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Summary record of the 1332nd meeting

Topic:
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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.

State was entitled was in essence a right to non-discrimination in a certain field. So long as that right was not violated by the granting State, the persons concerned had to comply with the laws and regulations of that State.

5. Under the rules of general international law, all persons and things in the territory of the granting State were subject to the laws and regulations of that State as the territorial State. The granting State could introduce new legislation which would also be applicable to those persons and things, but it could not enact any legislation that contravened treaty obligations into which it had entered. The laws and regulations enacted must not create a discriminatory situation to the detriment of the persons who, or things which, were the ultimate beneficiaries of the most-favoured-nation clause. The crux of the matter was that the most-favoured-nation clause did not purport to grant any special advantages, but to ensure equality of treatment; it was that principle of equality which the territorial State must respect.

6. There had been some discussion on the possibility of a granting State violating its obligations under the most-favoured-nation clause. In order to allay the fears expressed, he had prepared a new article 6 *quinquies*, the purpose of which was to prohibit any acts whereby the granting State might seek to evade its obligations under a most-favoured-nation clause.

7. The problem of such evasion was one which had frequently arisen in State practice. One of the devices used was the adoption of unduly specialized tariffs. In his 1968 working paper he had cited a classic example: in 1904, Germany had conceded to Switzerland a reduced tariff for heifer calves "reared at 300 metres above sea level" with "at least one month of grazing at at least 800 metres above sea level"—calves which obviously could not be produced by other countries entitled to most-favoured-nation treatment. [3] The purpose of the new article 6 *quinquies* was to prohibit the enactment of legislation which would discriminate in fact, but not in name, against the beneficiary State.

8. He would welcome suggestions for drafting improvements to both the new articles.

9. Mr. ŠAHOVIĆ said he found article 6 *quater* quite appropriate in the draft, since it was important to deal with the relationship between the most-favoured-nation clause, which came under international law, and the internal law of the granting State. The first part of the article reserved the right of the beneficiary State to most-favoured-nation treatment, whereas the second part stressed the need to observe the laws and regulations of the granting State.

10. In paragraph (6) of his commentary to article 6 *quater* (A/CN.4/280), the Special Rapporteur had explained that the article was formulated in sufficiently general terms to be applicable not only to unconditional, but also to conditional clauses, including those subject to a condition of reciprocity. It was self-evident that article 6 *quater*, as revised, and the new article 6 *quinquies* would apply both to conditional and to unconditional clauses. Perhaps that should be made clearer in the commentary to those provisions, since the clauses subject to a condition of reciprocity were probably those most likely to raise problems regarding not only observance of the laws and regulations of the granting State, but also the guarantees to be given to the beneficiary State.

11. It was in response to the comments made during the discussion on article 6 *quater*, as originally drafted, that the Special Rapporteur was proposing article 6 *quinquies*. The new article was not indispensable, but could be justified by the need to provide the beneficiary State with some guarantees. In connexion with possible guarantees to States, he referred to a situation which was very different from that contemplated in article 6 *quinquies*, but was not without interest for the consideration of that article: under a provision of the Yugoslav Constitution of 1974, contracts concluded with foreign persons or enterprises and relating to foreign investments in Yugoslavia could not be affected by any law enacted subsequently in Yugoslavia.

12. Mr. RAMANGASOAVINA said he found it natural to include in the draft a provision stipulating that the laws and regulations of the granting State must be respected without prejudice to the right of the beneficiary State to most-favoured-nation treatment. In view of the concern about article 6 *quater* expressed by some members of the Commission the previous day, the Special Rapporteur had amended that article *inter alia* by adding at the end the words "to the same extent as are the persons and things in the same relationship with a third State". In reality, that addition only shifted the problem. For the discussion at the previous meeting had been concerned with the relationship between the advantages granted to the beneficiary State under a most-favoured-nation clause and the internal law of the granting State, whereas the effect of the additional clause was to equalize the advantages granted to the beneficiary State and those granted to a third State, which seemed to be inherent in the very idea of most-favoured-nation treatment.

13. In its first version, article 6 *quater* had been clearly modelled on article 41 of the Vienna Convention on Diplomatic Relations [4] and on article 55 of the Vienna Convention on Consular Relations. [5] But those two provisions were placed in a very different context from that of the most-favoured-nation clause; they laid down the principle of respect for the laws and regulations of the receiving State or State of residence, as the case might be, by persons enjoying privileges and immunities not enjoyed by nationals of those States. According to the new version of article 6 *quater*, the advantages accorded to the beneficiary State under the most-favoured-nation clause could not be greater than those accorded to a third State. That was a settled principle, recognized by jurisprudence: a beneficiary State could not rely on the existence of a convention between the granting State and a third State to claim advantages greater than those enjoyed by that third State.

14. If a granting State took internal legislative measures concerning the status of aliens—if, for example, it

[3] *Yearbook . . . 1968*, vol. II, p. 170, para. 31.

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

[5] *Op. cit.*, vol. 596, p. 308.

reserved the practice of certain professions or the sale of alcoholic drinks or pharmaceutical products to its own nationals—and if those measures were incompatible with the advantages accorded under a most-favoured-nation clause, there would be a conflict between internal law and international law. Consequently, the new draft of article 6 *quater* merely shifted the problem, since the conflict would not necessarily be confined to the extent of the advantages accorded to the third State. Moreover, the Special Rapporteur had been well aware of that nuance, for he had mentioned that most States, when concluding agreements containing a most-favoured-nation clause, took care to stipulate that the granting of advantages was subject to observance of their internal laws. One example was to be found in the treaty between the Soviet Union and the United Arab Republic cited in paragraph (4) of the commentary to article 6 *quater* (A/CN.4/280).

15. So far as draft article 6 *quinquies* was concerned, he noted that it introduced a salutary restriction, for it meant that the granting State must show good faith in applying the most-favoured-nation clause.

16. Mr. SETTE CÂMARA said that while he was grateful to the Special Rapporteur for his efforts, he preferred the previous text of article 6 *quater* to the new wording, largely for the reasons stated by Mr. Ramangasoavina. Moreover, he did not see how the additional provision at the end of the article would operate. It appeared to suggest that some States were under a greater obligation than others to respect the laws and regulations of the granting State. As he saw it, observance of the laws and regulations of the territorial State was an absolute concept and a provision of that kind would be unworkable. He found the previous wording of article 6 *quater* clearer and simpler; it showed that the conflict arose between internal law and the favours resulting from the most-favoured-nation clause and did not raise the question of the degree of application of internal laws.

17. As to the new article 6 *quinquies*, he agreed with Mr. Šahović that it was unnecessary. States would be reluctant to subscribe to a provision of that kind, which affected their sovereign right to enact laws. The situation envisaged in the new article would normally be settled through the claim that would inevitably be made by a beneficiary State which was injured by discriminatory laws or regulations.

18. Mr. KEARNEY said he was basically in agreement with the previous speakers who had expressed misgivings about the revised text of article 6 *quater*. The reference to "persons and things in the same relationship with a third State" introduced into the article an undesirable fluctuating standard. In addition to confusing the issue, the new wording could have the effect of reducing the rights of persons and things entitled to benefit under a most-favoured-nation clause.

19. That being so, he suggested the following simpler formulation for the article:

> "Persons and things enjoying favours under a most-favoured-nation clause are subject to the laws and regulations of the granting State except to the extent that such laws and regulations may be rendered inapplicable to such persons or things as a consequence of the application of the most-favoured-nation clause".

He believed that language on those lines would preserve an adequate balance between the rights of the beneficiary State and those of the granting State.

20. With regard to the new article 6 *quinquies*, he shared the doubts which had been expressed about its desirability. As far as he could see, the content of the article amounted to no more than a reiteration of the principle of *pacta sunt servanda*. He did not think it was either necessary or wise to restate that fundamental principle of the observance of treaties, which was already affirmed in article 26 of the Vienna Convention on the Law of Treaties. [6] No useful purpose would be served, and some harm could be done, by reiterating it in the present context.

21. He understood the Special Rapporteur's concern about such special problems as countervailing duties and "anti-dumping" provisions, which had given rise to complicated technical arguments as to whether they were permissible or not within the reasonable scope of the most-favoured-nation clause. The proper procedure for dealing with problems of that kind was recourse to the competent domestic courts by the injured persons. Of course, if those persons did not obtain what they believed to be their rights from the domestic courts, they would need international machinery to settle the problem at the international level through the beneficiary State. He himself had always taken the position that international arrangements for the impartial adjudication of disputes were essential. Machinery of that kind existed under the GATT for the settlement of disputes arising out of the obligations of the contracting parties; perhaps it could provide guidance in the present context.

22. At the present stage of the work, he thought that article 6 *quinquies* should be dropped.

23. Mr. PINTO said he welcomed the fact that the Commission seemed inclined to retain article 6 *quater*. On the whole, he found the former version of the article more satisfactory than the new one; the rather general nature of the previous wording seemed more suitable.

24. As to article 6 *quinquies*, he agreed with some of the previous speakers that it was perhaps not essential in the draft. Moereover, its wording involved a technical difficulty, in that it clearly referred to laws and regulations that might be enacted in the future; it did not deal with the problem of evasion of the most-favoured-nation clause through the application of pre-existing laws and regulations.

25. Article 6 *quinquies* seemed far too heavy for the intended purpose, and he shared Mr. Sette Câmara's belief that States would not welcome a provision which affected their sovereign right to legislate, or willingly accept the implication that they were trying to evade their international obligations.

26. If the majority of the Commission considered that a provision of that kind should be included in the draft

[6] 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. 292.

articles, he would suggest that it be confined to a proviso to be inserted at the end of article 6 *quater*, which might read: "provided, however, that such laws and regulations shall not have a discriminatory effect against the beneficiary State vis-à-vis third States."

27. Mr. TSURUOKA said that article 6 *quater*, in its revised form, and the new article 6 *quinquies* were not essential, or even useful, from a strictly legal and logical point of view, since they only confirmed well-established rules of international law. They should be retained for practical reasons, however, because the existence of judicial decisions, such as the judgment of the French Court of Cassation cited by the Special Rapporteur, proved that the problems covered by article 6 *quater* did in fact arise.

28. According to the two new draft articles submitted by the Special Rapporteur, persons and things of the beneficiary State must comply with the laws and regulations of the granting State when benefiting from the advantages of the most-favoured-nation clause. Moreover, the granting State must keep the promises it had made in granting the most-favoured-nation clause. Personally, he thought those two ideas could be expressed in a single provision.

29. Mr. USHAKOV said that the two articles under consideration were acceptable in principle. It was quite natural to refer to a third State in article 6 *quater*, since the most-favoured-nation clause could not apply without such a State being involved. It was entirely necessary to specify that when the granting State exempted a third State from the application of part of its internal law, the beneficiary State was also exempt.

30. In the event of a conflict between the international obligation of the granting State deriving from the most-favoured-nation clause and its own internal law, it would be logical that the latter should be amended, otherwise the international responsibility of the granting State would be engaged. The Commission might even opt for a provision specifying that in such a case the granting State had an obligation to amend its internal law so as to respect the principle *pacta sunt servanda*.

31. With regard to the drafting of article 6 *quater*, he did not think that the word "subject" was appropriate.

32. According to article 6 *quinquies*, the granting State could not enact laws or regulations which discriminated against one or more countries, because they would be contrary to the most-favoured-nation treatment. While he approved of the substance of that provision, he hoped that the Drafting Committee would consider amending the phrase "to the treatment accorded by it under a most-favoured-nation clause", since the reference was rather to treatment which was accorded directly to a third State, but which, by the operation of the most-favoured-nation clause, was accorded to the beneficiary State. Perhaps the words "to the treatment due to them under a most-favoured-nation clause" would be more appropriate.

33. Mr. REUTER said he approved of the two articles under consideration because their purpose was to ensure better application of the most-favoured-nation clause. The only reason for dropping them would be the conclusion that they gave rise to difficulties which it did not seem possible to overcome. But that was not so.

34. Referring to article 6 *quinquies*, he pointed out, first, that that provision referred only to the case in which the granting State took legislative measures after granting the most-favoured-nation clause. To cover the case of prior measures, it might be provided that the clause could not be interpreted by reference to provisions of the internal law of the granting State, even if they had been enacted before the granting of the clause. A rule might also be laid down to the effect that a State which concluded a treaty containing a most-favoured-nation clause and which had laws that could limit the effects of that clause, must mention the relevant legislative provisions in the treaty, failing which it would be debarred from invoking them later. If the Commission decided in favour of that rule, which was certainly severe and far removed from the general principles of the interpretation of treaties, it should be included in draft article 6.

35. Several members of the Commission had stressed that States were hostile to any limitation of their sovereignty. In that connexion, he pointed out that article 6 *quinquies* dealt with a very special situation, namely, abuse of right. Every State had the right to enact laws, but it lost that right when its main object was to violate an international obligation. In the English version of article 6 *quinquies*, the words "nullify or jeopardize" might perhaps be replaced by the word "frustrate", which would be an allusion to the theory of frustration of contract, according to which a measure could not be taken if its main object was to prevent a certain result which others had been led to expect. When the notion of abuse of right had been referred to in connexion with State responsibility, the Special Rapporteur for that topic had not received it very favourably. But where the most-favoured-nation clause was concerned, manifest abuses of right did occur. He was therefore in favour of a provision such as article 6 *quinquies*, though he hoped that the idea of the essential intention would be introduced into it, for the sovereignty of the granting State must be respected when the measures it adopted were justified by considerations of general interest.

36. Sir Francis VALLAT thanked the Special Rapporteur for submitting two articles which would be very helpful to the Drafting Committee. Although the language could be improved, the texts now proposed represented a valuable effort to move forward in the direction of the original article 6 *quater*.

37. The wording added at the end of the new article 6 *quater* might perhaps have the effect of unduly narrowing the scope of the article. The original language, however, was much too broad, and it was necessary to correct that defect. The new text linked the application of the laws and regulations of the granting State to the enjoyment of benefits derived from the most-favoured-nation clause. The idea of subjecting persons and things to the whole body of laws and regulations of the granting State was outside the scope of the present draft articles.

38. The new article 6 *quinquies* introduced a useful balancing element. In a way, article 6 *quater* stated the

obvious and could have been dispensed with. But if the self-evident rule it contained was to be included in the draft, it became necessary also to include a statement of the equally obvious rule set out in the new article 6 *quinquies*. There were many examples in State practice of States relying on their own laws and regulations to evade the application of a most-favoured-nation clause. If a provision was to be included to the effect that the granting State was entitled to apply its laws and regulations, it was essential also to prohibit any acts whereby that State might attempt to frustrate the operation of the most-favoured-nation clause. It was true that the language of article 6 *quinquies* was rather heavy as it stood, but the Drafting Committee could no doubt find an improved form of words to express the idea of avoiding any discrimination which nullified the effect of the most-favoured-nation clause.

39. The CHAIRMAN, speaking as a member of the Commission, said he did not think it was sufficient to have article 6 *quater* standing alone; it should be balanced by article 6 *quinquies*, with which it was organically linked. It would be better, however, to replace the words "are subject to", in article 6 *quater*, by some phrase such as "should accept".

40. Without article 6 *quinquies*, the preceding provisions would serve no purpose. For instance, there were cases in which transit States offered land-locked countries the right of transit only under a most-favoured-nation clause; if those transit States then adopted legislation requiring the presentation of numerous and complex customs documents, the enjoyment by a beneficiary State of its rights under the clause could become extremely difficult.

41. Mr. SETTE CÂMARA expressed concern about the effects of article 6 *quinquies* on developing countries which found themselves faced with an economic crisis. Such countries might be compelled to adopt internal legislation, including protective measures, in the interval before international measures, such as the denunciation of treaties and invoking of the special provisions of the GATT, could take effect. The adoption of an article containing such a categorical prohibition as that in article 6 *quinquies* would deny them that chance to defend themselves. The Commission should bear in mind its own belief in regard to developing nations and the most-favoured-nation clause: that equal treatment of nations whose positions were not equal constituted inequality.

42. Mr. EL-ERIAN commended the Special Rapporteur for the scholarship he had shown in his commentary to article 6 *quater*. He shared the views of the Chairman and the apprehension of Mr. Sette Câmara concerning article 6 *quinquies*, and hoped that the Drafting Committee would be able to make it less categorical.

43. The CHAIRMAN, speaking as a member of the Commission in reply to Mr. Sette Câmara, said that periods of war and other emergencies were special cases in which it was customary for States to suspend international legislation. Nevertheless he still believed that article 6 *quinquies* was necessary. A precedent was provided by a United Nations instrument, the Convention on Transit Trade of Land-locked Countries, which contained both an article on the most-favoured-nation clause and an article stipulating that the application of the Convention could not be suspended even in time of war. [7]

44. Mr. USTOR (Special Rapporteur) said that the choice between the old and the new versions of article 6 *quater* was largely a matter of drafting. The new version emphasized, in its first phrase, the right to most-favoured-nation treatment, which was a contingent right dependent on the treatment of a third State. Whatever formulation was chosen, the basic idea behind the article was that the nationals and things of a State which was the beneficiary of a most-favoured-nation clause had, within the limits of the *ejusdem generis* rule, a right to the same treatment as was accorded to the nationals and things of a third State. That the nationals and things of a beneficiary State would, without prejudice to that right, be subject to the laws of the granting State within the latter's territory was, admittedly, self-evident, but he thought it was worth stating expressly.

45. Those who considered that both article 6 *quater* and article 6 *quinquies* were self-evident and therefore unnecessary, should bear in mind the comments made by Mr. Reuter and Mr. Tsuruoka in support of his proposals. He fully agreed that the drafting of the articles could be improved and was grateful to Sir Francis Vallat for his suggestions.

46. Referring to the comments by Mr. Sette Câmara and Mr. El-Erian on the special situation of the developing countries, he said that other draft articles still to be introduced took that situation into account. Article 6 *quinquies* could serve to protect developing countries—for example, in situations in which their exports were threatened. In his view it would not be in the interests of the developing countries to set the article aside. He did not believe that any member of the Commission would wish to adopt an article stipulating that developed countries could not, but developing countries could, adopt internal legislation modifying their treaty obligations. The article as it stood was essentially a restatement of article 27 of the Vienna Convention on the Law of Treaties, which was a basic rule applicable to all States.

47. Mr. Sette Câmara said that the Special Rapporteur had partly dispelled his concern over article 6 *quinquies*; but it was only very seldom that developing countries actually benefited from a most-favoured-nation or a national treatment clause. The discussions in GATT and elsewhere showed that developing countries were continually seeking exceptions to such clauses. The protection which the Special Rapporteur had said the article would afford to developing countries was far from being a reality in present-day life.

48. Mr. REUTER said he thought that article 6 *quinquies* could be seen only as referring to an abuse of right which was objectively manifested by the fact that the sole purpose of a measure was to deprive the beneficiary of the advantages of the clause. A State had the right to take general measures, even if they limited the advantages of the clause, provided that those measures were

[7] United Nations, *Treaty Series*, vol. 597, p. 42; see articles 10 and 13.

justified for basic economic, financial or other reasons. But the Commission should not omit to prohibit certain acts which were manifestly wrongful, on the pretext that safeguard clauses were necessary.

49. Under the GATT, developing countries had benefited since 1964 from an exemption from reciprocity, and since 1968 they had also benefited, through UNCTAD, from generalized preferences without reciprocity. Moreover, the system of generalized preferences had been extended very widely and the 1975 Lomé Agreements had granted full equality of treatment without reciprocity to 46 developing countries, including 12 of the poorest. In his opinion, it would be very dangerous to introduce into international law a general principle that no rule of international law must be formulated that might hamper developing countries, which already benefited—very properly—from a quite exceptional régime. It should not be forgotten that every State that wished to place itself in the category of developing countries had the right to do so, which had made it necessary for the Secretary-General of the United Nations himself to define a new category of least-developed countries. It was those countries, whose situation was absolutely tragic, which were entitled to an entirely exceptional régime.

50. Mr. USHAKOV said that article 6 *quinquies* was in no way related to the situation of the developing countries, which were affected by that article in exactly the same way as other countries. The adoption of legislation which discriminated against certain countries was prohibited for all States, including developing countries. The principle that if a State granted preferential treatment to developing countries it was not required to grant the same treatment to other countries, did not come within the scope of article 6 and would be the subject of subsequent articles.

51. Mr. USTOR (Special Rapporteur) said he thought article 6 *quinquies* was really very innocent and could be most useful to developing countries. He agreed with Mr. Sette Câmara that nowadays developing countries were interested in obtaining special preferences from developed countries rather than most-favoured-nation treatment, but the article would apply only where developing countries had granted most-favoured-nation treatment. It merely provided that when a developing country had promised most-favoured-nation treatment to another country, it could not introduce legislation which would discriminate against the beneficiary State contrary to that promise. He did not think that economic difficulties in developing countries would make it necessary for them to introduce discriminatory measures and thus violate their promises under most-favoured-nation clauses; on the other hand, the article would give a developing country which had most-favoured-nation rights in another developing country an assurance that it would not be subjected to discrimination.

52. Mr. SETTE CÂMARA pointed out that developing countries were far more likely to need special legislation to protect their industries than industrial countries, though even some of the most powerful industrial countries had recently taken emergency measures of that type. He was not opposed to the substance of article 6 *quinquies* and had no intention of suggesting that the Commission should approve an article giving developing countries the right to evade their obligations under a most-favoured-nation clause. His only doubt was whether the Commission should adopt an article that would seem to tie States' hands. If the article was binding, it would, he believed, be the very first provision approved by the Commission which prohibited a State from enacting legislation. If, on the other hand, the article was merely a reaffirmation of the present situation, in which a State having treaty obligations must not enact legislation conflicting with those obligations and if it did so the treaty would prevail, he had objection to it.

53. Mr. CALLE Y CALLE said that exceptions to most-favoured-nation clauses had long existed, and the right to make such exceptions was recognized in contemparary international economic law—for example, in the work of UNCTAD. The discussion had placed article 6 *quinquies* in its true context and shown that it should not be drafted in negative form as a categorical prohibition. The Commission should say that the granting State must not take any action affecting the rights of the beneficiary State which would result in the treatment accorded to that State being less favourable than that accorded to a third State, the basic obligation of the granting State being to ensure that there was no disparity between the treatment it accorded to the beneficiary and to third States. That did not mean, of course, that beneficiary States could escape the effects of article 6 *quater*: changes in the internal laws of the granting State affecting persons and things of a third State would also apply to persons and things of the beneficiary State.

54. The real meaning of article 6 *quater* had been defined by Sir Francis Vallat when he had said that the article did not seek to subject the persons and things of the beneficiary State in the territory of the granting State to all the laws and regulations of that State, but rather to ensure that the benefits of a most-favoured-nation clause would be enjoyed in accordance with the rules of the granting State relating to the field covered by the clause. He was sure that the Drafting Committee would be able to make appropriate amendments to articles 6 *quater* and 6 *quinquies*.

55. Mr. EL-ERIAN assured the Special Rapporteur that he had not meant that article 6 *quinquies* should be set aside. Nor had he intended any adverse reflection on the *pacta sunt servanda* rule or the rule that a State could not invoke its internal law to evade its international obligations. He was grateful to the Special Rapporteur for his intention to introduce draft articles providing for the special problems of the developing countries.

56. The Commission should always bear in mind that its task was to lay down universal rules of international law, but it had been considered appropriate to include in the draft articles on succession of States in respect of treaties, a section dealing separately with newly independent States. [8] The codifier of international law had to allow for the transitional provisions which inevitably appeared in the constitutions of at least some of the

[8] *Yearbook . . . 1974*, vol. II, Part One, document A/9610/Rev.1, chapter II, section D, part III.

many States which had gained independence in recent decades. At the same time, care must naturally be taken to ensure that those provisions did not undermine the universal character of the law of nations.

57. He agreed with Mr. Ushakov that article 6 *quinquies* was not concerned solely with the application of the most-favoured-nation clause to developing countries, but was a general article. In saying that the article was too categorical, he had in mind the possibility that a State which became a member of a regional organization and was subsequently required by that organization to adopt certain legislation, might thereby violate its obligations under a most-favoured-nation clause. He agreed with the substance of the article, but hoped it could be redrafted to take account of the points he had raised.

58. The CHAIRMAN suggested that articles 6 *quater* and 6 *quinquies* should be referred to the Drafting Committee.

It was so agreed. [9]

The meeting rose at 12.50 p.m.

[9] For resumption of the discussion see 1352nd meeting, para. 116.

1333rd MEETING

Thursday, 19 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.

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

ARTICLES 7 AND 7 *bis*

1. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 7 and 7 *bis*, which read:

Article 7

The ejusdem generis *rule*

Under a most-favoured-nation clause or a national treatment clause the beneficiary State cannot claim any other rights than those relating to the subject-matter of the clause and falling within the scope of the clause.

Article 7 bis

The scope of the most-favoured-nation clause regarding persons and things

1. The scope of the persons or things to whose most-favoured-nation treatment the right of the beneficiary State extends under a most-favoured nation clause is confined to the class of persons or things expressly specified in the clause or in the treaty containing it or implicitly indicated by the agreed sphere of relations where the clause applies.

2. From among the persons or things falling within the scope of paragraph 1 the beneficiary State may claim actual most-favoured-nation treatment for those (*a*) belonging to the same class of persons or things as the class of persons or things that are accorded favours under the right of a third State by the granting State and (*b*) being in the same relationship with the beneficiary State as the latter are with a third State.

2. Mr. USTOR (Special Rapporteur) said that the *ejusdem generis* rule was one which had been generalized, but it was not always easy to define and its implementation had caused much controversy. A most-favoured-nation clause consisted in a promise by the granting State to treat the beneficiary State no less favourably than it treated a third State in a certain field of relations. Operation of the clause was governed by the nature of that field of relations; by the fact that, pursuant to the general rules of limitation, the granting State could not be obliged to accord most-favoured-nation treatment in a field other than that to which the promise in the clause related; and by the extent and nature of the favours granted to a third State. Those points were essential to a proper understanding of the operation of the clause; that was why he had drafted articles 7 and 7 *bis*.

3. The simplest explanation of the substance of article 7 was to be found in paragraph (1) of the commentary to that article in his fourth report. [3] The operation of the most-favoured-nation clause might, however, be limited not only to a certain field of relations, but also to certain persons and things: for instance, if the clause provided that favourable treatment would be extended only to residents of a certain town or members of a certain profession, that treatment could not be claimed for other persons, and the same applied to things. Furthermore, the operation of the clause would always be restricted by the treatment accorded to a third State; even persons or things in a class mentioned in the clause could not enjoy the benefits promised to them unless the granting State accorded preferential treatment to persons or things of a third State in the same class.

4. Mr. TAMMES observed that in formulating the *ejusdem generis* rule the Special Rapporteur had relied heavily on treaty interpretation. He had referred, in the final sentence of paragraph (6) of the commentary to article 7 in his fourth report, [4] to the dilemma which always confronted drafters of a most-favoured-nation clause; but he had met that difficulty satisfactorily by his general drafting of articles 7 and 7 *bis*.

5. The Special Rapporteur's interpretation of the *ejusdem generis* principle was, as stated in the quotation from McNair in paragraph (1) of the commentary to article 7 in his fourth report, "that the clause can only operate in regard to the subject-matter which the two States had in mind when they inserted the clause in their treaty". Similar statements were to be found in the jurisprudence analysed in his various reports and it was, indeed, a basic principle, linked with the reference to performance by the parties "in good faith" in the Vienna

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

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

[3] *Yearbook . . . 1973*, vol. II, p. 102.

[4] *Ibid.*, p. 104.