the clause to individuals. In his opinion, the problem of the clause was a question of public international law, not of private international law, since it concerned relations between States and their reciprocal rights and obligations. Individuals enjoyed special rights, privileges and advantages, but they could only assert them through States, because it was to States that the rights belonged. When a dispute arose concerning the right of an individual residing in a territory to which the most-favoured-nation clause applied, the individual could assert his rights only through the intermediary of the State of which he was a national. Relations of that type were always governed by public international law. On the other hand, the question of the nationality of juridical persons came under private international law.

51. His reply to question 1 was in the affirmative, but international trade should be interpreted in its broad sense as the economic sector of international relations.

52. As to question 2, the Commission should study the legal aspects and should base its work on international practice and established legal rules.

53. With regard to questions 3 and 4, he considered that the outline set out in the working paper provided a useful working basis and that the Special Rapporteur's task was to prepare a draft for the Commission, which would have to decide what form it should take, whether a separate convention or whether a sequel to the future Vienna convention on the law of treaties.

54. His reply to question 6 was that it was essential that the Special Rapporteur should consult interested agencies.

55. In connexion with question 5, he would suggest that the Special Rapporteur deal with a new problem. There was a tendency to confuse two entirely different principles: the principle of the most-favoured-nation clause and the principle of non-discrimination. The Special Rapporteur should therefore take up that question in his report and examine the relationship between the two principles. Perhaps it would be advisable to draft a separate article defining the field of application of the

most-favoured-nation clause and of the principle of non-discrimination.

56. Mr. BARTOŠ said that the problem of the most-favoured-nation clause arose not only in the law of treaties but also in customary régimes; it arose both in connexion with trade and in connexion with a great many other fields.

57. The clause had assumed considerable importance on several occasions, particularly in the time of the League of Nations. Even before that time, it had been frequently employed in America, under the influence of the United States, for the purpose of getting rid of the more favourable régimes granted to certain countries or of offering more advantageous conditions to countries capable of holding their own in international trade and consequently possessing a high economic and political potential.

58. The studies which had been made showed that the clause by no means ensured the same advantages to everyone. It was, broadly speaking, a legal clause based on the economic or political circumstances of the moment. That was why the Commission, while studying with particular attention the legal aspects of the clause, should not leave aside the economic and political conditions which explained its development, such as, for example, the protection of States or the protection of a particular market. At the present time those questions arose in connexion with the markets of Europe and Africa, and no one could claim that the most-favoured-nation clause was an instrument for the universal and general protection of all States. Great prudence was therefore needed in codifying the question.

59. To turn now to question 1, it would be difficult to confine a study of the most-favoured-nation clause to its role in international trade, unless the word trade were understood in a very broad sense as covering commercial operations, transport, communications and so on. ICAO and IMCO, in matters of aerial and maritime navigation respectively, required their members to guarantee most-favoured-nation treatment to all other members. It would therefore be preferable to speak of the role of the clause, not in international trade, but in international economic life in general. The Commission was not directly competent to deal with commercial law proper, which was the province of another Commission. It could, however, examine the most-favoured-nation clause, since that was, as Mr. Ushakov had said, a question of public international law which touched on the general law of treaties.

60. Since the Second World War, the clause had been included in many international or multilateral conventions, particularly in connexion with stateless persons and refugees. Stateless persons and refugees were now entitled to claim the protection of international law directly both from national courts and from international tribunals. Many conventions concluded under the auspices of the United Nations and of certain other international organizations contained a clause providing that organizations could ask for protection for such persons through arbitral tribunals and joint commissions. Thus the most-favoured-nation clause could apply directly to individuals. It was also to be found in the Paris Convention for the Protection of Industrial Property[10] and the Berne Convention for the Protection of Literary and Artistic Works.[11] His answer to question 2 therefore was that the Commission should study the question from its legal aspects and not merely from the viewpoint of its role in international trade, in the light of the factors illuminating the legal aspects.

61. His answer to questions 3 and 5 was that the Special Rapporteur should base his report not only on the outline set out in his working paper but also on a good many other factors.

62. His answer to question 4 was that the topic of the most-favoured-nation clause should be dealt with not in a group of articles of the future convention on the law of treaties but in a separate instrument.

63. His answer to question 6 was that the Commission should ask interested international agencies—in the first place those concerned with trade, transport, humanitarian questions, authors' rights or industrial protection but also other international agencies dealing with different aspects of international activity where the most-favoured-nation clause was applied—to supply the most detailed documentation possible.

64. A further question was whether the most-favoured-nation clause was unconditional, whether it was gratis. After the war, some countries had thought they could invoke the clause without offering any return, while others had insisted that there should always be compensation when it was applied.

65. Yet another question was whether, in cases where the most-favoured-nation clause was not unconditional, there was discrimination or non-reciprocity. That question arose particularly with diplomatic and consular conventions. It had been thought that there was no discrimination in cases where a State A did not grant to a State B certain rights which other States enjoyed, if State B itself did not accord the rights regularly granted by State A to all other States.

66. In his view, the Special Rapporteur should expand his report by studying all the areas where the clause could be applied, as well as the restrictions on its application; Mr. Ago, for instance, had mentioned the question whether the most-favoured-nation clause in the Peace Treaties was also applicable to third States.

67. Mr. TABIBI said that the Special Rapporteur's clear and concise report showed that he had already delved deeply into the heart of the problem, which was of great practical importance and affected the daily lives of millions of people. The most-favoured-nation clause was no longer confined to bilateral treaties but most often appeared in multilateral treaties. UNCTAD had set up a special committee to devise rules governing the most-favoured-nation clause and covering all the economic, trade, social and political aspects. It had also considered

[10] For latest text, see *Paris Convention for the Protection of Industrial Property* (as revised at Stockholm on July 14, 1967): Geneva, United International Bureaux for the Protection of Intellectual Property (BIRPI).

[11] For latest text, see *Berne Convention for the Protection of Literary and Artistic Works* (as revised at Stockholm on July 14, 1967): Geneva, United International Bureaux for the Protection of Intellectual Property (BIRPI).

the question how most-favoured-nation treatment could be accorded to land-locked countries and an article on the subject had been included in the Convention on Transit Trade of Land-Locked States.[12]

68. His answer to the Special Rapporteur's first two questions was in the affirmative, but, as well as studying the legal aspects of the problem, the Special Rapporteur should also touch upon the other aspects referred to in paragraph 16 of his working paper.

69. His answer to question 3 was also in the affirmative, but the Special Rapporteur would need a great deal more material on the experience of international organizations.

70. His answer to question 4 was that it was too early to decide whether the draft articles should form part of the convention on the law of treaties. The Special Rapporteur should be given a free hand in deciding what the articles should contain.

71. His answer to question 6 was that the Special Rapporteur should certainly examine the vast amount of material available in the specialized agencies, particularly in the economic field.

72. Mr. CASTAÑEDA said the Special Rapporteur was to be congratulated on the objectivity and impartiality he had shown in preparing his report.

73. With regard to question 1, the Commission should not concentrate exclusively on the role of the most-favoured-nation clause in international trade. Sound juridical work required that legal rules must be founded on as solid and broad a basis as possible. All aspects should therefore be considered.

74. His answer to question 2 was that, while it was obvious that the Commission did not have to study, for example, the role of the clause in the expansion of international trade, it ought to consider certain fundamental questions relating to the economic, political and other spheres. In paragraph 28 of his working paper, the Special Rapporteur had quoted as an exception to the operation of the clause the interests of developing countries, which was a political and economic consideration. In paragraph 18, he had brought out the interrelation of the clause with various legal principles closely related to political questions. Such aspects were not strictly legal, but they would nevertheless have to be taken into account.

75. His answer to question 3 was in the affirmative but he found it difficult to answer question 4. However, some members who had more experience of the subject had said that the most-favoured-nation clause possessed a certain autonomy and should not therefore be regarded as forming part of the law of treaties. He would support that view, though he considered it would be premature to reach a final decision in the matter.

76. In parts VIII to XIII of the working paper, the Special Rapporteur had referred to the basic features of the problem. Perhaps he might now draw a clearer distinction between the bilateral and multilateral aspects, with the emphasis on the latter. The question of integration should also be pursued further. The Special Rapporteur had been right to mention, in paragraph 29 of his working paper, the exceptions resulting from treaties, but it would be of interest to go more thoroughly into the role played by the clause in integration.

77. In answer to question 6, he endorsed the Special Rapporteur's proposal, but it should be understood in a wider sense, as Mr. Bartoš had just said, and should take into account the recommendations made in connexion with question 1.

The meeting rose at 1.5 p.m.

[12] See *Official Records of the Trade and Development Board, Second Session, Annexes*, agenda item 6, document TD/B/18.

977th MEETING

Wednesday, 17 July 1968, at 9.50 a.m.

Chairman: Mr. José María RUDA

Present: Mr. Ago, Mr. Albónico, Mr. Amado, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Ramangasoavina, Mr. Rosenne, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Review of the Commission's programme and methods of work

(A/CN.4/205)

[Item 4 of the agenda]

(resumed from the 974th meeting)

1. The CHAIRMAN invited the Commission to consider Mr. Ago's memorandum on the final stage of the codification of international law (A/CN.4/205).

2. Mr. AGO said that the first part of his memorandum (A/CN.4/205) contained observations on the three stages of the work of codifying international law, namely, the preparation of the draft convention by the Commission, the adoption of the text by a diplomatic conference, and the receipt of ratifications and accessions. It commented mainly on the drawbacks which resulted from States often taking so long to transmit their instruments of ratification or accession. The consequence was a situation of some uncertainty concerning the general international law that was in force, an uncertainty which might present serious dangers in the event, for instance, of a dispute arising between a State that had ratified the convention and a State that had not.

3. The second part of the report dealt with possible remedies for the situation. Ratification was the sovereign prerogative of States; they could not be compelled to ratify a convention or a treaty. Nevertheless, a remedy could probably be found in the rule applied by certain specialized agencies, such as the ILO, WHO and UNESCO, whereby States were required to submit conventions to their constitutional authorities within a given period