

Document:-
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Summary record of the 1330th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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50. Mr. BEDJAOUI (Special Rapporteur) said that many members of the Commission were wondering how the choice of the few classes of State property he had adopted for his draft could be justified before the General Assembly; they feared that his choice might appear arbitrary. He did not share that view. State property not specifically mentioned in his text, such as warships, merchant vessels and armaments, was State property covered by draft article 9. Moreover, such property was less important than that expressly covered by specific provisions of the draft, because not all States possessed such property, whereas they all possessed currency, a treasury and archives. Thus his choice was not arbitrary at all.

51. Under article 9 as adopted by the Drafting Committee (A/CN.4/L.226), all State property which, on the date of the succession of States, was situated in the territory to which the succession of States related, passed to the successor State "subject to the articles of the present Part and unless otherwise agreed or decided". Consequently, the classes of State property not mentioned in the draft and not covered by article 9 could form the subject of other specific provisions.

52. To deal with the case of a succession affecting part of a territory, the Commission might also prepare only one general draft article. It might perhaps be necessary to add a specific article on one class of State property, such as currency, but a single general article might suffice. As the Commission was about to suspend consideration of the topic of the succession of States in respect of matters other than treaties, those questions could be considered by the Drafting Committee, before the Commission took them up again in a few weeks' time. To continue his work, he needed to know which solution the Drafting Committee and the Commission preferred.

53. Mr. USHAKOV said that it would be difficult for the Commission to take a decision on that question without knowing the Special Rapporteur's opinion.

54. Mr. USTOR said he hoped that the Special Rapporteur would be able to make proposals to the Drafting Committee and that a set of articles would result from the work of that Committee at the present session.

55. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to await the Drafting Committee's report on article 12 and on the texts drafted by Mr. Kearney and Mr. Ushakov.

*It was so agreed.*¹¹

The meeting rose at 12.50 p.m.

¹¹ For resumption of the discussion see 1351st meeting, para. 50.

1330th MEETING

Monday, 16 June 1975, at 3.10 p.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bedjaoui, 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.

Succession of States in respect of matters other than treaties

[Item 2 of the agenda]

(continued)

PRODUCTION OF RUSSIAN TEXTS OF ARTICLES

1. Mr. USHAKOV said he hoped that a document would soon be circulated containing the articles provisionally adopted on the topic of succession of States in respect of matters other than treaties. Whenever the Drafting Committee or the Commission adopted an article, he provided the Russian text in his capacity as a member of the Drafting Committee and of the Commission. Not infrequently, the Russian translation section at Geneva or New York took the liberty of changing his texts to such an extent that they became unrecognizable and even contained serious mistakes when published.

2. He thought that, to stop that practice, the Commission should adopt the following decision and bring it to the attention of those concerned at Geneva and New York: "The Russian translation section of the United Nations has no right to change the texts of articles drafted in the Russian version by Mr. Ushakov as a member of the Drafting Committee and of the Commission. No correction is permissible without his express authorization".

3. The CHAIRMAN said he felt sure the Commission was in full agreement with Mr. Ushakov on the question of the Russian texts. The Secretary to the Commission would bring the matter to the attention of the appropriate Secretariat authorities in New York and at Geneva.

Most-favoured-nation clause

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

[Item 3 of the agenda]

INTRODUCTORY STATEMENT BY THE SPECIAL RAPPORTEUR

4. The CHAIRMAN invited the Special Rapporteur to report on the progress of his work on the most-favoured-nation clause.

5. Mr. USTOR (Special Rapporteur) said that in its 1973 report on the work of its twenty-fifth session, the Commission had restated the ideas which were to guide it in the study of the most-favoured-nation clause. In that report the Commission had said that "it understood its task as being to deal with the clause as an aspect of the law of treaties".³ While recognizing the fundamental importance of the role of the clause in international trade, it had not wished to confine the study to its operation in that field, but "to extend the study to the operation of the clause in as many fields as possible".⁴ Lastly, the Commission had said that it wished to devote special attention

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

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

³ *Yearbook* ... 1973, vol. II, p. 211, para. 112.

⁴ *Ibid.*, para. 113.

to "the manner in which the need of developing countries for preferences in the form of exceptions to the most-favoured-nation clause in the field of international trade, can be given expression in legal rules".⁵

6. Guided by those principles, he had submitted a number of reports to the Commission and in 1973 it had adopted articles 1 to 7 on the most-favoured-nation clause, with commentaries.⁶ Those seven articles were based on articles 1 to 5 of his third report.⁷ The Commission had yet to examine his fourth report (A/CN.4/266), his fifth report (A/CN.4/280) and his sixth report (A/CN.4/286). The three articles in his fourth report had been numbered 6, 7 and 8, and he had retained that numbering in his subsequent work. In preparing his fifth and sixth reports, he had felt the need to reconsider the drafting of the seven articles adopted in 1973, and had submitted new versions of some of those articles as well as supplementary articles in his sixth report.

7. He suggested that the Commission should now examine article 9 (National treatment clause), article 10 (National treatment) and article 10 *bis* (National treatment in federal States) which he had submitted in his fifth report. The need to deal with national treatment and national treatment clauses had become apparent in the course of his work. There were a number of reasons for doing so. The first was that a great many clauses were cumulative, dealing both with most-favoured-nation treatment and with national treatment, and the problems arising from those cumulative clauses could not be avoided. A second reason was the need to consider the question whether a simple most-favoured-nation clause did or did not attract the benefits granted under a national treatment clause. For instance, where the granting State had promised national treatment to one State and most-favoured nation treatment to another, the question arose whether the latter State could invoke the most-favoured-nation clause in order to claim national treatment, on the grounds that that was the most-favoured-nation treatment granted to another State. Another important reason for dealing with national treatment was that the Commission was studying the most-favoured-nation clause as part of the law of treaties and not from the point of view of international trade and economic relations. Seen in that light, the question of national treatment and of national treatment clauses was very close to the topic of the most-favoured-nation clause, and it would be extremely artificial to exclude it from the present set of draft articles.

8. His own conclusion was that it would be awkward to confine the Commission's study exclusively to most-favoured-nation clauses and not to adopt any rules on national treatment clauses, which usually had the same effect. If the Commission shared that view, it should take up draft articles 9, 10 and 10 *bis* at the present stage, instead of examining article 6 and those which followed. If it adopted articles 9, 10 and 10 *bis* on national treatment, the Commission would have to consider the proposals in

his sixth report concerning revision of the texts of articles 1, 2 3 and 6 adopted in 1973 (A/CN.4/286, chapter I).

9. The CHAIRMAN invited members to express their views on the question whether the Commission should take up articles 9, 10 and 10 *bis*, the articles on national treatment proposed by the Special Rapporteur in his fifth report, instead of article 6 and the following articles.

10. Mr. USHAKOV said that he preferred the approach suggested by the Special Rapporteur, but that if it was adopted, the title of the draft articles should be amended to read "Draft articles on the most-favoured-nation and national treatment clauses".

11. Mr. SETTE CÂMARA said he fully agreed with the approach suggested by the Special Rapporteur. If it was adopted, it would be advisable to consider, at the same time as draft articles 9, 10 and 10 *bis*, the Special Rapporteur's proposed new article X (The source and scope of national treatment).

12. Mr. BILGE said he was not opposed to studying the national treatment clause, but he thought the Commission should consider it only from the point of view of its relationship with the most-favoured-nation clause. The national treatment clause could have a very wide scope in international law. The Commission had decided to study the most-favoured-nation clause generally, in all fields in which it applied, but it should restrict the study of the national treatment clause.

13. Mr. ŠAHOVIĆ noted that the Special Rapporteur had opened up a new field of study which extended the Commission's task considerably. It was not only a matter of amending the title of the draft; the scope of the discussions would be much wider than had been expected. Members of the Commission should therefore reflect carefully on the Special Rapporteur's proposal before starting the discussion he proposed.

14. Mr. KEARNEY said that he had no fundamental objection to the inclusion of draft articles on national treatment, but would welcome an explanation by the Special Rapporteur, or by the members who supported his approach, of the limits that would be set to the study of the question of national treatment.

15. Mr. CALLE Y CALLE said that the topic of the most-favoured-nation clause had followed from the Commission's consideration of the law of treaties. The Commission would be concerned more with most-favoured-nation treatment than with the clause, but the title "most-favoured-nation clause" had been retained because it was established by usage. If it was decided also to cover the question of national treatment, that would have to be made clear by changing the title of the draft.

16. The question of national treatment to be examined in the present context was quite distinct from the principle of equality of nationals and aliens, which applied to State responsibility for injuries to aliens. In the context of the present topic, the term "national treatment" was used simply to indicate an upper limit to the benefits extended under a clause.

17. Mr. AGO said he found the Special Rapporteur's proposal attractive, but he did not yet feel able to express

⁵ *Ibid.*, p. 212, para. 114.

⁶ *Ibid.*, pp. 213-223.

⁷ *Yearbook* . . . 1972, vol. II, pp. 162-170.

a final opinion on it. The resemblances between the most-favoured-nation clause and the national treatment clause were more apparent than real. Apart from the fact that both were conventional clauses and that their practical effect was to accord a particular treatment to foreign nationals or goods, the clauses did not resemble each other. Although probably narrower in scope than the national treatment clause, the most-favoured-nation clause could offer much more or much less. Besides, the treatment to be accorded under the most-favoured-nation clause did not necessarily always remain the same; on the contrary, its characteristic feature was that it changed when the granting State later decided to grant more favourable treatment to third States, which would entail an improvement in the treatment accorded to the beneficiary State.

18. The national treatment clause operated solely under internal law: a State accorded to the goods or persons of another State treatment identical with that which it accorded to its own nationals. The operation of the most-favoured-nation clause depended on the treatment accorded internationally to other States. Hence its content varied, not according to a particular country's internal legislation, but according to international treaties.

19. He feared that if it decided to study the national treatment clause, the Commission might be drawn into a very wide field—that of the status of aliens. It was, indeed, open to question whether national treatment resulted only from a conventional clause or was laid down by some general rule of customary law governing the status of aliens. It was not possible, at the present stage, to answer that question. Moreover, States might have entirely different views on it, and the Commission should not put itself in the position of having to express an opinion on general rules of the law relating to aliens.

20. He considered that the Special Rapporteur's proposal was attractive, but that it involved some risks.

21. Mr. REUTER said he thought the Commission should trust the Special Rapporteur, who was in a better position than anyone else to judge whether it was advisable to study the national treatment clause. In any case, the Commission ought to complete its study of the topic of the most-favoured-nation clause at its next session.

22. Both the most-favoured-nation clause and the national treatment clause were connected with the question of non-discrimination, and it was certainly tempting to study them together. The topic of the most-favoured-nation clause had been placed on the Commission's agenda when it had been preparing its draft articles on the law of treaties.⁸ Mr. Jiménez de Aréchaga, then a member of the Commission, had said that the most-favoured-nation clause ought to be studied, even though it had no bearing on the effects of treaties with respect to third parties, because it was commonly held to be related to the law of treaties.⁹ In fact, the operation of the clause, like that of the national treatment clause, depended on the process of *renvoi*. The two clauses were legal devices which consisted in laying down a rule the

content of which varied according to international law in one case, and according to internal law in the other. If the Commission decided to study them both simultaneously, that would show that it was especially responsive to questions of *renvoi*. That method might take it very far, however, and completely upset the structure of the draft.

23. The problem of *renvoi*, in the broad sense, had been rather neglected in the literature of public international law; all that was known about it came from private international law. If the Special Rapporteur thought there was sufficient time, it would be interesting to study those questions, though some aspects might be left aside if necessary.

24. Mr. USHAKOV pointed out that the Special Rapporteur, having first concentrated on the most-favoured-nation clause, had then found that treaties contained national treatment clauses which were closely connected with most-favoured-nation clauses. He was now proposing to study the national treatment clause also. Members of the Commission should therefore express themselves definitely for or against that proposal. He himself supported it.

25. Mr. SETTE CÂMARA confirmed his support for the approach suggested by the Special Rapporteur. It was difficult to see how the question of national treatment could be disregarded when dealing with most-favoured-nation treatment. It was true that the two types of treatment differed in some ways, but they were nevertheless closely connected. The clauses on both types of treatment were fundamental to the continuing negotiations in GATT. To omit the *subject* of national treatment clauses would leave a serious gap in the draft articles.

26. Sir Francis VALLAT expressed misgivings at the suggestion that the Commission should embark at the present stage on a study of national treatment. As Mr. Ushakov had pointed out, the decision to do so would involve amending the title of the draft articles; but although the Special Rapporteur's fifth report had been submitted to the Commission in 1974 and the Commission's report for that year had mentioned it, no indication had been given to the General Assembly that a study of that report would involve taking up a new subject and altering the title of the topic.

27. He shared Mr. Reuter's concern that if the scope of the topic was widened to include national treatment, the Commission would become involved in the study of problems that went much beyond most-favoured-nation treatment. Reservations would have to be made regarding the implications of national treatment clauses, which were much greater than might be realized at the present stage.

28. Practical considerations also militated in favour of caution. If the Commission had wished to broaden the topic of the most-favoured-nation clause to include national treatment, it should have taken that decision earlier. There was not much time at its disposal, and its duty was to take up the study of articles 6, 6 *bis* and 6 *ter* as drafted by the Special Rapporteur. The Commission was expected to continue its study of the most-favoured-nation clause and should only undertake to

⁸ *Yearbook* . . . 1967, vol. II, p. 369, para. 48.

⁹ *Yearbook* . . . 1967, vol. I, p. 188, para. 79.

consider national treatment if it proved impossible to carry on its work without examining that question.

29. The CHAIRMAN, speaking as a member of the Commission, said that he was in favour of leaving the question of national treatment aside until the second reading of the draft articles; at the present stage, the Commission should concentrate its attention on the most-favoured-nation clause. It should complete its work on the topic by the end of its 1976 session, and there was also the problem of explaining the proposed change of title to the General Assembly.

30. Mr. AGO said he regretted that at that stage he could not express a final opinion on the Special Rapporteur's proposal. Several members of the Commission had stressed a practical aspect of the matter, namely, the possibility of completing the work on the most-favoured-nation clause at the next session. It was also important to know all the reasons for and against a change in the title of the draft, since such a change would imply that the Commission had taken a position on the relationship between the most-favoured-nation clause and the national treatment clause.

31. Mr. USTOR (Special Rapporteur) said he did not think it was too late to decide to include the subject of national treatment. In his fifth report, submitted in 1974 (A/CN.4/280), he had included articles on national treatment because of the need to take into account not only clauses which promised most-favoured-nation treatment, but also clauses which promised national treatment.

32. It was necessary to bear in mind the case, which had often arisen in practice and had led to much discussion by writers, of a granting State which promised most-favoured-nation treatment to one State and national treatment to another; the State benefiting from the most-favoured-nation clause would claim the benefit of national treatment, and it was necessary to deal with that problem. In order to do so, national treatment would have to be defined, but he did not believe that that task would take up much of the Commission's time.

33. In any case, he wished to make it clear that the subject of national treatment in the present context was entirely different from the question of equality of treatment of nationals and aliens, which arose in connexion with the treatment of aliens. The present topic was a part of the law of treaties, and the rules governing most-favoured-nation clauses overlapped in many respects those governing national treatment clauses. It was therefore desirable to specify in the present draft that many of the rules on most-favoured-nation clauses applied *mutatis mutandis* to national treatment clauses.

34. He appreciated the desire of members to complete the work on the topic at the next session, but he thought that aim could still be achieved, even if the question of national treatment was considered. At the next session, he would only propose some five new articles to the Commission, so that it should be possible to complete consideration of all the pending articles by the end of that session.

35. If the Commission decided to include his proposed articles on national treatment in the draft, his proposals

for the revision of articles 1, 2, 3 and 6 adopted in 1973 (A/CN.4/286) need not be discussed by the Commission itself; they could be examined by the Drafting Committee.

36. Perhaps the Commission could postpone its decision on the change of title of the draft and proceed to consider the articles on the most-favoured-nation clause which followed those adopted in 1973. It would thus deal with articles 6 to 8 before it took up the problem of national treatment in article 9, proposed in his fifth report.

37. He appreciated that there were differences between national treatment and most-favoured-nation treatment, but there was also some similarity. There was an element of fluctuation in both: it resulted from other treaties in the case of the most-favoured-nation clause, and from national legislation in the case of the national treatment clause. The differences between the two were not, in any case, great enough to prevent the Commission from dealing with both of them together.

38. The CHAIRMAN pointed out that the approval of the General Assembly would be needed for a change in the title of the topic. He suggested that the Commission should follow its usual method and continue consideration of the draft articles on the most-favoured-nation clause, beginning with articles 6, 6 *bis* and 6 *ter*.

39. Mr. USHAKOV observed that the Sixth Committee might ask the Chairman of the Commission not only why it had decided to widen the scope of the topic, but also why it had not decided to include the study of the national treatment clause when the Special Rapporteur had put that idea forward in 1974.

40. Mr. USTOR (Special Rapporteur) said that in the light of the discussion he agreed to the Commission's starting consideration of articles 6 and the following articles at the present stage. The Commission could settle the question of extending the study to national treatment when it reached article 9 (National treatment clause).

41. Mr. AGO thanked the Special Rapporteur for taking account of the difficulties encountered by certain members of the Commission in taking an immediate decision on whether the question of the national treatment clause should be taken up. He supported the Special Rapporteur's new suggestion.

42. Nevertheless, he wondered whether those two types of clause should really be treated as parallel subjects, or whether the Commission should confine itself to the effects of national treatment on the most-favoured-nation clause. The substance of the problem seemed to lie in draft article 13 (A/CN.4/280), which dealt specifically with the operation of the most-favoured-nation clause when the State which had granted it granted national treatment to a third State. It might perhaps be preferable for the draft to deal with the question of national treatment only with reference to the most-favoured-nation clause.

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR ARTICLES 6, 6 *bis* AND 6 *ter*

43. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 6, 6 *bis* and 6 *ter* which read:

*Article 6¹⁰**Presumption of unconditional character
of the most-favoured-nation clause*

Except when in appropriate cases most-favoured-nation treatment is accorded under the condition of material reciprocity, the most-favoured-nation clause is unconditional.

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

1. Under an unconditional 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, without the obligation to reciprocate the same treatment in kind to the granting State.

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

*Article 6 ter**Effect of a most-favoured-nation clause conditional
on material reciprocity*

1. Under a most-favoured-nation clause conditional on material reciprocity the beneficiary State acquires the right to treatment not less favourable than that accorded by the granting State to a third State only against reciprocating the same treatment in kind to the granting State.

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

44. Mr. USTOR (Special Rapporteur) said that until the early nineteen-twenties there had been three types of most-favoured-nation clause: the unconditional clause, the clause conditional on material reciprocity and the form of the clause employed in United States practice. The latter clause had differed from the other two in that its operation had not been automatic, its essence being the stipulation that the beneficiary State would enjoy the favours accorded by the granting State to a third State if the concession had been freely made, or on allowing the same compensation if the concession had been conditional. It had thus not been a most-favoured-nation clause, but a *pactum de contrahendo*. It was no longer found in treaties and he had not considered it in his reports.

45. The most common form of most-favoured-nation clause was now the unconditional clause, the nature and effect of which were described in articles 6 and 6 *bis*. The operation of that clause was not dependent on consideration or advantages promised to the granting State by either a third State or the beneficiary State, and its aim was to place the beneficiary State in the same position in relation to the granting State as a third State. The unconditional clause was found in trade agreements and many other types of agreement and, unlike the clause conditional on material reciprocity, which was most often found in consular treaties, it was non-discriminatory.

46. Mr. REUTER said he had the impression that article 13 (A/CN.4/280) followed quite naturally from paragraph 2 of article 6 *bis*; he would like to know whether that impression was correct.

47. Mr. USTOR (Special Rapporteur) said it was true that there was a close connexion between article 6 and article 13, which really referred to a special case of the operation of the most-favoured-nation clause. Since article 6 stated that the operation of the clause was unconditional, it followed that article 13 would apply in all cases where it was not expressly stated that the beneficiary State would not receive national treatment. It was, however, apparent from both practice and jurisprudence that there was still some confusion on that point, and that was why article 13 had been included.

48. Mr. REUTER said that in principle he was not opposed to articles 6 and 6 *bis*, but he had a reservation about the principle stated in article 13, which was a very important consequence of the principle stated in article 6 and on which he could not commit himself. In his opinion, if the Commission did not accept article 13, it would be necessary to amend article 6. For he wondered whether a regional union was not, to some extent, founded on the principle of national treatment and whether, consequently, national treatment granted within a regional union might not be claimed on the basis of the most-favoured-nation clause.

49. Mr. KEARNEY said that, while articles 6 and 6 *bis* caused him no substantive problems, he was concerned at the wording of certain passages.

50. He assumed that the phrase "Except when in appropriate cases", in article 6, modified the condition of material reciprocity rather than the unconditionality of the most-favoured-nation clause, but he was not sure of the intention behind the phrase "in appropriate cases". If it was to place a limitation on what the condition of material reciprocity could be, the nature of the "appropriate cases" must be specified.

51. He also wondered whether the reciprocity referred to in article 6 must be "material" and, if so, whether it should be substantial or equivalent. In that connexion, he drew attention to the quotation from Piot in paragraph (16) of the commentary to article 6 in the Special Rapporteur's fourth report,¹¹ which suggested that there must be a measure of symmetry between the treatment each State accorded to the other. The way the phrase was used in the revised article 6 seemed to imply that if the condition of reciprocity was not material or equivalent, it might not be a condition at all. That implication was difficult to reconcile with the situation described in paragraph (5) of the commentary to articles 6 *bis* and 6 *ter* in the Special Rapporteur's fifth report (A/CN.4/280), in which the condition in question, though not material, was still a condition of reciprocity between the two States concerned and one which would have a specific effect on the advantages accruing to a State entitled to most-favoured-nation treatment. It might be advisable to delete the word "material" from article 6, since the nature of the most-favoured-nation clause was affected by any condition of reciprocity.

52. If, as provided in article 6 *bis*, the beneficiary State could acquire the right to treatment no less favourable than that granted to a third State irrespective of the conditions under which the grant had been made, it would

¹⁰ Text as revised by the Special Rapporteur; see *Yearbook* ... 1973, vol. II, p. 98.

¹¹ *Yearbook* ... 1973, vol. II, p. 100.

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.

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.

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.