Document:-

**A/CN.4/SR.1331**

**Summary record of the 1331st meeting**

Topic:

**Most-favoured-nation clause**

Extract from the Yearbook of the International Law Commission:-

**1975, vol. I**

seem unnecessary to specify that the beneficiary State was not under an obligation to reciprocate. That being so, the article could be reduced to a single paragraph.

53. He was also concerned about the question of exceptions to the scope of the most-favoured-nation clause. For example. it was often stipulated that a beneficiary State would not enjoy the special advantages of the GATT, the object being to prevent it from profiting from that Agreement without assuming the obligations imposed on the signatories. Did that stipulation constitute a requirement of reciprocity and, in its absence, would the GATT apply under a most-favoured-nation clause? Would that clause apply *in toto* and in favour of the beneficiary State? If so, and there was in the most-favoured-nation clause an exception of the type to which he had referred, would that constitute a limitation which made the clause partly conditional and partly unconditional?

54. Mr. CALLE Y CALLE said he approved of the division of article 6, as it had appeared in the Special Rapporteur's fourth report, because the second part of its single paragraph had been an explanation of the rule contained in the first. With regard to what was now article 6 *bis*, and particularly to the implications of the last clause of the first paragraph, it was important to emphasize, and to make clear for the benefit of States, the subtle distinction between formal reciprocity and material reciprocity discussed in paragraph (3) of the commentary to articles 6 *bis* and 6 *ter* in the Special Rapporteur's fifth report.

55. Mr. USTOR (Special Rapporteur) said that the conclusion he had reached in his sixth report concerning the need to imply exceptions, in certain cases, to ostensibly unconditional most-favoured-nation clauses, was diametrically opposed to Mr. Reuter's conclusion. He would discuss that question at length later.

56. In reply to Mr. Kearney, he said that in article 6 the phrase "in appropriate cases" was linked to the words "material reciprocity". As Mr. Calle y Calle had pointed out, there was a promise of formal reciprocity in all agreements. In some cases, however, States might wish to make the granting of most-favoured-nation treatment conditional on the extension to each other of the same treatment in kind; it was to those cases, such as the reciprocal granting of immunity from jurisdiction by two States to each other's consuls, that the phrase "material reciprocity" was intended to refer. So far as the question of exceptions to the most-favoured-nation clause was concerned, it might be necessary to make provision for cases in which a State wished to grant most-favoured-nation treatment to a potential beneficiary to a lesser extent, or in fewer matters, than to another State with which it had traditionally maintained particularly friendly relations.

57. In article 6 *bis*, paragraph 1, the phrase "without the obligation to reciprocate the same treatment in kind", mentioned by Mr. Calle y Calle, referred to the absence of a promise of material reciprocity. Where States did reciprocate the same treatment in kind, one of them might, for example, agree to give special treatment to the consul of the other, if its own consul in the territory of the other State was given the same advantages in kind as the first State gave to the most favoured of the consuls of any other State in its own territory.

The meeting rose at 5.50 p.m.

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## 1331st MEETING

*Tuesday, 17 June 1975, at 10.10 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Ago, Mr. Bilge, Mr. Calle y Calle, 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.

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### Most-favoured-nation clause

**(A/CN.4/266;[1] A/CN.4/280;[2] A/CN.4/286)**

[Item 3 of the agenda]

(*continued*)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 6 (Presumption of unconditional character of the most-favoured-nation clause),

ARTICLE 6 *bis* (Effect of an unconditional most-favoured nation clause) and

ARTICLE 6 *ter* (Effect of a most-favoured-nation clause conditional on material reciprocity) [3] (*continued*)

1. Mr. SETTE CÂMARA expressed his admiration for the extraordinary efforts the Special Rapporteur had made to extract the common elements from the mass of specific treaty provisions in his most difficult field. He had succeeded in producing a few succinct, objective rules, which were likely to gain general acceptance.

2. The division of article 6, as it had appeared in the Special Rapporteur's fourth report, [4] into two separate articles made for clarity and simplicity, and he approved of the substance of articles 6 and 6 *bis* as now proposed. He believed, however, that it would be better to reverse the order of the clauses in article 6, since it began with the exceptions to the presumption it stated, which seemed a little strange. He agreed with Mr. Kearney that the phrase "in appropriate cases" was rather vague. All the members of the Commission knew that the cases in question related to such matters as consular immunities and functions, private international law and establishment treaties, but the Drafting Committee might be able to find a better word than "appropriate" to describe them. Alternatively, the article as a whole could be simplified by the omission of the phrase "in appropriate cases".

3. With regard to article 6 *bis*, the Special Rapporteur had shown, in paragraph (4) of the commentary to articles 6 *bis* and 6 *ter* in his fifth report (A/CN.4/280), that

[1] *Yearbook ... 1973*, vol. II, pp. 97-116.

[2] *Yearbook ... 1974*, vol. II, Part One, pp. 117-134.

[3] For texts see previous meeting, para. 43.

[4] *Yearbook ... 1973*, vol. II, p. 98.

except in the rare instances of unilateral granting of most-favoured-nation treatment, most-favoured-nation clauses would always involve at least two reciprocal promises, even when they were free from conditions. The reciprocity in such cases was purely formal; the risk of confusion with the material reciprocity referred to in article 6 *ter* could be avoided by replacing the words "without obligation to reciprocate", in article 6 *bis*, paragraph 1, by the words "without any conditions". The Drafting Committee could be asked to improve the style of the sentence thus amended.

4. Mr. PINTO expressed his appreciation of the Special Rapporteur's very helpful fifth and sixth reports (A/CN.4/280 and 286).

5. As he now understood it, article 6 meant that a most-favoured-nation clause which contained no express reference to a condition to which it was to be subject would be presumed to be unconditional; that when the clause was stated to be subject to a particular condition, that would in fact be the case; and that where material or effective reciprocity was possible or customary, as in the case of agreements on consular relations, private international law and the like, most-favoured-nation treatment would be subject to such reciprocity even if the clause contained no express provision to that effect. If that was so, article 6 involved two presumptions rather than one, and, as it stood, was too condensed. The word "presumption" should be included in the body of the article, to make it easier to understand.

6. Mr. TSURUOKA supported the principle stated in article 6, but proposed that the wording should be amended on the lines indicated by Mr. Sette Câmara and Mr. Pinto, so that it would read: "Unless it is otherwise agreed [Unless the clause provides otherwise], the most-favoured-nation clause is unconditional". He thought that the words "appropriate cases" were indeed rather vague and that it would be difficult to make a complete list of appropriate cases.

7. The expression "material reciprocity" also seemed difficult to interpret and to apply in practice. For supposing that two States, A and B, had concluded a treaty containing a most-favoured-nation clause and State A had exempted a third State from a tax X—by reason of consular privileges and immunities, for example—State B could, if it had the same system as State A, benefit from the most-favoured-nation clause by exempting State A from tax X. But if State B did not have the same system as State A, it would be difficult for it to demand the immediate application of the most-favoured-nation clause without compensation. He did not think it was necessary to raise such problems, however, since the wording he had just proposed would make it possible to avoid the difficulty.

8. It could also be questioned whether the conditional form of the most-favoured-nation clause was limited material reciprocity. For example, States A and B might conclude a treaty containing a most-favoured-nation clause concerning exemption from an import tax, which provided that State B could claim most-favoured-nation treatment only on condition that it granted economic or technical assistance to State A. In that case the clause would be conditional, but not on material reciprocity. On the other hand, if it was assumed that the conditional form of the most-favoured-nation clause included cases other than that of material reciprocity, paragraph 1 of article 6 *bis* could be amended to read:

> "Under an unconditional most-favoured-nation clause the beneficiary State acquires without compensation the right to treatment not less favourable than that accorded by the granting State to a third State".

Similarly, paragraph 1 of article 6 *ter* could be amended to read:

> "Under a conditional most-favoured-nation clause the beneficiary State acquires the right to treatment not less favourable than that accorded by the granting State to a third State, only against the compensation determined by the clause".

9. He thought the second paragraphs of articles 6 *bis* and 6 *ter* were unnecessary.

10. Mr. KEARNEY said that the similarity of the terms employed in articles 6, 6 *bis* and 6 *ter* showed that those provisions were closely interrelated. For example, article 6 *bis*, paragraph 1, contained, in the phrase "without the obligation to reciprocate the same treatment in kind", a negative definition of material reciprocity, which was postitively defined in the phrase "only against reciprocating the same treatment in kind", in article 6 *ter*, paragraph 1; the Drafting Committee should consider whether the relationship between those two provisions ought to be made still clearer. In any case, he still thought it would be preferable to delete the reference to "material" reciprocity, and he approved of the suggestion made by Mr. Tsuruoka. He appreciated that the Special Rapporteur's aim had been to reduce the range of conditional most-favoured-nation clauses discussed, and to enlarge the scope of the unconditional clause in accordance with the apparent historical trend; but it should not be forgotten that new types of conditional reciprocity could still arise, as could be seen from section 26 of the United States Foreign Trade Act of 1974.

11. With regard to article 6 *bis*, it would be preferable to maintain the same language where possible, so the word "reciprocate", in paragraph 1, should be replaced by the word "accord". In the same paragraph, the phrase "the same treatment in kind", which he found too restrictive and likely to give rise to difficulties of interpretation, should be replaced by a phrase such as "equivalent treatment".

12. It was clear from treaties and from the Special Rapporteur's own commentary that the beneficiary State would enjoy its rights under the most-favoured-nation clause from the time of the granting of favourable treatment to a third State, without having to request them. While that was a generally accepted rule, it was desirable to state it expressly in the draft articles and that could be done most appropriately in article 6 *bis*, which dealt with the effect of the most-favoured-nation clause.

13. Mr. USTOR (Special Rapporteur) agreed that the Drafting Committee should consider the amendments to articles 6 and 6 *bis* suggested by Mr. Sette Câmara. The inclusion of the word "presumption" in the text of

article 6, suggested by Mr. Pinto, was also a drafting matter. The first two parts of Mr. Pinto's analysis of the effects of article 6 had been correct; but it would be contrary to practice to assume, even in the cases mentioned by Mr. Pinto, that a State could apply the condition that favours would be granted only in return for what Mr. Kearney had termed "equivalent" treatment, if that condition was not expressly mentioned in the most-favoured-nation clause.

14. He agreed that the version of article 6 proposed by Mr. Tsuruoka was simpler than the present text, the starting point for which had been his own belief that the only types of most-favoured-nation clause still in existence were the unconditional clause and the clause conditional on material reciprocity. As Mr. Tsuruoka had pointed out, it would be necessary to take account, either in the articles themselves or in the commentary, of the types of condition other than the obsolete "American" condition which could still be attached to a most-favoured-nation clause. The drafting amendments proposed by Mr. Tsuruoka should be carefully considered.

15. He agreed that the 1974 United States Foreign Trade Act referred to by Mr. Kearney could lead to the stipulation of various conditions in the most-favoured-nation clause, such as the condition that the operation of the clause would be reviewed after a certain length of time. Mr. Kearney's suggestion concerning the phrase "the same treatment in kind" was valuable and should be studied by the Drafting Committee. The purpose of article 6 *ter*, in which, as in article 6 *bis*, that phrase occurred, was explained in paragraph (14) of the commentary to those two articles in his fifth report.

16. The question of what exactly constituted "material reciprocity" was very complex, owing to the differences in national legislation. That difficulty was, however, inherent in the operation of the most-favoured-nation clause, so that even where the clause stated that reciprocal treatment should be "equivalent", it would be very difficult to determine whether the favours offered actually met that requirement. The matter would have to be dealt with in the commentary, but it was doubtful whether it could be successfully covered in the text of the articles.

17. The question of the arising of the rights of a beneficiary State simultaneously with the granting of favourable treatment to a third State was covered by draft article 15. He had not thought it necessary to mention the fact that such rights would arise without their being requested by the beneficiary State, but would have no objection to doing so.

18. Mr. USHAKOV said he was grateful to the Special Rapporteur for the efforts he had made to widen the scope of the draft articles and include national treatment. He had no difficulty in accepting the principle stated in articles 6 and 6 *bis*. It was a simple principle, though difficult to state. According to that principle, if State A had concluded with State B a treaty containing an unconditional most-favoured-nation clause and had concluded with a third State an agreement containing a conditional most-favoured-nation clause, when State B received the treatment accorded to the third State, it was not obliged to fulfil the conditions imposed on that third State. For example, if a State tried to use the most-favoured-nation clause to impose on the Soviet Union certain conditions regarding emigration from its territory and the Soviet Union accepted those conditions, a third State, such as Hungary, on receiving the same treatment as the Soviet Union, would not be obliged to fulfil the conditions regarding emigration imposed on the Soviet Union.

19. He was not sure what was meant by the words "treatment in kind" in the English text of article 6 *bis*.

20. Mr. RAMANGASOAVINA said he fully supported the principles stated in article 6, and in articles 6 *bis* and 6 *ter*. With regard to the wording of article 6, he shared the view of several other members of the Commission that the first phrase, "Except when in appropriate cases most-favoured-nation treatment is accorded under the condition of material reciprocity", was rather difficult to understand. It was true that the Special Rapporteur had taken care to indicate, both in his report and in his oral explanations, that in the practice and in various agreements concluded between States, there were specific cases in which a clause with reciprocity was obligatory because the very nature of the case required it. But he (Mr. Ramangasoavina) considered that the words "appropriate cases" were not very clear and that it would be better to use the customary formula "Unless it is agreed otherwise".

21. The essential point in the revised article 6 was the affirmation contained in the words "the most-favoured-nation clause is unconditional". That affirmation followed from the title of the article: "Presumption of unconditional character of the most-favoured-nation clause". But that presumption was a rebuttable presumption which fell away when there was a clause providing that the advantages were granted subject to reciprocity. Article 6 *bis* dealt with the effect of an unconditional most-favoured-nation clause. There was thus a logical connexion between those two articles, which had been combined in the former article 6 submitted by the Special Rapporteur in his fourth report. Article 6 *bis* was, indeed, the necessary complement to article 6, for it explained the principle stated in that article, namely, that in the absence of other clauses the most-favoured-nation clause was presumed to be unconditional. Hence it could be either a paragraph of article 6 or a separate article.

22. He therefore considered that, in the explanatory part of article 6 *bis*, it was unnecessary and even illogical to refer again to the unconditional clause, since the unconditionality was presumed according to article 6. If the unconditional nature of the most-favoured-nation clause was presumed, it was not necessary to include an express provision on that point in a contract. He thought it would accordingly be better to present article 6 *bis* as the logical sequel to article 6 and word it to read : "In these circumstances, the beneficiary State acquires the right to treatment not less favourable than that accorded by the granting State to a third State".

23. Article 6 *ter* could be a separate article, because the subject with which it dealt, namely, the effect of a most-favoured-nation clause conditional on material reciprocity, did not come within the scope of the presumption of

unconditionality, which applied when there was no conditional clause. If the contracting parties wished to include in their contract a most-favoured-nation clause conditional on material reciprocity, they must do so expressly.

24. Mr. KEARNEY said that, while he knew of no decisions on the subject, there was a view, which he shared, that in cases such as those described in article 6 *ter*, paragraph 2, where a granting State accorded favourable treatment to a third State gratuitously, the treatment required of the beneficiary State under the most-favoured-nation clause should be no more favourable than that required of the third State. In those circumstances, the basic triggering mechanism for the operation of the most-favoured-nation clause was absent and the beneficiary State should not be required to give the granting State the same treatment as it received itself.

25. Mr. USTOR (Special Rapporteur) said that to his mind it was obvious that where States A and B had concluded a most-favoured-nation clause in respect of consular privileges and immunities which was not subject to conditions, State A was obliged to grant the consuls of State B all the privileges and immunities it granted to representatives of other States, and *vice versa*. It did not matter whether there was any difference in the levels of treatment accorded by the two States, for the clause aimed only at ensuring that neither would discriminate in favour of any of the representatives in its territory. Where a similar agreement existed which was subject to a condition, State A, for example, would not be able to enjoy the special benefits provided for in the conditional clause unless it granted to the consuls of State B in its own territory privileges as extensive as those accorded by State B to consuls in its own territory. It was absolutely immaterial, however, whether the privileges granted to foreign consuls by State B had been accorded gratuitously or against compensation; the decisive factor was the extent of the privileges, not the way in which they had arisen.

26. Mr. KEARNEY said the situation was clearly one on which his own views and those of the Special Rapporteur were far from identical.

27. The CHAIRMAN suggested that, on the understanding that the question raised by Mr. Kearney would be discussed in the commentary, articles 6, 6 *bis* and 6 *ter* should be referred to the Drafting Committee.

*It was so agreed.* [5]

28. Sir Francis VALLAT said he had a statement to place on record regarding article 6 *ter*. There had been very little discussion on that article which, as he saw it, was likely to cause more difficulty than articles 6 and 6 *bis* at the present stage. As it was drafted, it was very difficult to see what the exact effect of article 6 *ter* would be. That was only natural, because paragraph 1 of the article concentrated the very phrases of the two previous articles on which comments had been made during the discussion.

29. He therefore reserved his position on article 6 *ter* until its language had been clarified.

[5] For resumption of the discussion see 1352nd meeting, para. 1.

ARTICLE 6 *quater*

30. The CHAIRMAN invited the Special Rapporteur to introduce article 6 *quater* in his fifth report (A/CN.4/280) which read:

*Article 6* quater

*Observance of the laws and regulations of the granting State*

Without prejudice to the right to most-favoured-nation treatment acquired by the beneficiary State under a most-favoured-nation clause the persons and things enjoying the favours deriving from that treatment are subject to the laws and regulations of the granting State.

31. Mr. USTOR (Special Rapporteur) said that article 6 *quater* was a simple safeguard clause. Its only purpose was to express the idea that favours granted under a most-favoured-nation clause could not go beyond the stipulation of the clause. Persons enjoying those favours had to observe the laws and regulations of the granting State. There was some similarity between the provisions of article 6 *quater* and those of article 41 of the Vienna Convention on Diplomatic Relations, paragraph 1 of which stated the duty of all persons enjoying privileges and immunities under that Convention was "to respect the laws and regulations of the receiving State". [6] Provisions to the same effect were contained in the Vienna Convention on Consular Relations [7] and the Convention on Special Missions. [8]

32. In the commentary to article 6 *quater* some precedents were cited which showed that the obvious rule stated in the article was generally recognized. He hoped that the article would meet with general support in the Commission.

33. Mr. CALLE Y CALLE said that the rule in article 6 *quater* was self-evident; benefits granted under the most-favoured-nation clause could not go beyond the bounds set by the duty to observe the laws and regulations of the granting State.

34. As the Special Rapporteur had pointed out, there was a similarity between the provisions of article 6 *quater* and the corresponding provisions of the Conventions on Diplomatic Relations, Consular Relations and Special Missions. The most recent convention on diplomatic law, the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, [9] also contained a provision on the subject in article 77 (Respect for the laws and regulations of the host State).

35. The draft articles under consideration dealt with the most-favoured-nation clause in relations between States. Since the question of most-favoured-nation treatment could also arise as between organizations, he suggested that a reference to international organizations should be included.

36. He supported article 6 *quater*, which set out in clear and precise terms a rule that was well grounded in doctrine and in practice.

[6] United Nations, *Treaty Series*, vol. 500, p. 120.

[7] *Op. cit.*, vol. 596, p. 308, article 55.

[8] General Assembly resolution 2530 (XXIV), annex, article 47.

[9] Document A/CONF.67/16.

37. Mr. TSURUOKA said he had no objection to the retention of draft article 6 *quater*, but wondered whether it was absolutely necessary to deal with the question of observance of the laws of the granting State in draft articles on the most-favoured-nation clause. It was obvious that the granting State's internal law must be respected. Nevertheless, the Special Rapporteur's commentary (A/CN.4/280), and especially his reference to a judgment of the French Court of Cassation in paragraph (2), showed the usefulness, if not the necessity, of dealing with that matter in the draft.

38. Mr. REUTER said that he too was prepared to accept draft article 6 *quater*, which, although it was only a formal provision, nevertheless raised difficulties it would be better not to overlook. Draft article 6 established a presumption of the unconditional character of the most-favoured-nation clause, and in his commentary to article 6 *quater* the Special Rapporteur had rightly pointed out that a State must not withdraw the benefits of an unconditional clause by its legislation; he had added that it was a question of good faith. The judgment of the French Court of Cassation which he had cited was surprising: France had granted a most-favoured-nation clause, but the Court had subsequently invoked French law, and in particular article 11 of the French Civil Code, under which aliens in France enjoyed the rights accorded to French nationals only subject to reciprocity. The Court had thus combined the unconditional clause with article 11 of the French Civil Code, which made the clause conditional.

39. The Commission should therefore recognize either that that judgment was not compatible with the draft articles, or that the wording of article 6 was not sufficiently strict. True, the Special Rapporteur had pointed out that the presumption in article 6 was not irrebuttable, and two conclusions could be drawn from that. To state that evidence to the contrary could be derived only from the treaty containing the most-favoured-nation clause would be opting for a very strict solution; it would exclude any evidence that could be derived from the circumstances of the individual case and, in particular, the circumstances of the conclusion of the agreement. Moreover, it could be maintained that the French Court had been justified in finding that the unconditional clause in question was in fact conditional, by reason of a fundamental principle concerning the treatment of aliens in France laid down in the French Civil Code. States concluding an agreement with France concerning the status of aliens would normally be aware of that provision. Interpreted in that light, article 6 would open the way to sources of evidence other than the text of the treaty.

40. The judgment of the French Court of Cassation cited by the Special Rapporteur faced the Commission with a choice. If it adhered to the rules of interpretation in the Vienna Convention on the Law of Treaties [10] and did not lay a stricter rule, that would mean that it was prepared to admit evidence from sources other than the treaty in rebuttal of the presumption in article 6; if it considered that the interpretation of most-favoured-nation clauses required a stricter rule, it would have to state that rule expressly, but the rule would have repercussions on article 6.

41. Mr. USHAKOV pointed out that the rule stated in article 6 *quater* might conflict with a most-favoured-nation clause which provided for exceptions to the application of the granting State's internal law. Moreover, it might not be necessary to make a general reference to the granting State's laws and regulations, since only the laws and regulations relating to the application of the clause were involved.

42. The drafting of article 6 *quater* prompted a question which he had not raised in regard to articles 6 *bis* and 6 *ter*, since they might have to be completely recast: in view of the text of article 5, was it really possible to speak of the right to most-favoured-nation treatment "acquired by the beneficiary State"? It was rather a right accorded to the beneficiary State, or to "persons or things in a determined relationship with that State", to quote draft article 5.

43. The reference in article 6 *quater* to persons and things enjoying the favours deriving from most-favoured-nation treatment was also unsatisfactory, as it might be taken to mean persons and things of any State, whereas obviously there must be a determined relationship with the beneficiary State.

44. Mr. AGO noted that the main difficulties raised by the article under discussion had already been mentioned by other members of the Commission. He merely wished to point out that the purpose of the article was to protect, at the international level, the right of the beneficiary State vis-à-vis the granting State. It might therefore be asked what would happen if the granting State kept in force laws or regulations contrary to the most-favoured-nation treatment. How would such a conflict between a rule of international law and provisions of internal law be resolved?

45. Article 6 *quater* also raised some drafting problems. In particular, it was always awkward to speak of persons and things being "subject" to the laws and regulations of a State, as the term "subject" could hardly apply to movable property.

46. Mr. SETTE CÂMARA said he had no objection to the text of article 6 *quater*, but shared the doubts expressed by Mr. Tsuruoka as to whether the article was really necessary in the draft.

47. The practice of most States was that once a treaty containing a most-favoured-nation clause had been ratified, it was enacted as internal law to render it enforcable. It thus became the law of the land, and if it conflicted with existing laws and regulations, the provisions of the treaty would prevail, on the principle *lex posterior derogat priori*.

48. That being said, he was prepared to support the approval of article 6 *quater*, subject to the necessary drafting amendments.

49. Mr. BILGE said he thought article 6 *quater* was acceptable in its present form, not only because it was

[10] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 293, section 3.

useful, but also because it dispelled certain doubts which might arise in practice. The commentary to the article gave the impression that the laws of the granting State concerning the modalities of the exercise of a certain right must be respected. It should therefore be specified that laws concerning the modalities of the acquisition of a right or of the practice of a profession, for example, must be respected. A country's internal law might well impose conditions, as did a Turkish law requiring reciprocity. If the granting State's laws imposed restrictions in a certain sphere—for instance, if the practice of certain professions was restricted to its own nationals—and it accorded the benefits of a most-favoured-nation clause to another State, the clause had to be applied. Such a situation engendered a conflict both between international law and internal law, and between a general rule and a special rule of internal law.

50. Hence it was important to emphasize the first phrase of article 6 *quater*. In the commentary, the Commission could stress the fact that a right acquired by virtue of a most-favoured-nation clause was really acquired, and that the laws and regulations of the granting State could in no way impede its enjoyment.

51. Sir Francis VALLAT said he was prepared to accept the principle underlying article 6 *quater;* he had been greatly assisted in understanding it by the excellent commentary to the article (A/CN.4/280). He had considerable doubts, however, about the wisdom of stating the rule in article 6 *quater* as a single proposition. The problem of the application of local laws and regulations could be an extremely subtle one in individual cases. If a trader was required to have a permit by the local law, it could be said that the treatment consisted in the right to trade and that it was being made conditional on a permit being obtained. Seen in that light, the requirement of a permit could be regarded as a condition within the meaning of articles 6 and 6 *bis*.

52. It was also possible, however, to see the same case in a totally different light. The extension of the right to trade could be considered as being subject to a permit, and the requirement of a permit would then be regarded as part of the treatment. The conclusion would then be the opposite of that reached by the other approach.

53. The provisions of article 6 *quater* gave rise to serious doubts because they dealt with rights at two levels: first, the right of the beneficiary State to most-favoured-nation treatment at the level of international law; second, the right of persons to enjoy the favours deriving from that treatment and from the internal laws and regulations that might be applicable. It was very difficult to clarify the relationship between those two levels of rights in the cases under consideration.

54. The operative part of article 6 *quater* raised serious problems. It was difficult to see in what sense persons, and particularly things, could be said to enjoy the favours deriving from most-favoured-nation treatment. What was probably meant was that the persons concerned were entitled to raise a complaint, through the State to which they belonged, if they did not receive certain benefits.

55. It would seem normal to require those enjoying the favours deriving from most-favoured-nation treatment to comply with the laws and regulations of the granting State. If, under a most-favoured-nation clause, the ships of a State had the right of access to a port, the persons or companies to whom they belonged enjoyed that benefit, but the ships had to observe the local laws and regulations while in port.

56. The application of the rule stated in such concise terms in article 6 *quater*, however, might open the way for enactment by the granting State of legislation which could operate in a discriminatory fashion. And the principle of non-discrimination was fundamental to the whole subject. For example, trade licensing provisions were undoubtedly made in accordance with the laws and regulations of the granting State. They could, however, be applied in a discriminatory manner. In cases of that kind, it was difficult to see how the provisions of article 6 *quater* would apply.

57. As he saw it, the Commission had two alternatives. The first was to go into the whole question more thoroughly and in greater detail; the second was to delete article 6 *quater* from the draft and deal with the matter in a commentary. Certainly, a short article on the lines of the present article 6 *quater* could not cover the great variety of cases that could arise in practice.

58. The situation contemplated in article 6 *quater* was different from that dealt with in article 41 of the Vienna Convention on Diplomatic Relations. The latter provision dealt with two things which were comparable: the privileges and immunities of diplomatic agents under international law and the duty imposed on them by international law to respect the laws and regulations of the receiving State. It had been necessary to lay down in that Convention the general principle of the respect due to those laws and regulations, because diplomatic agents operated in the territory of the receiving State. The same was true of consuls, members of special missions and other representatives who enjoyed privileges under the various conventions mentioned during the discussion. The position was very different, however, in the case of a person enjoying the favours deriving from most-favoured-nation treatment; article 6 *quater* was much too broad a provision to cover the variety of problems which could arise in that context. The language of the article needed to be made more specific, particularly in its last part.

59. Mr. KEARNEY said he shared the concern expressed by the previous speaker. He doubted, however, whether it would be possible to go into more detail regarding the subject-matter of article 6 *quater* with any hope of achieving a solid result. The scope of the subject-matter was so varied and the conditions so contingent that it would not be possible to cover, in that article, the great variety of problems involved.

60. He cited the example of a standard clause contained in most establishment treaties, concerning access to courts of justice by companies of the contracting States on a most-favoured-nation basis. Clauses of that kind raised the problem of the requirement, which existed in

many countries, that a company must register as a domestic company before it was permitted access to the courts. The only practical way to deal with that type of problem was through a suitable provision in the establishment treaty. It would be an intractable task to deal, in the context of the subject-matter of article 6 *quater*, with the enormous number of different problems of that kind.

61. It was very difficult to achieve a proper balance when defining the relationship between internal law and most-favoured-nation treatment required under an international agreement. Under the system embodied in the Vienna Convention on the Law of Treaties, international law prevailed over internal law in the event of a conflict; [11] hence the rights enjoyed under a most-favoured-nation clause should take precedence over the provisions of the law of the granting State. The language of article 6 *quater*, however, seemed to imply that the laws and regulations of the granting State would take precedence over the observance of most-favoured-nation clauses under international law. That impression should be dispelled. It could be done by rewording article 6 *quater* to provide that persons enjoying the favours deriving from most-favoured-nation treatment were "subject to the laws and regulations of the granting State except as otherwise required by the most-favoured-nation clause". He would certainly prefer to drop article 6 *quater* from the draft than to retain it with its present unbalanced wording.

62. Mr. PINTO said he was in favour of including an article such as article 6 *quater*. He believed that the language proposed by the Special Rapporteur adequately balanced the two ideas of the enjoyment of rights under the most-favoured-nation clause and the implementation or exercise of those rights.

63. The right to most-favoured-nation treatment could clearly not be altered by internal law. At the same time, article 6 *quater* placed appropriate emphasis on the exercise of that right, which was subject to due respect for the laws and regulations of the granting State. He cited the example of a country that wished to encourage foreign investment and gave certain facilities to another country for the repatriation of profits by its nationals. Those facilities would be automatically extended to other States benefiting from a most-favoured-nation clause. The beneficiary States would have the right to that treatment notwithstanding any provisions to the contrary in the local legislation, but they would not be exempted from using the normal administrative machinery or from complying with the regulations governing the exercise of the right to repatriate profits made in the granting State.

64. While he appreciated that there were genuine difficulties in adopting a general provision dealing with a variety of different situations, he thought those difficulties in no way justified the omission of article 6 *quater* from the draft.

The meeting rose at 1 p.m.

[11] *Ibid.*, p. 293, article 27.

## 1332nd MEETING

*Wednesday, 18 June* 1975, *at 10.10 a.m.*

*Chairman:* Mr. Abdul Hakim TABIBI

*Members present:* Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, 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.

### Tribute to the memory of Mr. Eisaku Sato, former Prime Minister of Japan

1. The CHAIRMAN, speaking on behalf of the Commission, expressed its condolences to the Government and people of Japan on the death of their former Prime Minister, Mr. Eisaku Sato, a man of peace whose passing was greatly regretted. He felt sure the members would also wish to express their sympathy for Mr. Sato's family.

2. Mr. TSURUOKA thanked the members of the Commission for their expression of sympathy to his country and to the family of a great Japanese statesman.

### Most-favoured-nation clause

**(A/CN.4/266; [1] A/CN.4/280; [2] A/CN.4/286)**

[Item 3 of the agenda]

*(resumed from the previous meeting)*

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLES 6 *quater* (*continued*) AND 6 *quinquies*

3. The CHAIRMAN invited the Special Rapporteur to introduce the redraft of article 6 *quater* and his new article 6 *quinquies*, which read:

*Article 6* quater

*Observance of the laws and regulations of the granting State*

Without prejudice to the treatment to which they are entitled under a most-favoured-nation clause, persons and things in a determined relationship with the beneficiary State are subject to the laws and regulations of the granting State on the territory of the latter to the same extent as are the persons and things in the same relationship with a third State.

*Article 6* quinquies

*Prohibition of evading obligations arising from a most-favoured-nation clause*

The granting State shall not enact laws or regulations which would nullify or jeopardize the right of persons or things in a determined relationship with the beneficiary State to the treatment accorded by it under a most-favoured-nation clause i.e. which would in law or in fact have the effect that the treatment of such persons or things becomes less favourable than that of the persons or things in the same relationship with a third State.

4. Mr. USTOR (Special Rapporteur) said that the new version of article 6 *quater* expressed essentially the same thought as the original text (A/CN.4/280), but brought our more clearly that the right to which the beneficiary

[1] *Yearbook ... 1973*, vol. II, pp. 97-116.

[2] *Yearbook ... 1974*, vol. II, Part One, pp. 117-134.