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Summary record of the 1336th meeting

Topic:

Most-favoured-nation clause

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attempt to solve the problem of defining a developing country, which was under consideration by several United Nations bodies. He saw no obstacle, however, to making provision for developing countries in the present draft, without actually defining them. The International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly in 1966 and annexed to resolution 2200 (XXI), contained a provision on developing countries which made no attempt to define them, namely, article 2, paragraph 3, which read: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee economic rights recognized in the present Covenant to non-nationals". On the basis of that precedent, set by the General Assembly itself, the Commission was undoubtedly free to refer to developing countries in the present draft for the purposes of one of the rules included in it.

54. In reply to Sir Francis Vallat, he explained that article 8 *bis* had been included, although its provisions could be said to be covered by those of article 4 defining the most favoured nation clause, because of the enormous volume of writings on the subject it dealt with. In view of the tendencies which had become apparent and of the great interests at stake, it was desirable that a specific rule on that subject should be included in the draft.

55. The idea suggested by Mr. Šahović and Mr. Tsuruoka, of a saving clause concerning express consent to restrict the operation of the most-favoured-nation clause, should be referred to the Drafting Committee.

56. It was true, as Mr. Ago had pointed out, that the facts of international life were complex, but the Commission should nevertheless try to draft a rule which was as clear and simple as possible. Mr. Ago had said that he could accept article 8 *bis* for a simple multilateral agreement, but not for a multilateral agreement which set up a regional economic community. The rule stated in that article applied to all kinds of multilateral agreement with a single exception, namely, agreements whereby the contracting States relinquished part of their sovereignty and became a union of States. In that particular case, the third State disappeared as an international entity and there was no basis for the application of the rule in article 8 *bis*. But if a multilateral agreement established a regional economic community such as the European Economic Community, which did not involve any loss of sovereignty, the rule in article 8 *bis* clearly applied. If a State which became a member of such an economic union decided that it could not continue to grant most-favoured-nation treatment to other countries, it would have to take the necessary arrangements with its partners to terminate the agreements under which it had granted them most-favoured-nation treatment. There could be no question of the actual validity of the most-favoured-nation clause being in any way affected merely because the granting State had signed a multilateral agreement purporting to establish an economic union.

57. He suggested that, in accordance with the Commission's usual practice where opinion was divided, the different views should be covered at length in the commentary.

58. The CHAIRMAN suggested that articles 8 and 8 *bis* should be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed. [9]

The meeting rose at 6 p.m.

[9] For resumption of the discussion see 1352nd meeting, para. 49.

1336th MEETING

Tuesday, 24 June 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, 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 9 AND 10

1. The CHAIRMAN invited the Special Rapporteur to introduce articles 9 and 10 in his fifth report (A/CN.4/280) which read:

Article 9

National treatment clause

"National treatment clause" means a treaty provision whereby a State undertakes to accord national treatment to another State in an agreed sphere of relations.

Article 10

National treatment

"National treatment" means treatment by the granting State of persons or things in a determined relationship with the beneficiary State, not less favourable than treatment of persons or things in the same relationship with itself.

2. Mr. USTOR (Special Rapporteur) said that the purpose of articles 9 and 10 was to define the national treatment clause and national treatment; the texts were modelled on articles 4 and 5, which defined the most-favoured-nation clause and most-favoured-nation treatment. [3]

3. There were two reasons why it was necessary to include articles 9 and 10 in the draft. The first was that many most-favoured-nation clauses were really cumulative clauses whereby the granting State promised the beneficiary State either most-favoured-nation treatment or national treatment. Occasionally, a cumulative clause

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

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

[3] *Yearbook . . . 1973*, vol. II, pp. 215 and 218.

specified that the beneficiary State could claim the benefit of whichever of the two types of treatment it found more favourable.

4. The second reason for including the articles was that they were a necessary complement to article 13, which dealt with the right of the beneficiary State, under a most-favoured-nation clause, to claim national treatment on the grounds that such treatment had been extended to a third State.

5. The definitions of the national treatment clause and national treatment, given in articles 9 and 10 respectively, conformed with generally accepted notions. They were briefly explained in the joint commentary to the two articles.

6. There was a great similarity between national treatment clauses and most-favoured-nation clauses, in that both were of a contingent character. The operation of the most-favoured-nation clause depended on the treatment accorded to a third State by the granting State; the operation of the national treatment clause depended on the treatment accorded by the granting State to its nationals or to things within its jurisdiction. Both types of clause contained an element of *renvoi*: in one case, the reference was to the treatment accorded to a third State; in the other, to the internal law of the granting State.

7. The question of national treatment, which was the subject-matter of articles 9 and 10, was entirely different from the question of equality of treatment with nationals, which arose in connexion with the treatment of aliens and had given rise to much discussion in the past.

8. Mr. SETTE CÂMARA said that of the four possible ways of dealing with provisions on national treatment clauses described by the Special Rapporteur in his sixth report (A/CN.4/286, para. 3), the best was to mention both the most-favoured-nation clause and the national treatment clause explicitly in the articles applicable to both; that method would entail fewer changes in the structure of the articles already adopted.

9. The inclusion of articles on the national treatment clause was fully justified, because throughout the century-long practice of States there had always been a relationship between the most-favoured-nation clause and the national treatment clause; those clauses were often combined in treaties or included side by side. Both clauses purported to achieve equality of treatment, but the pattern of reference was different.

10. In the most-favoured-nation clause, the standard of reference was the treatment of persons and things belonging to other States; in the national treatment clause, it was the treatment of persons and things belonging to the national legal order of the granting States. In paragraph (6) of the commentary to articles 9 and 10 (A/CN.4/280), the Special Rapporteur had aptly called those two standards of treatment "foreign parity" and "inland parity".

11. Traditionally, national treatment clauses had dealt with the treatment of aliens in the national territory, but more recently they had found wide application in trade. The national treatment clause and the most-favoured-nation clause had become the two central pillars of the GATT system, and the former was embodied in article III, paragraph 4 of the General Agreement. Like the most-favoured-nation clause, the national treatment clause, as applied to trade, was treated with reserve by developing countries. Those countries always preferred to negotiate within the context of Part IV of the GATT. Internal parity could only work to the detriment of economically weak national individuals and enterprises; only preferential treatment would enable the poorer developing countries to achieve their economic independence.

12. There were certainly some human rights and fundamental freedoms that were granted to nationals and aliens on an equal footing by every internal legal order. But those rights were outside the scope of the negotiations by which national treatment clauses were adopted, since parity of treatment in regard to them was obligatory under general international law. In practice, while equality before the law was the general constitutional rule, ordinary legislation gave preference to nationals in a number of specific situations, and those advantages could be the subject of negotiations for the granting of national treatment to foreigners. Some rights, however, such as political rights, were constitutionally reserved to nationals and sometimes to nationals by birth; as a general rule, those rights were outside the realm of concessions of national treatment.

13. In article 10, he suggested that the concluding word "itself", which was ambiguous, should be eliminated by redrafting the text to read: "'National treatment' means treatment granted by a State to persons or things in a determined relationship with a beneficiary State not less favourable than treatment of persons or things in the same relationship with the granting State".

14. Sir Francis VALLAT said that when the Commission had first discussed the question of national treatment,[4] it had been his understanding that it had not taken any final decision to deal with that question in the context of the most-favoured-nation clause. It had then been suggested that the Commission should continue consideration of the articles on the most-favoured-nation clause and see whether the need to deal with national treatment emerged from its discussions.

15. The Commission had since discussed a number of articles on the most-favoured-nation clause, but there had been no indication, during the debates, of any need to deal with the national treatment clause at the present stage. He favoured as broad an approach as possible to all subjects dealt with by the Commission, but thought that in the present instance to embark on what amounted to a new topic would adversely affect the Commission's work. If it did so, the Commission would have to adopt the dubious course of altering the title of the draft under consideration.

16. The topics of national treatment and most-favoured-nation treatment were fundamentally different. The standard of national treatment was defined by reference to the internal law and practice of the State concerned. Most-favoured-nation treatment, on the other hand, was

[4] See 1330th meeting, paras. 7-41.

defined by reference to the treatment accorded to third States.

17. Article 10 *bis* provided a good illustration of the kind of difficulty that would arise if the Commission took up the study of national treatment clauses. That article dealt with the question of national treatment in federal States, and all those who had had experience of negotiating treaties in recent years knew the difficult problems that arose regarding the special position in federal States. It was a completely new field which had nothing to do with the most-favoured-nation clause as such; but the subject-matter of that article would inevitably have to be dealt with if the Commission decided to cover the question of national treatment and national treatment clauses in the present draft.

18. The first article in the draft which established a link between national treatment and the most-favoured-nation clause was article 13 (A/CN.4/280) which dealt with the right of the beneficiary State, under a most-favoured-nation clause, to claim national treatment if it was accorded to a third State. He did not believe, however, that there was any need for a specific provision on the lines of article 13, since the result stated in it would necessarily follow from the provisions of articles 5 and 7. [5] Indeed, the inclusion of article 13 would only create doubts. If any emphasis on that particular application of articles 5 and 7 was needed, it could be supplied in the commentary.

19. He was also concerned about the procedural issue involved in the proposed study of national treatment clauses. Under article 18, paragraph 2 of its Statute, when the Commission considered that the codification of a particular topic was necessary or desirable, it was required to "submit its recommendations to the General Assembly"; but the Commission had not made any recommendation to the General Assembly on the study of national treatment clauses. In the Commission's 1974 report, the Special Rapporteur's fifth report had been referred to as a report "on the most-favoured-nation clause"; [6] and in the section entitled "Organization of future work", [7] the Commission had declared its intention of continuing, at the present session, its study of a number of topics, including the most-favoured-nation clause. If the Commission had intended to deal with national treatment clauses at the present session, it should have stated that intention in its 1974 report.

20. In operative paragraph 4 (*c*) of General Assembly resolution 3315 (XXIX), dealing with the Commission's 1974 report, the Assembly had recommended that the Commission should "proceed with the preparation of draft articles on the most-favoured-nation clause". And in the Sixth Committee's debates, from which that recommendation had emerged, no delegation had thought that the reference to the most-favoured-nation clause might conceal the possibility of a study of national treatment clauses.

21. Practical considerations relating to lack of time strengthened those procedural and constitutional arguments, and he therefore suggested that articles 9 and 10 should be left aside, while the Commission continued to examine the articles dealing with most-favoured-nation treatment. Later, with the possible backing of the General Assembly, it might be also to take up the question of national treatment.

22. Mr. USTOR (Special Rapporteur) reminded the Commission that when it had started consideration of the most-favoured-nation clause at the present session, he had proposed that it should begin with articles 9 and 10 because of the very close links between national treatment and the most-favoured-nation clause. [8]

23. The study of the most-favoured-nation clause necessarily involved consideration of the question dealt with in article 13—the right of the beneficiary State under a most-favoured-nation clause to national treatment. Sir Francis Vallat had argued that, on the basis of earlier articles of the draft, no other solution was possible than that adopted in article 13. That position was certainly tenable, but the fact remained that there had been considerable controversy on the point. Contrary views had been expressed, and for his part, he thought it was absolutely necessary to include an article stating the rule that, under a most-favoured-nation clause, the beneficiary State could claim national treatment if the granting State had accorded that treatment to a third State.

24. There was also the important question of cumulative clauses, dealt with in article 14. The rule stated in that article was a simple one, namely, that a beneficiary State to which both most-favoured-nation treatment and national treatment had been promised, could claim the treatment which it considered the more favourable.

25. He did not believe that the Commission could possibly be criticized for dealing with all aspects of the most-favoured-nation clause, including those covered in articles 13 and 14. The inclusion of those articles, which made specific reference to national treatment, made it necessary also to include articles defining national treatment clauses and national treatment. The question whether the Commission should retain articles 9 and 10 in the draft was entirely different from the question whether the earlier articles, and the title of the whole draft, should be amended so as to include references to national treatment.

26. One further consideration should be borne in mind. For a number of years the Secretariat had been carrying on the formidable task of analysing the most-favoured-nation clauses contained in treaties registered with the United Nations. That work was still under way, but he had seen some of it and had noted that there were a vast number of clauses which promised most-favoured-nation treatment and national treatment side by side. The most-favoured-nation clause and the national treatment clause were similar, because they both contained promises of a contingent nature. Each of the two clauses, however, had its own peculiar character. The content of the promise in the most-favoured-nation clause varied according

[5] *Yearbook ... 1973*, vol. II, pp. 218 and 221.

[6] *Op. cit., 1974*, vol. II, Part One, document A/9610/Rev.1, para. 161.

[7] *Ibid.*, para. 164.

[8] See 1330th meeting, para. 8.

to the treatment given to the third State; the content of the promise in the national treatment clause depended on the treatment accorded to nationals.

27. He suggested that the Commission should consider forthwith the question whether articles 9 and 10 should be included in the draft. To his mind, those articles were indispensable complements of articles 13 and 14. The Commission would not be performing its task adequately if it did not extend its work to national treatment.

28. The CHAIRMAN invited the Commission to discuss the procedure to be followed.

29. Mr. CALLE Y CALLE said that, as he understood it, the Commission's decision to study the topic of the most-favoured-nation clause carried with it the intention of dealing with all aspects of the practical application of that clause. That point had been made clear in the very first report on the most-favoured-nation clause submitted by the Special Rapporteur.[9] The question of national treatment was part and parcel of the topic, since one of the commonest forms of most-favoured-nation treatment within the meaning of article 5 of the draft was, precisely, national treatment.

30. In view of the close connexion between national treatment and the most-favoured-nation clause, it was clearly both useful and necessary to explain the meaning and scope of national treatment in the draft. That was the purpose of article 9 and the following articles proposed by the Special Rapporteur. In article 13, the question of national treatment arose for the first time in direct connexion with the most-favoured-nation clause. At the present stage of its work, the Commission should not readily engage in the process of eliminating or merging draft articles. There would be ample opportunity for doing that during the second reading, on the basis of government comments. Moreover, in many of its other drafts, the Commission had gone into very considerable detail and he saw no reason why a different approach should be adopted for the present topic. It should be borne in mind that reasonably detailed provisions on a topic in process of codification were of great assistance to States.

31. The question of national treatment was of great interest to Latin America. It was particularly important that national treatment in the context of the most-favoured-nation clause should be carefully differentiated from the doctrine of equality of treatment between nationals and aliens. That doctrine had been put forward by Calvo and other authoritative Latin American writers in the nineteenth century, in order to combat the abuses involved in exaggerated claims arising out of alleged injuries to aliens.

32. The national treatment referred to in articles 9 and 10 was treatment accorded to the persons and things of a third State by the granting State, which placed them on a par with its own nationals or things under its jurisdiction. Many examples could be given of situations in which it would be out of the question to grant national treatment to foreign persons or companies. A powerful transnational company, for instance, was able to obtain credit facilities from the local banks as soon as it started business in a country. It could thus absorb a huge proportion of the local financial resources and enrich itself by making use of the scanty savings painfully accumulated by the local population. The only remedy for that type of situation was to debar such a company from local credit facilities and to reserve national savings for investment in national undertakings.

33. The arrangements for integration among the countries of the Andean region provided another interesting example. Multinational companies set up by the Andean countries were granted national treatment under those arrangements. Clearly, the same treatment could not be accorded to companies foreign to the region.

34. For those reasons, he considered it important that the draft should include suitable provisions on the question of national treatment, and he did not believe that by studying that question the Commission would be in any way exceeding the mandate it had received from the General Assembly.

35. Mr. KEARNEY said that the example given by the previous speaker illustrated the difficulty of dealing with the question of national treatment at the present stage. If a State in the Andean region had promised most-favoured-nation treatment to a non-Andean State with respect to the establishment of companies, it was debatable whether it could refuse that beneficiary State the benefit of national treatment accorded to a national company of the Andean region. Many other equally intractable problems would arise if the Commission tried to deal with the question of national treatment at the present stage. Consequently, he thought it should leave aside article 9 and the following articles, and continue its work on the articles dealing with the most-favoured-nation clause.

36. Article 14, on cumulation of national treatment and most-favoured-nation treatment, did not present any major difficulty. As he understood its provisions, the article merely meant that if, in the same sphere, a beneficiary State was granted both most-favoured-nation treatment and national treatment, it was entitled to choose whichever treatment it considered the more favourable. There seemed hardly any need to state such an obvious rule, because the beneficiary State clearly had two rights and there could be no doubt about its being entitled to claim whichever it preferred.

37. Article 13, on the right of the beneficiary State, under a most-favoured-nation clause, to claim national treatment on the ground that it had been granted to a third State, would need more careful study. As indicated in the commentary (A/CN.4/280), the rule which it stated was not unanimously endorsed.

38. Another reason for not taking up the question of national treatment at present was that the Secretariat was carrying out a study on most-favoured-nation clauses contained in treaties, and the connexion between these clauses and national treatment clauses. It would certainly be most helpful to the Commission if it could

[9] *Yearbook ... 1969*, vol. II, p. 158, para. 3.

examine the results of that study before it took up the question of national treatment.

39. He had himself examined a number of treaties of friendship, navigation and establishment concluded by the United States, and that study had shown that there was great variety in the way in which most-favoured-nation clauses and national treatment clauses were presented. In one and the same treaty—for example, the treaty of 1961 between the United States and Belgium—a series of articles specifying national treatment was followed by an article which contained a most-favoured-nation clause, and by an article containing a cumulative clause for the benefit of the vessels of either country using the ports and waters of the other. Problems of reciprocity also arose, which differed according to whether national treatment or most-favoured-nation treatment was concerned.

40. For all those reasons, and in view of the division of opinion on the effects of national treatment clauses, the Commission would only be acting with due caution if it postponed consideration of the question of national treatment until its next session.

41. Mr. USHAKOV said that, under cover of comments on procedure, Sir Francis Vallat had spoken on substance when he had said that articles 13 and 14 were self-evident, and that the definition of "national treatment" was not at issue. The Chairman himself had considered that it was a question of procedure. On the contrary, however, draft articles 13 and 14 followed from the definitions already adopted by the Commission and were within the scope of the topic of the most-favoured-nation clause. It was not when examining the Special Rapporteur's fifth report (A/CN.280), but when examining his sixth report (A/CN.4/286) that the Commission would have to consider enlarging the topic and possibly amending articles previously adopted, in order to take account of the problems raised by national treatment. The question which would then arise might be one of procedure, but at the moment the Commission was dealing with essential provisions that were fully within the scope of the topic of the most-favoured-nation clause.

42. He therefore formally proposed that the Commission should first consider articles 13 and 14, and then examine the definitions proposed in articles 9 and 10. In the report on the work of its twenty-fifth session the Commission had expressly stated that it would later consider the interaction between most-favoured-nation clauses and national treatment clauses.[10] Thus the Commission had already proposed the method of work he recommended.

43. Sir Francis VALLAT said he could agree to consideration of articles 13 and 14 at the present stage. In examining those articles the Commission could consider whether it needed definitions of the national treatment clause and national treatment. That procedure would be more in accordance with the Commission's normal practice.

44. Mr. TSURUOKA agreed with the Special Rapporteur that articles 13 and 14, if not absolutely indispensable, were at least useful for defining the operation of the most-favoured-nation clause and its relationship with national treatment.

45. Mr. ELIAS said he thought it was possible to find a mean between the conflicting views of Sir Francis Vallat and the Special Rapporteur. In his opinion, articles 9 to 12 could not engage the Commission's attention at the present stage, since, like most definition articles, they would probably take up too much time, and it had never been the Commission's practice to concern itself to an inordinate extent with the precise details of definitions. The articles were useful, however, in that they gave an idea of how the terms they contained should be employed for the purposes of articles 13 and 14. Articles 10 *bis* to 12 went further into detail than was necessary to enable the Commission to decide which portions of articles 13 and 14 it might wish to retain.

46. He had serious reservations concerning article 13: while its wording appeared simple, the problem it raised was so fundamental that the Commission might be unable to find an acceptable solution at the present session. That problem had been well illustrated by the Special Rapporteur, particularly in the first paragraph of the quotation from Pescatore, in paragraph (8) of the commentary (A/CN.4/280). In addition, the first two sentences of the third paragraph of that quotation drew attention to two major difficulties. The Special Rapporteur himself had hinted at some of the problems involved, and the Commission would have to give them further detailed consideration if it was to draft an effective article taking them into account.

47. The problem raised by article 14 did not seem so difficult. He would have thought that the ordinary rules of interpretation would provide sufficient guidance for the beneficiary State, but it might be necessary, for the sake of clarity, to say that it had the right of election. If the most-favoured-nation clause and the national treatment clause were contained in the same instrument, or had been established in closely similar circumstances, the choice between them should not be too difficult. The question remained, however, whether the Commission could agree on the final form of article 14, in view of the Special Rapporteur's contention that, if article 14 was adopted, it would also be necessary to adopt at least the definition clauses in articles 9 and 10.

48. If the Commission wished briefly to consider articles 9 and 10, solely with a view to the use of the terms they defined in articles 13 and 14, he would not object. In his opinion, however, articles 13 and 14 went to the heart of the matter under discussion, so that there was merit in the suggestion that the Commission should do no more than approve provisional versions of those articles at the present session, leaving the formulation of the final texts until the following year, when members would have had more time for reflection, the study being prepared by the Secretariat would be available, and the Sixth Committee of the General Assembly would have had a chance to state its opinion on whether provisions relating to national treatment should be included. At present, it did not seem to him that the provisions of articles 1 to 8 necessarily led to the provisions of articles 13 and 14,

[10] *Yearbook ... 1973*, vol. II, p. 211, para. 110.

which were perhaps important residuary rules to be fitted in at some other point.

49. Mr. QUENTIN-BAXTER said that the Commission appeared to be approaching agreement to concentrate its attention on draft articles 13 and 14, making reference to the definition articles as necessary—a decision with which he would not disagree. But whether the Commission took up the broad question of the relationship between most-favoured-nation treatment and national treatment or the narrower question of the way in which the two types of treatment came together in article 13, there were certain considerations that should be borne in mind.

50. For him, the major concern was not constitutional: he was sure that if the Commission thought it necessary to consider national treatment, an arrangement could be reached with the General Assembly. The problem was rather, as other speakers had said, that there was a considerable difference between the ways in which the two principles were applied, and little time to complete consideration of an important set of draft articles.

51. He agreed with the Special Rapporteur that both the most-favoured-nation clause and the national treatment clause involved *renvoi,* and it was certainly true that they were often found in juxtaposition in the same instrument. The Special Rapporteur had acted entirely within his terms of reference in drawing attention to those points and recommending a course of action. For his part, however, he believed that the difference between the two types of clause—the existence of a triangular relationship under the most-favoured-nation clause and a bilateral relationship under the national treatment clause—was not merely formal, but lay at the heart of the matter.

52. An essential fact relating to the most-favoured-nation clause had been mentioned by several speakers, namely, that it was impossible to formulate principles which were capable of automatic application. Questions of judgement arose in two different contexts: Mr. Reuter had mentioned the very real difficulty of measuring the most-favoured-nation clause against the facts and obtaining the proper basis of comparison, [11] and it was equally difficult to make allowance for the fact that, in concluding most-favoured-nation treatment agreements, States intended neither to avoid their obligations thereunder nor to permit any restriction of their sovereignty in respect of matters outside the agreed sphere of application. In situation after situation, therefore, the need arose for discussions on what it was reasonable and proper to do in the circumstances, and the solution often had little to do with formal responsibility.

53. In following the discussion on the articles up to 8 and 8 *bis*, he had become increasingly convinced that the Commission's aims must be to produce a set of draft articles which would be both flexible and coherent. He feared that if restrictive drafting had to be balanced by broad exceptions, the draft articles would not attain the place which the Commission hoped would be theirs in international law and which the efforts and scholarship of the Special Rapporteur so greatly deserved.

[11] See 1333rd meeting, paras. 19-23.

54. The national treatment clause did not give rise to the same problems. There was not, for example, the problem of applying a set of obligations to a complicated factual situation involving a relationship with a third State, and it was seldom necessary to strike a balance between the unfettered sovereignty of the granting State and its obligation to accord national treatment. But as Mr. Sette Câmara and Mr. Calle y Calle had pointed out, there were difficulties closely associated with the responsibility of a State for the treatment of aliens within its territory. As matters stood, he could see no reason to believe that the Commission could go into such complex questions and still complete on time, and to a standard acceptable to the international community, the set of draft articles on the most-favoured-nation clause which now seemed within its grasp.

55. Consequently, while he recognized; that the questions raised in articles 13 and 14 were entirely relevant to the Commission's work, he approached even those articles with caution. The first priority was to deal with the subject, which had now been before the Commission for a number of years and the work on which must be completed soon.

56. Mr. HAMBRO said he thought it would be going too far to say that the Commission could not discuss the question of national treatment because it had not mentioned the matter in its report to the General Assembly. The Commission should be free to discuss even peripheral subjects if it found that necessary for the consideration of its main topic.

57. None the less, he hoped that the Commission would not take up the national treatment clause, for that would require far more than the small amount of thought which it had been suggested the matter should receive. It should not be forgotten that the conflict between national treatment and a minimum standard was one which had hitherto bedevilled all discussions on the treatment of aliens. The same difficulties would be encountered in discussing the relationship between national treatment and most-favoured-nation treatment, and he agreed with Sir Francis Vallat that there was as yet no evidence that it was necessary to discuss national treatment in that connexion.

58. He supported the suggestion that the Commission should take up articles 13 and 14 and, if the need arose, revert to the question of national treatment at some later stage.

59. Mr. RAMANGASOAVINA said that with articles 13 and 14 the Commission was entering an entirely new field, despite the close connexion between those articles and the preceding ones. While he had no difficulty with articles 9 to 12, since they contained definitions and were intended to explain the difference between the most-favoured-nation clause and the national treatment clause, articles 13 and 14 caused him grave concern, as they did other members of the Commission. If those articles were concerned only with bilateral relations between two States and with relations with the State benefiting under the most-favoured-nation clause, the problem could be approached without too much anxiety. But articles 13 and 14 opened up prospects the full extent of which could not

yet be assessed. For there was now a tendency among States—particularly young States— to form customs unions in order to increase their prosperity and hasten their development. And if one of the States members of an economic community had, before joining it, granted most-favoured-nation treatment to another State not a member of the community, that extraneous element, introduced through the operation of the most-favoured-nation clause, would suffice to destroy the whole system of preferences laboriously built up in the interests of the community.

60. In his opinion, it was not yet possible to gauge all the consequences of the rules stated in articles 13 and 14. The Special Rapporteur had been rather laconic on that point, for practice did not yet offer sufficient precedents to illustrate the possible consequences of those articles. He therefore shared the opinion of some members of the Commission who would prefer to defer a decision on articles 13 and 14 until a more thorough study had been made to determine the possible consequences of the cumulation of national treatment and most-favoured-nation treatment. He was impatiently awaiting the articles on non-reciprocal preferences to be granted to developing countries, which might perhaps throw some light on the possible consequences of the principles stated in articles 13 and 14. He appreciated that those articles were of definite interest, but he had some fears—possibly unjustified—about their consequences.

61. The CHAIRMAN observed that there seemed to be general agreement that the Commission should proceed to consider articles 13 and 14 and revert to articles 9 to 12 at some later stage.

62. Mr. USTOR (Special Rapporteur) said that, while he regretted that the Commission had not adopted that course at the beginning of the meeting, the discussion had been useful in throwing light on the difficulties of the subject. Since the study of most-favoured-nation clauses and of the cumulation of national treatment and most-favoured-nation treatment being prepared by the Secretariat would be essentially statistical, it would not be possible to use it in connexion with the discussion of national treatment in the way some members of the Commission hoped. He had been rather puzzled by the calls for further time to study articles 13 and 14, which had been available for more than a year, and he trusted that the Commission would be able to deal with them quickly at its next meeting.

The meeting rose at 1 p.m.

1337th MEETING

Wednesday, 25 June 1975, at 10.20 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, 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)

STATEMENT BY THE SPECIAL RAPPORTEUR ON THE QUESTION OF THE NATIONAL TREATMENT CLAUSE

1. Mr. USTOR (Special Rapporteur) said that he hoped he had not offended members of the Commission by his remarks at the end of the previous meeting. While he naturally accepted the view of the majority that the question of the national treatment clause should not be brought within the scope of his study at the present stage, he remained unconvinced by the arguments adduced in support of that view.

2. Those arguments related to procedure and to the merits of his proposal. As the procedure, the Commission had always tried to maintain a certain intellectual freedom in relation to the General Assembly. Indeed, it had been the Commission, not the Sixth Committee, which had first decided that a study of the most-favoured-nation clause should be undertaken. That being so, he thought the Commission could take the liberty of extending the study to some degree.

3. While much had been said about the need for caution and for making haste slowly, little had been said about the actual merits of his proposal. For example, no one had said, in regard to any particular article, that extension of that article to national treatment would be very difficult, and he did not think there was any instance in which that would, in fact, be the case. Had it considered the national treatment clause, the Commission would have remained within the sphere of the law of treaties; just as it had not discussed the merits of the most-favoured-nation clause, but had merely adopted rules for its application, so the Commission would have had no need to go into questions of national treatment and minimum standards of international law.

4. He believed that when explaining the Commission's decision to the General Assembly, he would be justified in saying that the Commission might extend its study to national treatment clauses at its next session.

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 13

5. The CHAIRMAN invited the Special Rapporteur to introduce article 13, which read:

Article 13

The right of the beneficiary State under a most-favoured-nation clause to national treatment

1. The beneficiary State acquires under a most-favoured-nation clause the right to national treatment if the granting State has accorded national treatment to a third State.

2. Paragraph 1 applies irrespective of whether national treatment has been accorded by the granting State to a third State unconditionally or subject to material reciprocity or against any other compensation.

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[1] *Yearbook . . . 1973*, vol. II, pp. 77-116.

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