

Document:-  
**A/CN.4/L.238**

**Draft articles on the most-favoured-nation clause: texts adopted by the Drafting Committee -  
articles 6 [8], 6 bis [9], 6 ter [10], 7 [11], 7 bis [12], 6 ter/bis [13], 8 [14], 8 bis [15],  
13 [16], 14 [17], 15 [18], 16 [19], 6 quarter [20], and 0 [21] - reproduced in A/CN.4/SR.1352**

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

Extract from the Yearbook of the International Law Commission:-  
**1975, vol. I**

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(<http://www.un.org/law/ilc/index.htm>)*

49. Sir Francis VALLAT said that the two words had virtually the same meaning but, on reflection, he would prefer to see the word “attenuating” retained.

*Paragraph 43 was approved.*

*The introduction to chapter II, as amended, was approved.*

**Succession of States in respect of matters  
other than treaties**

(A/CN.4/282; A/CN.4/L.237)

[Item 2 of the agenda]

*(resumed from the 1330th meeting)*

**NEW ARTICLE PROPOSED BY THE SPECIAL RAPPORTEUR  
(A/CN.4/L.237)<sup>2</sup>**

50. The CHAIRMAN drew attention to the new article proposed by the Special Rapporteur, which read:

1. If part of a State's territory becomes part of the territory of another State, the passing of State property of the predecessor State to the successor State shall be settled by agreement between the predecessor and successor States.

2. In the absence of such agreement:

(a) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in the territory to which the succession of States relates shall pass to the successor State;

(c) movable State property other than that mentioned in sub-paragraph (b) shall pass to the successor State in an equitable proportion.

He invited members to comment on the article with a view to its being referred to the Drafting Committee as early as possible.

51. Mr. ELIAS said that, in view of the importance of the proposed new article, it was essential that it should be introduced by the Special Rapporteur, so that the Commission could hold an informed discussion.

52. Mr. USHAKOV said that, with regard to the topic of succession of States in respect of matters other than treaties, the Commission should first adopt the relevant chapter of its report. When it had done so, it could proceed to deal with the proposed new article.

53. Mr. KEARNEY said that the text of the proposed new article seemed inconsistent with the general approach adopted in preceding articles which had been referred to the Drafting Committee. In the new article a distinction was made between immovable and movable State property. A new classification was introduced with regard to succession of States to the two types of property, as well as a new type of qualification regarding two kinds of movable State property. That approach departed completely from the position taken by the Commission in

earlier articles, which dealt with the effects of a succession of States on all State property.

54. In view of the fundamental nature of those issues, it was necessary that they should be discussed in the presence of the Special Rapporteur. Only in that manner could the Commission reach a reasoned view on the proposal now before it.

55. Sir Francis VALLAT said that it was not possible for the Commission to do justice to the very important proposed new article in less than two full meetings, with the assistance of the Special Rapporteur. In view of the pressure of time, he felt that the only course open to the Commission was to do as it had done at the previous session with certain proposed articles that it had not been able to discuss, namely, to mention the proposal contained in document A/CN.4/L.237 in a foot-note, explaining that the Commission had not had time to deal with it.

56. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that it would not be right for such an important proposal to be referred to the Drafting Committee without a full discussion in the Commission itself. There was also a problem of administrative convenience: the Drafting Committee had at present to give first priority to the draft articles on treaties concluded between States and international organizations or between two or more international organizations.

57. Mr. HAMBRO said that, in view of the serious objections raised by Mr. Elias, Mr. Kearney, Sir Francis Vallat and the Chairman of the Drafting Committee, it was evident that the proposed new article could not be referred to the Drafting Committee. He agreed that the only course open to the Commission was to mention it in a foot-note.

58. Mr. USHAKOV said that it was essential that the Commission should adopt, in the presence of the Special Rapporteur, the chapter of its report dealing with the topic of the succession of States in respect of matters other than treaties. Should the time available at the present session so permit, the Commission could examine the proposal contained in document A/CN.4/L.237; in that case, the Commission should focus its attention on the general idea embodied in the proposal rather than on the wording.

The meeting rose at 12.45 p.m.

**1352nd MEETING**

*Thursday, 17 July 1975, at 10 a.m.*

*Chairman: Mr. Abdul Hakim TABIBI*

*Members present: Mr. Ago, Mr. Bilge, Mr. Castañeda, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.*

<sup>2</sup> See discussion on article 12 at the 1325th meeting, para. 6, and following meetings.

**Most-favoured-nation clause**

(A/CN.4/266,<sup>1</sup> A/CN.4/280,<sup>2</sup> and A/CN.4/286;  
A/CN.4/L.228/Rev.1 and A/CN.4/L.238)

[Item 3 of the agenda]

(resumed from the 1344th meeting)

**DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE****ARTICLE 6<sup>3</sup>**

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the articles proposed by the Drafting Committee (A/CN.4/L.238), starting with article 6, which read:

*Article 6 [8]**Unconditionality of most-favoured-nation clauses*

A most-favoured-nation clause in a treaty is unconditional unless that treaty otherwise provides or the parties otherwise agree.

2. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that, before introducing article 6, he wished to make some general comments on the present series of draft articles proposed by the Drafting Committee. In 1973 the Commission had adopted at first reading articles 1 to 7.<sup>4</sup> The articles now proposed for adoption should logically follow on from that numbering. For the present, however, they had been given the numbers originally assigned to them by the Special Rapporteur which had been used throughout the discussion in the Commission. The suggested renumbering of the articles, to bring them into line with the numbering of the articles adopted in 1973, was given in square brackets. In order to avoid confusion, he would refer to the articles by their original numbers.

3. In general, the order and arrangement of the articles had been left as proposed by the Special Rapporteur. In two cases, however, the Drafting Committee had rearranged the articles so as to bring related texts into proximity and to place the more general articles nearer the end. The new article 6 *ter/bis* had been placed immediately before article 8 and article 6 *quater* immediately after article 16.

4. Another general point should be mentioned concerning certain terms used throughout the draft articles. The Drafting Committee had decided to use the verb "extended" to indicate treatment given by a granting State to a third State, whether in law or in fact. The word "accord" had been reserved to indicate treatment given by a granting State on the basis of a treaty provision, such as the most-favoured-nation clause. That distinction had been adhered to consistently throughout the draft articles. In the other language versions, different verbs had been used to render the English terms "extended" and "accorded" respectively.

5. The Drafting Committee had been very conscious of the fact that the rules stated in the articles were in general intended to be residual rules and should be understood as

being always subject to the agreement of the parties concerned. One way of making that point clear was to include a proviso such as "unless the treaty otherwise provides or it is otherwise agreed" in the articles in question. That course had been adopted in article 13, where the proviso had been placed between square brackets. The commentary would indicate that it had been included because many members had considered that it was necessary in that particular case. The fact that it had been introduced in article 13 did not imply that a similar qualification was unnecessary in other contexts. The Special Rapporteur intended to give further consideration to the question whether a general provision on the matter should be included somewhere in the draft.

6. Article 6 had originally been entitled "presumption of unconditional character of the most-favoured-nation clause" but now bore the title "Unconditionality of most-favoured-nation clauses". The redraft now proposed represented an attempt to streamline the earlier text; it avoided the use of the phraseology "except when in appropriate cases most-favoured-nation treatment is accorded under the condition of material reciprocity"; it referred rather more simply to the unconditionality of the clause.

7. Mr. KEARNEY said the Special Rapporteur and the Drafting Committee were to be congratulated on the excellent manner in which they had reviewed the series of articles contained in document A/CN.4/L.238 so as to remove many of the doubts expressed by members during the discussion. He had no comments on article 6 and proposed that it be approved by the Commission.

8. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 6 in the form in which it had been submitted by the Drafting Committee.

*It was so agreed.*

**ARTICLE 6 bis<sup>5</sup>**

9. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 6 bis as proposed by the Drafting Committee, which read:

*Article 6 bis [9]**Effect of an unconditional most-favoured-nation clause*

If a most-favoured-nation clause is not made subject to conditions, the beneficiary State acquires the right to most-favoured-nation treatment without the obligation to accord material reciprocity to the granting State.

10. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that, in briefly introducing article 6 bis, he would also say a few words about article 6 *ter*. Those two articles were intended to underline the essential distinction between a most-favoured-nation clause that was subject to material reciprocity, the matter dealt with in article 6 *ter*, and a clause which was not subject to that requirement, the matter dealt with in article 6 bis. The latter type of clause could be subject to independent conditions that would not affect the application of article 6 bis to the most-favoured-nation clause.

<sup>1</sup> Yearbook . . . 1973, vol. II, pp. 97-116.

<sup>2</sup> Yearbook . . . 1974, vol. II, Part One, pp. 117-134.

<sup>3</sup> For previous discussion see 1330th meeting, para. 43.

<sup>4</sup> Yearbook . . . 1973, vol. II, pp. 213-221.

<sup>5</sup> For previous discussion see 1330th meeting, para. 43.

11. Paragraph 2 of the Special Rapporteur's original text of article 6 *bis*, as he had already pointed out in his introductory remarks, had been placed in a new article, article 6 *ter/bis*. The present text of article 6 *bis* was based on the first paragraph only of the original article.

12. Mr. TSURUOKA said that, although he had accepted the text of article 6 *bis* in the Drafting Committee, he still thought that the opening phrase of the article could be considerably simplified. A clause which was "not made subject to conditions" was simply an "unconditional clause". Since article 6 defined what was meant by an "unconditional clause" and since that expression already appeared in the title of article 6 *bis*, he would suggest, though he had no wish to press the point, that the same expression be introduced into the text of article 6 *bis*.

13. Mr. SETTE CÂMARA said the Drafting Committee had had remarkable success in improving and simplifying the earlier texts of the articles, but in the case of article 6 *bis* he was inclined to share Mr. Tsuruoka's views.

14. Mr. USHAKOV said that the amendment suggested by Mr. Tsuruoka would have the effect of turning article 6 *bis* into a purely descriptive provision void of all legal content.

15. Mr. TSURUOKA said that he withdrew his suggestion, although he did not accept the view expressed by Mr. Ushakov.

16. Mr. KEARNEY asked whether the Special Rapporteur was considering the possibility of submitting to the Commission at its next session a definition of "material reciprocity".

17. Mr. USTOR (Special Rapporteur) said that he had not yet reached a decision on that point. He had, however, included an explanation of material reciprocity in the commentary.

18. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 6 *bis* in the form in which it had been submitted by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 6 *ter*<sup>6</sup>

19. The Chairman invited the Special Rapporteur to introduce article 6 *ter* as proposed by the Drafting Committee, which read:

##### *Article 6 ter* [10]

##### *Effect of a most-favoured-nation clause conditional on material reciprocity*

If a most-favoured-nation clause is made subject to the condition of material reciprocity, the beneficiary State acquires the right to most-favoured-nation treatment only upon according material reciprocity to the granting State.

20. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that article 6 *ter* was the counterpart of article 6 *bis*. It corresponded to the first paragraph of the Special Rapporteur's original article 6 *ter*;

the second paragraph of that original text was covered by the new article 6 *ter/bis*.

21. The Drafting Committee had given some consideration to the question of a definition of the expression "material reciprocity", and it had been agreed that the Special Rapporteur should give further thought to the problem.

22. Mr. KEARNEY said that, in view of the remarks of the Chairman of the Drafting Committee regarding the use of the terms "extended" and "accorded" throughout the draft articles, he was not certain that it was appropriate to use, in the concluding phrase of article 6 *ter*, the form of words "according material reciprocity to the granting State". The contractual obligation would already exist in that case and the question which arose was whether in fact material reciprocity was going to be extended.

23. Mr. USTOR (Special Rapporteur) said that the verb "to accord" had been used in the draft articles with reference to the grant to the beneficiary State of a certain treatment by the granting State; the verb "extend" had been used for the grant to a third State.

24. The passage mentioned referred to yet a third situation and it might be desirable to avoid using either the verb "to accord" or the verb "to extend". One possibility was to use the verb "to confer". It was a question which had not been considered by the Drafting Committee. On the whole, the reference in the context was not to a factual situation but to a legal obligation: a promise on the part of the beneficiary State was necessary.

25. Mr. ELIAS said that, in the light of that explanation, the word "according" should be retained in the concluding phrase of article 6 *ter*.

26. Mr. USHAKOV said he noticed that paragraph 2 of article 15 referred to the communication by the beneficiary State to the granting State of its consent "to extend" material reciprocity.

27. Sir Francis VALLAT said that the use of the verb "to extend" in paragraph 2 of article 15 ruled out its use in the passage of article 6 *ter* mentioned by Mr. Kearney. He supported the view of Mr. Elias that the word "accord" should be retained.

28. Mr. KEARNEY said that he had no basic objection to the use of the word "according", but the fact remained that the verb "to accord" had been used elsewhere in a different sense. His remark had been made in the interests of consistency but if the word "according" was retained, the resulting ambiguity would not be sufficient to raise a serious problem.

29. Mr. TSURUOKA said that he was in favour of retaining the verb "to accord". When the Commission came to examine article 15, it would have to decide whether the distinction between the verbs "to accord" and "to extend" was being correctly made in that case.

30. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 6 *ter* in the form in which it had been submitted by the Drafting Committee.

*It was so agreed.*

<sup>6</sup> *Ibid.*

ARTICLE 7<sup>7</sup>

31. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 7 as proposed by the Drafting Committee, which read:

*Article 7 [11]**Scope of rights under a most-favoured-nation clause*

1. Under a most-favoured-nation clause the beneficiary State is entitled, for itself or for the benefit of persons or things in a determined relationship with it, only to those rights which fall within the scope of the subject-matter of the clause.

2. The beneficiary State is entitled to the rights under paragraph 1 only in respect of those categories of person or things which are specified in the clause or implied from the subject-matter of that clause.

32. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that articles 7 and 7 *bis* were the heart of the whole set of articles prepared by the Special Rapporteur. They had been the subject of much attention in the Drafting Committee and should be read together. The new texts which had emerged from the Drafting Committee's examination corresponded in scope to the original texts but the Drafting Committee had adopted a different distribution of the various elements contained in the original draft articles. Under the Drafting Committee's redistribution of the original material, article 7 dealt with the potential scope of the most-favoured-nation clause—the scope that the most-favoured-nation clause allowed; article 7 *bis* dealt with actual scope—the scope for which there was a matching grant to a third State.

33. Paragraph 1 of article 7 corresponded basically to the Special Rapporteur's original article 7, which had been entitled "The *ejusdem generis* rule" but a new element had been introduced: the Drafting Committee had thought it desirable to reflect the fact that the beneficiary State might be entitled to a right for itself and not merely for the benefit of persons or things in a determined relationship with it. That element had therefore been added to the text of the original paragraph 1 of article 7. He understood that the commentary would deal specifically with the question of the meaning of "rights which fall within the scope of the subject-matter of the clause".

34. Paragraph 2 of article 7 was patterned on paragraph 1 of the original article 7 *bis*. It provided further clarification of the rights to which the beneficiary State was entitled under paragraph 1 for the benefit of persons and things in a determined relationship with it.

35. When examining articles 7 and 7 *bis*, it was necessary to bear in mind also articles 15 and 16, which dealt with the time factor and the right to enjoyment of rights under a most-favoured-nation clause; the provisions of articles 15 and 16 brought the clause into operation and enabled enjoyment to begin. The scope dealt with in article 7 and the entitlement dealt with in article 7 *bis* had to be understood in conjunction with the provisions of articles 15 and 16.

36. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to

approve article 7 in the form in which it had been submitted by the Drafting Committee.

*It was so agreed.*

ARTICLE 7 *bis*<sup>8</sup>

37. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 7 *bis* as proposed by the Drafting Committee, which read:

*Article 7 bis [12]**Entitlement to rights under a most-favoured-nation clause*

1. The beneficiary State is entitled to the rights under article 7 [11] for itself only if the granting State extends to a third State treatment which is within the field of the subject-matter of the most-favoured-nation clause.

2. The beneficiary State is entitled to the rights in respect of persons or things within categories under paragraph 2 of article 7 [11] only if they (a) belong to the same category of persons or things as those which benefit from the treatment extended by the granting State to a third State and (b) have the same relationship with the beneficiary State as those persons or things have with that third State.

38. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that he had already referred to the links between articles 7 and 7 *bis*. The key word in article 7 *bis* was the opening word of its title: "Entitlement"—entitlement to rights which were already within the scope of the clause and which now fell within the ambit of the matching grant to a third State.

39. Paragraph 1 of the text now submitted was a new provision, which did not appear in the original text and which dealt with the beneficiary State's entitlement to rights for itself under article 7. There had been a difference of views in the Drafting Committee regarding the need for that paragraph, but the predominant view had been that, since reference had been made in article 7 to the State's entitlement for itself, there was a case for including a similar reference in article 7 *bis*.

40. Paragraph 2 of article 7 *bis* followed closely the main thought and structure of paragraph 2 of the Special Rapporteur's original article 7 *bis*. It maintained the Special Rapporteur's tests for the entitlement of persons and things in a defined relationship with the beneficiary State.

41. Mr. KEARNEY said he would like an explanation of the use of the term "field" in paragraph 1 of the article as applied to a concept for which the term "scope" was used elsewhere in the draft.

42. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) explained that it would not be strictly correct to use the term "scope" in the present context, since that term applied only to the relations between the beneficiary State and the granting State. The purpose of using the word "field" instead was to show that paragraph 1 did not refer to the relationship between the granting State and the beneficiary State but rather to the position of the third State. It indicated that the intention was to draw an analogy or to make a comparison.

43. Mr. KEARNEY said he hoped the Special Rapporteur would include an explanation of the point in the commentary.

<sup>7</sup> For previous discussion see 1333rd meeting, para. 1.

<sup>8</sup> *Ibid.*

44. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 7 *bis* in the form in which it had been submitted by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 6 *ter/bis*

45. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the article 6 *ter/bis* proposed by the Drafting Committee, which read:

##### *Article 6 ter/bis [13]*

##### *Irrelevance of the fact that treatment is extended gratuitously or against compensation*

The beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, acquires under a most-favoured-nation clause the right to most-favoured-nation treatment independently of whether the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended gratuitously or against compensation.

46. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the new article 6 *ter/bis* replaced paragraph 2 of the original article 6 *bis* and paragraph 2 of the original article 6 *ter*. The Drafting Committee had decided to place it immediately before article 8 and 8 *bis* because, like those two articles, it concerned the relevance of certain matters for purposes of the entitlement of the beneficiary State to most-favoured-nation treatment.

47. The new title of the article reflected the rule stated in the text, the irrelevance of the fact that treatment was extended gratuitously or against compensation by the granting State to a third State.

48. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to approve article 6 *ter/bis* in the form in which it had been submitted by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 8 <sup>9</sup>

49. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 8 as proposed by the Drafting Committee, which read:

##### *Article 8 [14]*

##### *Irrelevance of restrictions agreed between the granting and third States*

The beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended under an agreement limiting its application to relations between the granting and third States.

50. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that article 8 corresponded to the Special Rapporteur's original article 8. The Drafting Committee, however, had made some drafting changes. In particular, it had preferred not to use the verb "affected" and had recast the text in a more direct form.

51. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to

approve article 8 in the form in which it had been submitted by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 8 *bis* <sup>10</sup>

52. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 8 *bis* as proposed by the Drafting Committee, which read:

##### *Article 8 bis [15]*

##### *Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement*

The beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended under a bilateral or a multilateral agreement.

53. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that article 8 *bis* had been the subject of much discussion in the Commission. Many members had expressed doubts as to the necessity of including an article on the subject-matter of article 8 *bis*. The view had been expressed that it contained a self-evident proposition which did not need to be expressly stated. There had been a similar difference of opinion in the Drafting Committee, but on balance it had been felt desirable to keep the article, partly on the grounds that it was always easier to focus attention on issues raised by a text that had been included in a draft than on issues raised by a text which had been excluded.

54. It was not the intention of the Drafting Committee that the rule stated in article 8 *bis* should in any way prejudge the question of exceptional cases such as customs or economic unions, or the special position of developing States. There was no intention whatsoever to restrict the scope of the Commission's inquiry into those special cases.

55. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to approve article 8 *bis* in the form in which it had been submitted by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 13 <sup>11</sup>

56. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 13 as proposed by the Drafting Committee, which read:

##### *Article 13 [16]*

##### *Right to national treatment under a most-favoured-nation clause*

[Unless the treaty otherwise provides or it is otherwise agreed,] the beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended as national treatment.

57. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that, in his general opening remarks on the whole set of articles in document A/CN.4/L.238, he had referred to the problem of the proviso "Unless the treaty otherwise provides or it is otherwise agreed"

<sup>10</sup> *Ibid.*

<sup>11</sup> For previous discussion see 1337th meeting, para. 5.

<sup>9</sup> For previous discussion see 1334th meeting, para. 26.

which had been placed between square brackets at the beginning of the text of article 13. It had been placed there because of the desire of many members to stress that the rule embodied in article 13 must be subject to any agreement reached by the parties.

58. Whether that opening proviso would be maintained would depend ultimately on the Commission's decision on the question whether or not to include in the draft a general provision to deal with the predominance of the intention of the parties. The fact that the opening proviso appeared in article 13 did not imply that a similar proviso would not be needed in other articles where no such phrase appeared between square brackets.

59. The Special Rapporteur's original text of article 13, which consisted of two paragraphs, had been shortened and reformulated in an endeavour to give better expression to the intended rule.

60. The CHAIRMAN said that if there were no comments he would take it that the Commission agreed to approve article 13 in the form in which it had been submitted by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 14<sup>12</sup>

61. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 14 as proposed by the Drafting Committee, which read:

##### *Article 14 [17]*

##### *Most-favoured-nation treatment, national or other treatment with respect to the same subject-matter*

If a granting State has undertaken by treaty to accord to a beneficiary State most-favoured-nation treatment and national or other treatment with respect to the same subject-matter, the beneficiary State shall be entitled to whichever treatment it prefers in any particular case.

62. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Special Rapporteur's original formulation of article 14 referred to the right of the beneficiary State to claim with respect to the same subject-matter either most-favoured-nation treatment or national treatment, whichever it deemed more favourable, assuming that the State was entitled to more than one kind of treatment. The redraft of the article now proposed contained an additional element, relating to a possible third type of treatment, described as "other treatment". The point was one on which the Drafting Committee had not been unanimous. Some members had wanted the scope of article 14 to be restricted so as to deal solely with the relationship between most-favoured-nation treatment and national treatment; others, however, had felt that it was possible that the beneficiary State might be entitled to a third type of treatment, perhaps to a direct grant of some sort, or another kind of special régime. The Committee had therefore concluded that the article should have a wider purpose and make it clear that, where a State was entitled to the benefit of alternative régimes, it should be able to claim the most favourable one.

63. The concluding words of the article, "in any particular case", had caused some difficulty in the Drafting

Committee. There had been no difference of opinion on the need to include some wording to show that a beneficiary State which was entitled to two or more kinds of treatment did not have to make some irrevocable decision applicable at all times and in all cases. The beneficiary State was entitled to take full advantage of the benefits accorded to it; that entitlement involved a right of choice. The text of article 14 made it clear that the right of choice belonged to the beneficiary State itself, and not to the persons or things which might be benefited. There were consequently some reservations regarding the inclusion of the words "in any particular case", and those reservations would be reflected in the commentary to article 14. There was no doubt about the need for a formula on those lines, but there was a slight doubt as to whether or not the particular phrase might introduce administrative difficulties in determining which kind of treatment should be granted in any given case.

64. There had been some discussion in the Drafting Committee on the possible need to deal in greater detail with the communication of the choice to the granting State by the beneficiary State. Subsidiary problems of that kind could well be left over for further consultation.

65. One or two members of the Drafting Committee were inclined to the view that, because of the difficulties to which he had referred, further consideration might yet be given to the possibility of drafting the rule in article 14 in the form of a general saving clause. That was by no means the view of the majority in the Drafting Committee, however.

66. Mr. KEARNEY said that, as far as he was concerned, article 14 was the only one in the present series of articles which gave rise to any substantive problems.

67. First, however, he wished to draw attention to a problem of drafting. The title referred to "Most-favoured-nation treatment, national or other treatment", a presentation which suggested that the text of the article would deal with the interplay of three types of treatment. When one turned to the text of the article itself, however, one found that the formula used was "most-favoured-nation treatment and national or other treatment". That formulation seemed to group together national treatment and "other treatment", thereby suggesting that the rule in article 14 related to the interplay of most-favoured-nation treatment on the one and with "national or other treatment" on the other. The title and the text of the article should be brought into line so as to avoid the ambiguity created by the present difference between them.

68. The reference to "other treatment" created a serious problem. The expression "other treatment" had no generally accepted meaning in the particular context. The Chairman of the Drafting Committee had mentioned the possibility of a grant being made to a third State. The type of grant referred to was not at all clear to him. To take an extreme example, he would assume that the granting State had made a grant of money to the third State. Was it being suggested that all States entitled to most-favoured-nation treatment should be able to claim a similar grant of money from the granting State? An explanation in the commentary would not be sufficient to dispel all the doubts that would be created by the

<sup>12</sup> For previous discussion see 1339th meeting, para. 1.

reference to "other treatment". He would therefore urge that the provisions of article 14 be confined to most-favoured-nation treatment and national treatment and that the problem of "other treatment" be dealt with exclusively in the commentary. It would obviously be unwise to include that expression in the text without thorough research into the subject-matter it was intended to cover.

69. He now wished to deal with the difficulties created by the inclusion of the concluding words "in any particular case". As he saw it, the situation envisaged in article 14 was that the beneficiary State would request either most-favoured-nation treatment or national treatment, whichever it preferred, for certain categories of persons or things. It would give rise to almost insoluble administrative difficulties if the beneficiary State were allowed to make that choice not for whole categories of persons or things but for individual persons or companies. It had to be remembered that it was not the beneficiary State which was involved at the operational level in the situation envisaged in article 14, it was the individual trader or company which would put in an application to the appropriate administrative authorities of the granting State; in that application, the person or company concerned would ask to be dealt with as a member of a certain category of persons.

70. For those reasons, he urged that the words "in any particular case" be replaced by a formula which dealt with the matter in terms of categories.

71. Mr. USTOR (Special Rapporteur) said that the meaning of the expression "other treatment" would be explained in the commentary. The expression was intended to refer mainly, although not exclusively, to some kind of direct advantage given to the beneficiary State without reference to nationality; it would thus consist of a special treatment which was not a "national treatment".

72. The concluding words "in any particular case" had given rise to considerable difficulty in the Drafting Committee, but it had been finally agreed to keep them in the text and to explain in the commentary that the whole matter would be reconsidered by the Commission at its next session.

73. Sir Francis VALLAT said that, as he had pointed out during the Commission's discussion at the 1339th meeting, the difficulties which arose in connexion with article 14 were due to the fact that it was couched in terms of a positive right and had therefore to cover all conceivable cases. It was precisely in order to avoid those difficulties that he had proposed that article 14 be redrafted in the form of a saving clause.<sup>13</sup>

74. Mr. USTOR (Special Rapporteur) said that the commentary to article 14 would contain a reference to Sir Francis Vallat's view and to his suggestion for a redraft of article 14 in the form of a saving clause.

75. Mr. USHAKOV said that, regardless of the form in which article 14 was drafted, it was not the Commission's task to define in detail the relationship between the granting State and the beneficiary State. Article 14 contained the general rule; the meaning of the expression

"in a particular case" was a matter which would be determined by the two States concerned.

76. Mr. ŠAHOVIĆ said that, in the Drafting Committee, he had only accepted the wording of article 14 on the understanding that it would be reviewed by the Commission at second reading.

77. Mr. USTOR (Special Rapporteur), replying to Mr. Kearney's suggestion regarding the title, said that, in order to bring it into line with the text, the title might be amended to read, "Most-favoured-nation treatment and national or other treatment with respect to the same subject-matter".

78. Mr. KEARNEY said that the change in the title suggested by the Special Rapporteur only strengthened his misgivings regarding the reference to "other treatment".

79. Mr. ELIAS said that he shared those misgivings and accordingly proposed the deletion of the words "or other", which appeared before the word "treatment", both in the title and in the text of article 14. The question of "other treatment" could be dealt with in the commentary.

80. Mr. SETTE CÂMARA said he strongly supported the proposal by Mr. Elias. Despite all the explanations which had been given, he did not understand how a beneficiary State could claim any so-called "other treatment" otherwise than as a most-favoured-nation treatment.

81. Mr. USHAKOV said that the reference to "other treatment" was necessary because cases did exist where the beneficiary State would claim a certain treatment which was neither most-favoured-nation treatment nor national treatment. To take the example of port dues, most-favoured-nation treatment might mean dues of 50 cents per ton and national treatment dues of 20 cents per ton but, under a particular agreement, a special régime could be established under which no dues at all were payable in a particular port. That special régime for the particular port would be more favourable than national treatment itself.

82. Mr. HAMBRO said that the present discussion had convinced him of the desirability of dropping the reference to "other treatment".

83. Sir Francis VALLAT said that cases did exist, in such matters as the treatment of aliens, where a particular class of alien was given a special treatment. If the provisions of article 14 confined the choice to most-favoured-nation treatment and national treatment, cases of that kind would be left out altogether. Similar cases of special treatment existed with regard to the administration of justice, and care should be taken that they did not remain outside the scope of the article.

84. As he had already pointed out, the whole problem could be avoided by framing article 14 in a negative form so as just to preserve the rights of the beneficiary State under the most-favoured-nation clause. In that way it would be possible to avoid the trap into which the Commission had fallen of having to deal with all possible cases.

85. Mr. RAMANGASOAVINA said that article 14 had been framed so as to cover the situation where a choice was possible between different treatments. The case

<sup>13</sup> See 1339th meeting, para. 14.

could arise of a number of States being bound by one or more treaties which provided for most-favoured-nation treatment, national treatment and a mixed type of treatment. In its present form, article 14 drew a distinction between most-favoured-nation treatment on the one hand, and "other treatment with respect to the same subject-matter" on the other. In his view, the words "other treatment" covered national treatment. According to article 13, the beneficiary State was entitled to the treatment extended by the granting State to a third State, even if that treatment was extended as national treatment, which constituted the extreme case. In article 14, the expression "other treatment with respect to the same subject-matter" covered all cases of treatment other than most-favoured-nation treatment, including national treatment. Accordingly, he suggested the deletion of the reference to "national" treatment from both the title and the text of article 14.

86. The CHAIRMAN said that the Commission might wish to consider approving article 14 as it stood, subject to an explanation being given in the commentary regarding the problems raised by the reference to "other treatment".

87. Mr. ELIAS proposed that the words "or other" in both the title and the text of article 14 be placed between square brackets and that the different views which had been put forward in that connexion be set out fully in the commentary.

88. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 14 as proposed by the Drafting Committee, but with the change in the title suggested by the Special Rapporteur and with the words "or other" placed between square brackets in both title and text, as proposed by Mr. Elias.

*It was so agreed.*

#### ARTICLES 15 AND 16<sup>14</sup>

89. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 15 and 16 as proposed by the Drafting Committee, which read:

##### *Article 15 [18]*

##### *Commencement of enjoyment of rights under a most-favoured-nation clause*

1. The right of the beneficiary State to any treatment under a most-favoured-nation clause not made subject to the condition of material reciprocity arises at the time when the relevant treatment is extended by the granting State to a third State.

2. The right of the beneficiary State to any treatment under a most-favoured-nation clause made subject to the condition of material reciprocity arises at the time of the communication by the beneficiary State to the granting State of its consent to extend material reciprocity in respect of the treatment in question.

##### *Article 16 [19]*

##### *Termination or suspension of enjoyment of rights under a most-favoured-nation clause*

1. The right of the beneficiary State to any treatment under a most-favoured-nation clause not made subject to the condition of

material reciprocity is terminated or suspended at the time when the extension of the relevant treatment by the granting State is terminated or suspended.

2. The right of the beneficiary State to any treatment under a most-favoured-nation clause made subject to the condition of material reciprocity is also terminated or suspended at the time when the termination or suspension of the material reciprocity in question is communicated by the beneficiary State to the granting State.

90. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that articles 15 and 16, which constituted a pair, were to be read side by side with other articles, including articles 7 and 7 *bis*. The Drafting Committee had not thought it necessary to include internal references in the article to make that clear. In both articles, the Committee had followed the fundamental distinction illustrated by articles 6 *bis* and 6 *ter* between most-favoured-nation clauses which were subject to material reciprocity and those which were not. Consequently, article 15, paragraph 1, dealt with the commencement of the enjoyment of rights under a most-favoured-nation clause not subject to material reciprocity, while article 15, paragraph 2, dealt with the same subject in the case of clauses which were subject to that condition.

91. The Committee had considered it desirable to include in article 15, paragraph 2, mention of the notion of "communication", the intention being that the granting State should be given adequate evidence that the potential beneficiary State intended to respect the condition of reciprocity. Some members of the Committee had felt that the question of how that notion could best be expressed would require further thought.

92. Mr. PINTO said that the wording of both articles 15 and 16 should be reviewed at some future stage, possibly at the next session. It was clear from the discussion of the topic of the most-favoured-nation clause that the operation of the clause depended, on the one hand, on the clause itself or the treaty containing it, and, on the other, on the treatment given to a third State. If ambiguity was to be avoided, those two elements should be constant twin points of reference in any discussion of the commencement of the enjoyment of rights under the clause. But there was no mention in article 15, paragraph 1, of the commencement of operation of the clause, and no mention in article 15, paragraph 2, of the treatment accorded to a third State.

93. The fact that article 15, paragraph 1, referred only to the "time when the relevant treatment is extended [. . .] to a third State" could give rise to substantial uncertainty as to when the enjoyment of rights under a most-favoured-nation clause should actually begin. It would, he supposed, be clear that, where favourable treatment had been granted to a third State long before the conclusion of a most-favoured-nation clause, such treatment could not be claimed by the beneficiary State, but it was possible to construe the present wording of the paragraph as implying that, when the grant to the State preceded the conclusion of the clause by a relatively short period of time, say, less than a year, action of the clause would be retroactive. That such a possibility should exist was unacceptable.

<sup>14</sup> For previous discussion of articles 15 and 16 see 1339th meeting, para. 34.

94. Mr. KEARNEY said he found the comments by Mr. Pinto very interesting. They seemed to be directed as much towards the question whether enjoyment of the rights under a most-favoured-nation clause was contingent upon some positive effort by the beneficiary State to exercise that right as to the question of when the right arose. Neither of those questions was answered by the draft articles as they stood and each merited further study.

95. He noted that articles 15 and 16 contained the first references in the draft to "any treatment", rather than simply to "treatment" under a most-favoured-nation clause, and he would be interested to learn the reason for that change.

96. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that, as he understood it, the phrase "any treatment" was intended to mean the treatment, of whatever kind, for which a most-favoured-nation clause might provide. The members of the Drafting Committee were not entirely satisfied with that phrase, but had been unable, partly for linguistic reasons, to find a suitable alternative. The phrase "certain treatment", for example, was acceptable in English but not in other languages.

97. Mr. KEARNEY proposed that the words "to all third States" be inserted between the word "extension" and the words "of the relevant treatment" in article 16, paragraph 1. His proposal was justified by the fact that it was perfectly possible for treatment accorded to one third State to have ceased, but for identical treatment to another third State, and thus the operation of the most-favoured-nation clause, to continue. While he realized that the expression "relevant treatment" might be intended to cover that point, he could see no harm in making it perfectly clear.

98. Mr. USTOR (Special Rapporteur) said that Mr. Kearney had correctly interpreted the intention behind the phrase "relevant treatment". It would seem preferable, in order to avoid overburdening the text of the article itself, to draw attention to Mr. Kearney's point in the commentary.

99. The phrase "not made subject to the condition of material reciprocity" should be deleted from article 16, paragraph 1, since the statement in that paragraph applied to both conditional and unconditional most-favoured-nation clauses.

100. Mr. BILGE said that article 16, paragraph 2, might give the impression that when material reciprocity ceased, the operation of the clause also ceased, whereas in fact it was merely suspended. The point should be made clear in the commentary.

101. Mr. KEARNEY said that he did not see any necessity to substitute for his proposed amendment, which was very simple, an explanation in the commentary.

102. Mr. HAMBRO said he supported the amendment proposed by Mr. Kearney.

103. Mr. ELIAS said that it had already been explained, with regard to article 7 and other articles, that the reference to "extension" always meant extension to third States, and that, as Mr. Kearney himself had recognized, the fact that the phrase "relevant treatment" meant the

treatment accorded to third States was apparent from the context. If the Commission wished to make article 16, paragraph 1, clear beyond all doubt, it could entertain Mr. Kearney's proposal, but that might entail amending all other articles in which similar language appeared.

104. Mr. USHAKOV said that the Drafting Committee had spent a great deal of time discussing the wording of the paragraph in question, in the hope of avoiding difficulties. It had preferred not to make any mention of third States, since "relevant treatment" might be extended to only one such State. The reason for that decision would be explained in the commentary. The possible inclusion of a reference to "all third States" was more a matter for a saving clause relating to non-discrimination than an article such as article 16 and the commentary would, indeed, also state that an article on non-discrimination as between third States and as between beneficiary States might be submitted at a later stage.

105. Mr. SETTE CÂMARA said he supported Mr. Kearney's proposal, since he thought it essential to make clear that the right of a beneficiary State would cease only when favourable treatment had been withheld or withdrawn from each and every one of the third States involved. In his view the amendment would not affect other articles.

106. Mr. USTOR (Special Rapporteur) said he agreed that the aim of article 16, paragraph 1, was to state that, with the exception of the case mentioned in paragraph 2, enjoyment of the rights accruing to the beneficiary State of a most-favoured-nation clause could be terminated only when the granting State no longer accorded favourable treatment to any third State. That being so, he would not object to the inclusion, at the point proposed by Mr. Kearney, of either the phrase "to any third State", or the words "to all third States".

107. Mr. TSURUOKA said that the general arrangement of the draft required the maintenance of a triangular relationship between the beneficiary State, the granting State and the third State by employing the singular throughout. He saw no sufficient legal justification for speaking of "all third States".

108. Mr. ŠAHOVIĆ said he thought Mr. Kearney's amendment was acceptable because it referred to a special case.

109. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that one of the points the Drafting Committee had had in mind in drafting article 16, paragraph 1, had been the fact that there was a certain parallelism between that paragraph and article 15, paragraph 1. The right of the beneficiary State was considered to arise under the latter paragraph whenever the treatment in question was accorded to any third State, and it had thus seemed to be quite logical to deal only with a single case in article 16, paragraph 1. A second point had been that it was extremely difficult to use the words "any" or "all" in ways which were not ambiguous. That was a problem which could have been resolved only through the use of a cumbersome paraphrase. It was such drafting matters, rather than any more funda-

mental considerations, which lay behind the current wording of the paragraph.

110. Mr. USHAKOV said he agreed with the explanation given by the Chairman of the Drafting Committee.

111. Mr. KEARNEY said that in his view it was the phrase "relevant treatment" which was ambiguous. His proposal was designed to provide the necessary clarification.

112. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the problems to which the use of the phrase "all third States" might give rise could be illustrated by taking a case in which favourable treatment of the kind promised under a most-favoured-nation clause was accorded to ten third States. If that treatment were withheld from one of those States, it could be argued that operation of the most-favoured-nation clause should cease since relevant treatment was no longer accorded to "all" of the third States involved, but to ten minus one of those States.

113. Mr. ELIAS proposed that the Commission approve the draft article as amended by the Special Rapporteur while stating in the commentary that several members had shared the view expressed by Mr. Kearney, and that efforts would be made to find more satisfactory wording in time for the next session.

114. Mr. KEARNEY said that he would agree to Mr. Elias's proposal in the hope that that would enable the Commission to complete its work on time. He would, however, continue to deprecate what he felt was the unfortunate approach of employing the commentary, rather than direct amendments, to modify articles produced by the Drafting Committee.

115. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 15 in the form in which it had been submitted by the Drafting Committee, and article 16 as amended by the Special Rapporteur.

*It was so agreed.*

#### ARTICLE 6 *quater*<sup>15</sup>

116. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 6 *quater* as proposed by the Drafting Committee, which read:

##### *Article 6 quater* [20]

*The exercise of rights arising under a most-favoured-nation clause and compliance with the laws of the granting State*

The exercise of rights arising under a most-favoured-nation clause for the beneficiary State and for persons or things in a determined relationship with that State is subject to compliance with the relevant laws of the granting State. Those laws, however, shall not be applied in such a manner that the treatment of the beneficiary State and of persons or things in a determined relationship with that State becomes less favourable than that of the third State or of persons or things in the same relationship with that third State.

117. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that article 6 *quater* as pro-

<sup>15</sup> For previous discussion see 1331st meeting, para. 30, and 1332nd meeting, para. 3.

posed by the Drafting Committee corresponded to articles 6 *quater* and 6 *quinquies* as proposed by the Special Rapporteur. It provided a balance within a single article between the rule that a beneficiary State must comply with the relevant laws of the granting State and the rule that the granting State must not apply those laws in such a way as to frustrate the enjoyment of the rights it granted.

118. In the English version of the article, the term "laws" referred both to laws proper and to regulations, or "subordinate legislation", whereas in the other language versions the concept had been expressed *in extenso*. Precedents for that procedure could be found in texts already approved by the Commission and established in treaty form.

119. Mr. BILGE asked whether article 6 *quater* also applied to national treatment accorded under a most-favoured-nation clause.

120. Mr. USTOR (Special Rapporteur) said it seemed reasonable that the rule that the beneficiary State should enjoy its right to favourable treatment only within the framework of the laws of the granting State should apply whatever the nature of the treatment.

121. Mr. USHAKOV said that, in his opinion, national treatment implied compliance with the laws of the State concerned.

122. Mr. KEARNEY said he noted that the second sentence of the article directed organs of a State to conduct themselves in a certain fashion. Such language was unusual in a draft international treaty and he hoped that the Commission would be able to find wording more appropriate to the context.

123. He proposed that in the second sentence the word "becomes" be replaced by the word "is", since both the initial and the subsequent effects of application of the laws of the granting State were concerned.

124. Mr. SETTE CÂMARA said he agreed with the comments by Mr. Kearney concerning the tone of the article.

125. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to approve article 6 *quater* in the form in which it had been submitted by the Drafting Committee, as amended by Mr. Kearney.

*It was so agreed.*

#### ARTICLE 0<sup>16</sup>

126. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 0 as proposed by the Drafting Committee, which read:

##### *Article 0* [21]

*Most-favoured-nation clauses in relation to treatment under a generalized system of preferences*

A beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a generalized system of preferences established by that granting State.

<sup>16</sup> For previous discussion see 1341st meeting, para. 1.

127. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the fact that article 0 appeared in square brackets did not indicate any doubt on the part of the members of the Drafting Committee that the Commission would wish to deal with the matters to which it referred, but rather reflected a feeling arising out of the discussion within the Commission itself that the subject was one which had not been fully explored. In addition, the majority of the members of the Drafting Committee did not believe, and did not feel that the Commission as a whole believed, that article 0 could stand alone as an adequate statement of special measures in favour of developing States.

128. The Drafting Committee had based itself on the text submitted by the Special Rapporteur in document A/CN.4/L.228/Rev.1. The Committee had considered that the aim of the article should be to reproduce faithfully a situation founded in current State practice within UNCTAD and illustrated by the waivers to GATT, and that it would be consistent with the existing rules to replace the opening phrase of the Special Rapporteur's version of the article, "A developed beneficiary State", by the phrase "A beneficiary State".

129. It had also considered it unnecessary, and indeed undesirable, to retain the phrase "trade advantages", since the meaning of those words was not clear and the context of the article was, in any case, governed by the reference to a "generalized system of preferences".

130. The fact that the title of the article contained no reference to developing countries as such was linked with a feeling in the Drafting Committee that that would avoid giving the impression that the article went further than it really did. As matters stood, the article represented an attempt to include a reference to the existing state of affairs in the draft, on the assumption that the Commission would at some later stage wish the Special Rapporteur to prepare additional articles on the same or related topics.

131. Mr. HAMBRO said that the explanations given by the Chairman of the Drafting Committee were so wide in scope that they would require further discussion.

132. The CHAIRMAN speaking as a member of the Commission, said that he was afraid that to approve the article within square brackets might give the impression that the entire Commission had doubts about its value, which was not the case.

133. Mr. USHAKOV said that, for him, the fact that the article appeared in square brackets indicated only that the Commission intended to devote further attention to it at its next session, particularly since the Commission would then be taking up the article only in first, and not in second reading.<sup>17</sup>

The meeting rose at 1.15 p.m.

## 1353rd MEETING

Monday, 21 July 1975, at 3.10 p.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

### Question of treaties concluded between States and international organizations or between two or more international organizations

(A/CN.4/285; A/CN.4/L.240)

[Item 4 of the agenda]

(resumed from the 1350th meeting)

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

##### ARTICLE 2 (Use of terms), PARAGRAPHS 1 (b) AND 1 (b bis)<sup>1</sup>

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the articles proposed by the Drafting Committee (A/CN.4/L.240), starting with article 2, paragraphs 1 (b) and 1 (b bis).

2. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following texts for article 2, paragraphs 1 (b) and 1 (b bis):

(b) "ratification" means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(b bis) "act of formal confirmation" means an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty;

3. Mr. REUTER (Special Rapporteur) said that article 2, paragraph 1 (b), did not call for any comment by him or any decision by the Commission, since it merely reproduced the corresponding provision of the Vienna Convention on the Law of Treaties. It would be seen that the expression "ratification" meant only the act of a State. The Drafting Committee had considered that it was preferable, largely for historical reasons, not to use the term "ratification" in respect of international organizations.

4. In his own approach to the concept of ratification, he had distinguished between the historical background of the practice of States in that respect and the actual mechanism of ratification, whereby an initial expression of consent, not implying a formal commitment, was followed by a second act which did represent a formal commitment. That mechanism, which comprised the provisional indication of an intention followed by a definitive decision, could be useful to international organizations, but there was at present no generally accepted term, on the international plane, to designate the act by which an international organization manifested, in two stages, its consent to be bound.

<sup>17</sup> For resumption of the discussion see next meeting, para. 101

<sup>1</sup> For previous discussion see 1347th and 1348th meetings.