Document:-
**A/CN.4/SR.1333**

# Summary record of the 1333rd meeting

Topic:
**<multiple topics>**

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

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.

Convention on the Law of Treaties. [5] The application of that principle, however, was not always simple, since most-favoured-nation clauses were frequently invoked long after their conclusion, when their language had become obsolete or obscure.

6. It seemed clear from the Special Rapporteur's studies that what the parties to a later, or collateral treaty had had in mind in promising certain favours was irrelevant to the interpretation of the clause if those favours only corresponded materially or intrinsically to those which fell within the scope of the clause. The Special Rapporteur was therefore justified in rejecting, in paragraphs (13) to (15) of the commentary to article 7 in his fourth report, the contention that the legal context of the clause and the framework within which the advantage was claimed were necessarily of importance. Of course, that did not mean that there could not be cases in which account should be taken of things other than the clause itself in determining the scope of the clause. For example, a collateral treaty concluded prior to the adoption of a most-favoured-nation clause could be considered to have influenced the attitude of the parties drafting the clause. That consideration was part of the complex problem of the relationship between national and international law mentioned by Mr. Reuter in connexion with article 6 *quater*.

7. Mr. KEARNEY said he thought Mr. Tammes' comment on the relationship between the first and subsequent treaties in a particular field should be considered in the light of the provision in the Vienna Convention on the Law of Treaties that the practice of the parties should be taken into account in the interpretation of a treaty. [6] Hence that aspect was one which should normally be taken into account.

8. The principles stated in articles 7 and 7 *bis* were acceptable and correct, but he thought they had been expressed in too complex a fashion. The two stipulations in article 7 that the rights claimed must be those "relating to the subject-matter of the clause and falling within the scope of the clause" seemed to overlap, but he would not object to the retention of both conditions if the intention was to clarify the situation beyond all possible doubt. He found it difficult to determine the relationship between the two paragraphs of article 7 *bis* and wondered whether the difference between the alternative and the cumulative definitions of the persons and things affected by the clause, in paragraph 1 and paragraph 2 respectively, was deliberate.

9. Mr. USTOR (Special Rapporteur) said that the distinction mentioned by Mr. Kearney was deliberate. The starting point for article 7 *bis* was the promise contained in the most-favoured-nation clause. The first essential for operation of the clause was that the persons or things to benefit from it should be identified, and that could be done either explicitly or implicitly in the clause. The treatment received by the beneficiary State would then depend on the treatment accorded by the granting State to a third State, in the sense that the beneficiary State could not claim favours accorded to persons or things outside the scope of the clause.

10. Mr. KEARNEY said that, as he understood the commentary to article 7 *bis* (A/CN.4/280), the first paragraph of that article had been drafted in its present form because there were both most-favoured-nation treatment agreements which applied to expressly identified persons or things, and agreements which applied to an entire sphere of relations. That fact having been admitted in the first paragraph, he did not see the logic of limiting the beneficiary State to claiming advantages for persons or things which met both the conditions in the second paragraph.

11. Mr. USTOR (Special Rapporteur) said that the reason for the double requirement mentioned by Mr. Kearney could be illustrated by the example of a general most-favoured-nation clause offering benefits in regard to shipping. If the granting State accorded favourable treatment only to such vessels of a third State as flew the flag of that State, the beneficiary State should be able to claim similar treatment only in respect of vessels which flew its own flag. Condition (*b*) of paragraph 2 would prevent the beneficiary State from requesting favoured treatment for vessels which it controlled, but which did not fly its flag, since the relationship of such vessels to itself would not be the same as that of the originally favoured vessels to the third State.

12. Mr. KEARNEY said that in the light of the reasons advanced by the Special Rapporteur for having an alternative requirement in paragraph 1 and a cumulative requirement in paragraph 2, he was not certain that condition (*b*) of paragraph 2 was appropriate. If, as the Special Rapporteur had said, the beneficiary State should not be able to obtain treatment more favourable than that granted to the most favoured nation, condition (*b*) would seem to require further study. He believed that article 7 *bis* could be simplified and made a more positive rule if its two paragraphs were combined.

13. Mr. ŠAHOVIĆ agreed with the Special Rapporteur that article 7 laid down a fundamental rule, but he thought the rule was rather too general to solve a number of problems that might arise in practice, to which Mr. Kearney had drawn attention. Those problems arose from the interpretation of the *ejusdem generisis* rule, which could be differently understood, as the Special Rapporteur had shown in his commentary to article 7, by comparing Pescatore's interpretation with that of Sauvignon, which he supported. [7] In his opinion, the Special Rapporteur should indicate whether any connexion existed between the rule in article 7 and the various types of most-favoured-nation clause he had in mind.

14. It was clear from the commentary that the question dealt with in article 7 *bis*—the scope of the most-favoured-nation clause regarding persons and things—could not be dealt with in article 7, which stated a general rule. The application of that rule raised a number of questions: for example, whether the application of the most-favoured-nation clause must be confined to persons and things.

[5] 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, article 26.

[6] *Ibid.*, p. 293, article 31.

[7] *Yearbook . . . 1973*, vol. II, pp. 106-107, paras. (13) and (14).

He was not opposed to the Special Rapporteur's approach, for he, too, believed that persons and things should be considered first. He thought, however, that it might perhaps be possible to simplify the wording of article 7 *bis* by reducing it to a single paragraph.

15. He gathered that in paragraph 1 the Special Rapporteur had tried to show the general relationship which must exist between the classes of persons and things benefiting from most-favoured-nation treatment and the classes of persons and things expressly covered by the clause; and in paragraph 2 he had tried to define the scope of the clause in regard to the persons and things entitled to benefit. But in doing so the Special Rapporteur seemed to have made a distinction between the persons and things specified in paragraph 1 and those referred to in paragraph 2. It was not quite clear what distinction he had intended to make between those two classes of persons and things.

16. In paragraph (1) of his commentary to article 7 *bis* (A/CN.4/280) the Special Rapporteur said that although it would have been simpler if the title of the article had referred only to the "personal scope" of the clause, for the sake of completeness he had chosen a somewhat more elaborate title. He thought the Special Rapporteur should perhaps explain more clearly why he had thought it necessary to make parallel references to persons and things. He would also like to know what exactly was meant by the words "implicitly indicated" in paragraph 1 of article 7 *bis*. In paragraphs (8), (9) and (10) of his commentary to article 7 *bis* the Special Rapporteur had spoken of problems relating to the controversial notion of "like articles" or "like products", saying that he had intended to define that notion by the rule stated in article 7 *bis*. The Special Rapporteur's intention did not seem very clear, however, and he thought it should be explained.

17. Mr. USHAKOV said that he accepted articles 7 and 7 *bis* in principle, but thought that their interpretation raised a number of questions. Referring to the definition of the most-favoured-nation clause given in article 4, [8] he reiterated his view that the clause should not be defined as a "treaty provision", but as "treaty provisions", since it comprised all the provisions of the treaty concerning most-favoured-nation treatment. If the definition was thus amended, it would not be necessary to include the words "or in the treaty containing it" in paragraph 1 of article 7 *bis*. In addition, he had a reservation about the words "or implicitly indicated": he did not think that an alternative was involved; it would be better to say "and/or implicitly indicated".

18. Paragraph 2 of article 7 *bis* would be justified only where the classes of persons and things benefiting from most-favoured-nation treatment were "implicitly indicated by the agreed sphere of relations where the clause applies", and in that case only. For if the classes of persons and things benefiting from most-favoured-nation treatment were "expressly specified in the clause" it was unnecessary to give further particulars of paragragh 2. If, on the other hand, those classes of persons and things were only "implicitly indicated by the sphere of relations" to which the clause applied, paragraph 2 would have to specify what they comprised. Thus, if the alternative in paragraph 1 were eliminated by replacing the words "or implicitly" by "and implicitly", paragraph 2 would no longer be necessary.

19. Mr. REUTER said that he, too, accepted articles 7 and 7 *bis*, though he was not sure whether it would really be possible to retain a very precise and satisfactory text, or whether a simpler text should be adopted, with an explanation in the commentary that it needed to be clarified by jurisprudence.

20. The *ejusdem generis* rule was a very simple one. All the members of the Commission agreed that the most-favoured-nation clause had a clearly defined field of application, which was determined by the totality of the rules of the treaty. But difficulties arose as soon as one attempted to describe exactly the classes of persons and things benefiting from most-favoured-nation treatment. For example, if the granting State allowed a third State—Belgium—to export under specially favourable conditions fruit grown in its territory, did it follow that the State claiming the benefit of the most-favoured-nation clause could claim the same advantages for fruit grown in Belgium—such fruit being so designated in the treaty made with the third State—or should it be inferred, as common sense would suggest, that the advantages it claimed under the most-favourable-nation clause applied to fruit grown in its own territory? The problem did not arise in that particular case, for the object described in the initial treaty obviously had to be transposed; but there were cases in which it could arise.

21. The question which did, in fact, arise was that of the relationship between internal law and international law. When the subject-matter to which most-favoured-nation treatment was to apply was defined by international law, there was no problem. For instance, if the most-favoured-nation clause related to shipping matters which were defined by international law, the question would be whether the advantages accorded by the clause came within the scope of the definition of international shipping matters. But some treaties referred to internal law: for example, in regard to the right of establishment of legal persons. The definition of legal persons raised a particularly difficult problem, because they were defined by internal law. The problem arose when a treaty expressly granted a third State favourable treatment for a class of legal persons specified according to the internal law of the third State. For example, if a treaty between Germany and France gave Germany advantages for the establishment of a certain kind of German limited liability company known as a *Gesellschaft mit beschränkter Haftung*, which did not exist in the Anglo-Saxon countries, would the United Kingdom be able to invoke the most-favoured-nation clause to claim the same advantages for the British type of company which most closely resembled the German type referred to in the treaty, or would it be debarred from doing so? Similarly, if a treaty granted some advantage to French companies of the type known as *association en participation*, which corresponded to the "joint venture" of the common law countries, would an Anglo-Saxon country be able to invoke the most-favoured-nation clause to claim the same

[8] *Ibid.*, p. 215.

advantages for those of its companies which were of the "joint venture" type? The Special Rapporteur had well understood the problem that arose when persons or things were defined in terms of internal law: in that case, the most-favoured-nation clause did not permit extension of the advantage granted, or permitted such extension only by transposition.

22. The same problem arose in regard to the nationality of companies, which was not determined by international law. For when a treaty of establishment granted advantages to a foreign State for its national companies, it was the law of that State which determined the nationality of the companies. That being so, could the State which invoked the most-favoured-nation clause claim its advantages for all the companies defined as "national" under its own law? Could not the granting State object that the national companies of a third State to which it had granted an advantage were defined much more restrictively, under the law of that third State, than the national companies of the State invoking the most-favoured-nation clause? Under the law of the latter State, for a company to be regarded as "national", it might suffice for it to have its registered offices or a principal place of business in the territory of the State in question, or for that State to control a substantial part of its registered capital. Hence, the granting State could refuse to extend the benefit of the clause, arguing that it had accorded to the third State a specific kind of advantage which, when transposed into the law of another State, would become much more extensive.

23. The *ejusdem generis* rule might thus have rather far-reaching consequences in regard to multinational companies, so he wondered whether it would not be better to put the rule in modern terms and draw attention, in the commentary, to all the problems it raised.

24. Mr. USTOR (Special Rapporteur) agreed that all the difficulties to which Mr. Reuter had alluded were present in articles 7 and 7 *bis*. It was clear to him, as it was to Mr. Reuter, that the adoption of articles on the most-favoured-nation clause would not prevent discussion at the interpretation stage. The Commission's rules and commentaries could, however, be helpful to those wishing to conclude most-favoured-nation clauses, if the articles adopted were made as precise as possible and the difficulties involved were mentioned in the commentaries.

25. Mr. KEARNEY proposed the following redraft of article 7 *bis:*

> Under a most-favoured-nation clause persons or things included in a class of persons or things specified in the clause or the treaty containing it, or coming within an agreed sphere of relations to which the clause applies under the treaty, shall be accorded most-favoured-nation treatment if the granting State is according favours to the same class of persons or things in a third State or (and) they have the same relationship with the beneficiary State as the persons or things being accorded the favours have with the third State.

26. That wording combined in a single paragraph the provisions of both paragraphs of the Special Rapporteur's text. It omitted the adverb "expressly" before the word "specified" and the expression "implicitly indicated", which appeared in paragraph 1. Adverbs such as "expressly" and "implicitly" raised problems which had been well illustrated by Mr. Reuter.

27. His proposed text brought together two ideas: that of the right of the beneficiary State, at present contained in paragraph 1, and that of the claim of the beneficiary State for most-favoured-nation treatment for particular persons or things, which was contained in paragraph 2. His text not only brought those two balancing factors closer together, but had the advantage of indicating clearly the automaticity of the operation of the most-favoured-nation clause. No request or claim by the beneficiary State was mentioned; the persons or things in the appropriate relationship with the beneficiary State were entitled to the treatment in question merely by reason of the fact that it had been granted to persons or things in the same relationship with the third State. His proposed text simply stated that the persons or things entitled to most-favoured-nation treatment "shall be accorded" that treatment.

28. There was one important point in the redraft, on which his final position would depend on the reaction of the Special Rapporteur: it was indicated by the use of the words "or (and)" in the last part of the text. The difficult problem of the choice between the two conjunctions "or" and "and" arose because article 7 *bis* was concerned with two different types of treatment: treatment based on specification in a class and treatment based on an agreed sphere of relations. By the rule of permutations, four different cases were possible between two States. In three of them, it would seem appropriate to use the conjunction "or", but in the fourth the conjunction "and" would be more suitable.

29. The first case in which the conjunction "or" should be used was that in which the scope of the clause was confined to a specified class and the persons or things of the third State were also in the specified class. The second case was that in which the scope of the clause was confined to an agreed sphere of relations and the grant to the third State was also made on the basis of relationship. The third case was that in which the scope of the most-favoured-nation clause was confined to a specific class, but the grant made to the third State covered the total field of relations, which included that class. The conjunction "and" should be used in the fourth case, where the scope of the most-favoured-nation clause extended to a general field of relations, but the grant made to the third State referred to a specified class of persons or things. In that case, for the clause to operate, the persons or things of the beneficiary State had to fall within the total relationship and also within the specified class.

30. He appreciated that the provision was a complex one, but thought it was necessary in order to cover a complex set of situations.

31. Sir Francis VALLAT said that Mr. Kearney's statement provided one more illustration of the fact that articles 7 and 7 *bis* involved questions of interpretation. That being so, he had misgivings regarding the use of the Latin expression *ejusdem generis*. The Commission had decided many years previously to avoid using Latin

as far as possible; the only traditional Latin phrase which had survived in the Vienna Convention on the Law of Treaties was *pacta sunt servanda*, which was a time-honoured expression. Moreover, in English legal practice, at least, the expression "*ejusdem generis*" was used in a sense different from that in which it was employed in article 7. It served to indicate that, where a series of specific items was enumerated, but was followed by a general expression, that expression should be interpreted by reference to the specific items. For example, a list reading"chicken, ducks, turkeys and other livestock" would be interpreted so that the term "livestock" would cover pheasants, that was to say, livestock of the same kind as the items specifically mentioned. It would not be interpreted so as to cover pigs. Possibly, some such rule might be useful in the present draft, because problems of that nature arose in connexion with the application of the most-favoured-nation clause. The important point, however, was that the words "*ejusdem generis*" were not used in that sense in the title of article 7; hence it was desirable to dispense with them.

32. He was concerned about the relationship between articles 7 and 7 *bis* and the rules of interpretation contained in the Vienna Convention on the Law of Treaties. [9] It was particularly important that nothing should be done to detract from the authority of the rules in articles 31 and 32 of the Vienna Convention; those rules had acquired a very significant standing in the international community. In the recent *Golder case*, in which he had represented the United Kingdom before the European Court of Human Rights, the view had been taken by all those involved in the case—the Court, the European Commission of Human Rights and Counsel for the United Kingdom—that articles 31 and 32 of the Vienna Convention codified pre-existing rules of customary international law.

33. It was essential to make it clear whether there was any intention, in articles 7 and 7 *bis*, to treat the most-favoured-nation clause as a particular kind of treaty and to depart from the system of article 31 of the Vienna Convention, in which the idea of specific rules of interpretation had been deliberately avoided. Possibly the intention was a different one and articles 7 and 7 *bis* came under the heading of "relevant rules of international law applicable in the relations between the parties", referred to in article 31, paragraph 3 (*c*) of the Vienna Convention. In that case, if the provisions were intended to constitute codification, they would have to be very well founded on doctrine and practice. Possibly, it was intended to lay down only conventional rules applicable exclusively to the parties. The Special Rapporteur should give some indication of his intentions on that point.

34. That being said, he was prepared to accept the basic ideas underlying articles 7 and 7 *bis*, despite the very difficult questions of interpretation and application they raised.

35. Mr. REUTER said that Mr. Kearney's proposal had the advantage of simplifying at least one of the problems raised by article 7 *bis*. The use of the words "class ... specified" and "agreed sphere" indicated that the clause applied only to persons or things included in a specific class or sphere. Thus according to the text proposed, the benefit of the most-favoured-nation clause could not be claimed when the favours accorded were entirely individualized. For example, a most-favoured-nation clause relating to shipping would not apply where the granting State concluded an agreement with a third State by which it allowed vessels from a certain port in that State to enter one of its own ports, since such an advantage would not be included in a specified class or an agreed sphere.

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

## Co-operation with other bodies

[Item 8 of the agenda]

(*resumed from the 1321st meeting*)

### Statement by the Observer for the European Committee on Legal Co-operation

36. The CHAIRMAN welcomed Mr. Golsong, the Observer for the European Committee on Legal Co-operation, and invited him to address the Commission.

37. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said that the Commission's work was always followed with great interest by the European Committee on Legal Co-operation. He regretted that the Commission's heavy programme of work had prevented it from being represented at the last meeting of the Committee, which had been held recently.

38. Among the activities at Strasbourg which might be of interest to the Commission, he wished to mention, first, the arrangements made to enable the European Communities to become contracting parties to the European Convention for the Protection of International Watercourses Against Pollution; for that matter was related to a topic which the Commission was now studying, namely, treaties concluded between States and international organizations or between two or more international organizations. In order that the European Communities might be able to become contracting parties to the Convention, which was not yet open for signature, it was planned to include in the text a signature and ratification clause which would enable them to sign it on the same basis as States and then deposit an instrument by which they would express their consent to be bound. That instrument would not be counted among the number of ratifications necessary for the entry into force of the Convention. Once they had become parties to that multilateral Convention, however, the Communities would nevertheless assume the same obligations and enjoy the same rights as States. Lastly, their participation would not depend on the prior or concomitant ratification of the Convention by all their member States.

39. The formulation of that clause had raised a number of difficulties. Since the relations between the Communities and their member States were evolving, it would be difficult to fix, over a period of time, the scope of the competence of the Communities in regard to water pollution control. It had therefore been decided to submit to the Committee of Ministers of the Council of

Europe, which had prepared the Convention, a draft declaration by which the Committee of Ministers would, at the time of the signature of the Convention, take note of the fact that "the necessary competence for implementing the European Convention for the Protection of International Watercourses Against Pollution may be vested, as the case may be, in its member States or in the Community itself, for whom it is to state how such competence is distributed in accordance with its internal procedures".

40. That solution might give rise to some difficulties, because States which were not members of the Communities might be faced with partners who were hard to get at, particularly in the event of a dispute. Consequently, an arbitration procedure had been provided for in an annex, which covered various possible cases. In the event of a dispute between two contracting parties, only one of which was a member of the European Economic Community, which was itself a contracting party, the other party would make an application both to the member State and to the Community, which would jointly notify it, within two months of receipt of the application, whether the member State, the Community, or the member State and the Community jointly, would be a party to the dispute.

41. The European Communities had applied to become parties to three other conventions. Since two of them were already in force, the only possible procedure would be to prepare an additional protocol.

42. Also related to the law of treaties was the work undertaken with a view to adapting the European Convention on Extradition to current needs. That Convention, the preparation of which went back about 20 years, was now in force between many States, both members and non-members of the Council of Europe. Recent efforts had aimed, in particular, at reducing the number of reservations formulated by States. The work had resulted in three instruments: an interpretative declaration, which had been adopted by the representatives of the contracting States members of the Council of Europe within the Committee of Ministers, with the express consent of the contracting States not members of the Council; a recommendation to States designed to ensure the application of the provisions of the Convention in a specific way; and an additional protocol which would add to the Convention provisions relating, in particular, to the scope of the privileges deriving from the notion of a political infrastructure. The latter instrument stipulated that, for the purposes of application of the rule making it possible not to extradite for a political offence, the crimes against humanity specified by the Convention on the Prevention and Punishment of the Crime of Genocide, the offences specified in certain articles of the Geneva humanitarian Conventions in their present form, and all similar violations of the laws of war in force at the time of the entry into force of the protocol and of the customs of war existing at that time which were not already specified in the Geneva Conventions, would not be regarded as political offences. That clause might raise some difficulties because it referred to provisions in force at the time of entry into force of the protocol, without specifying for whom those provisions must be in force.

43. In the field of criminal law, with which the Commission was only incidentally concerned, he wished to mention a Convention which had recently entered into force, namely, the Convention on the International Validity of Criminal Judgments, which related to the recognition and execution of criminal sentences passed by foreign courts, and another that would soon enter into force, the Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, which made it possible to grant privileged treatment, such as a suspended sentence, not only to nationals of the country of the court, but also to nationals of other contracting parties.

44. The European Court of Human Rights had recently referred to the Vienna Convention on the Law of Treaties when hearing the *Golder case*, which concerned the interpretation of a provision of the Convention for the Protection of Human Rights and Fundamental Freedoms that was nearly identical with a provision of the International Covenant on Civil and Political Rights. In order to interpret that provision and determine whether it implied a right of access to the courts, the Court had followed the method of interpretation provided for in articles 31 to 33 of the Vienna Convention on the Law of Treaties:[10] it had examined the disputed provision in its context and in the light of the object and purpose of the treaty; it had taken the preamble to the treaty into consideration; and it had taken into account the relevant rules of international law applicable in the relations between the parties. The Court's interpretation had led it to state that the principle that it must be possible to bring a civil dispute before a judge was one of the fundamental and universally recognized principles of law.

45. The European Committee on Legal Co-operation also had under consideration the drafting of instruments relating to mutual administrative assistance. In addition, work would soon begin on concerted acts of violence.

46. Lastly, he noted that the Commission's work on the most-favoured-nation clause might have some repercussions on the scope of the European Convention on Establishment and, if the Commission dealt with national treatment, on the current drafting of provisions relating to the status of migrant workers.

47. The CHAIRMAN, speaking on behalf of the Commission as a whole, thanked the Observer for his lucid and interesting account of the work of the European Committee on Legal Co-operation. The Commission's relations with that Committee were particularly friendly, and a close personal bond had been established by Mr. Golsong, who had acted as its observer at all the sessions of the Commission held since those relations had been established.

48. He expressed the Commission's thanks for the invitation to send an observer to the Committee's meetings. He himself had enjoyed the hospitality of the European Committee at Strasbourg in 1974, when he had attended its meetings as observer for the Commission.

49. Exchanges of views between the Commission and the regional bodies concerned with the codification of

[10] *Ibid.*

international law were particularly useful. They served to bring home the views, needs and requirements of the regions to the Commission in its task of making universal law. Europe, as a highly developed region which had produced many great jurists in the past and had sent outstanding international lawyers to the International Law Commission, had a special contribution to make to that task. The Commission derived great benefit from the work and the experience of the European Committee for Legal Co-operation.

50. He had been impressed by the Observer's reference to the question of participation by the European Economic Communities in a treaty as parties in their own right. He had also been greatly interested by the description of the new mechanism whereby the Communities could become bound by a treaty as institutions, quite independently of their member States, which might or might not be parties to the treaty. That process, whereby a European institution made itself responsible to the world community for the application of a convention, was particularly important at a time when the discussions on European security appeared to be about to lead to a definite agreement.

51. He had found equally interesting the Observer's description of the work of the European Committee on criminal law. In its early days, the International Law Commission had worked in that field; in 1954 it had adopted a Draft Code of Offences against the Peace and Security of Mankind. [11] The Commission had also worked for a number of years on the question of an international criminal jurisdiction.

52. There was one point relating to co-operation between the two bodies, to which he had referred in 1974 when he had appeared as an observer at Strasbourg, and which he wished to stress again. It was the question of maintaining close contact in regard to the approach to items under consideration by the International Law Commission. The Statute of the Asian-African Legal Consultative Committee specified that one of that Committee's purposes was to study the work of the International Law Commission and possibly to comment on it. Pursuant to that provision of its Statute, the Asian-African Committee had discussed such topics as the law of treaties and international rivers, and its work had been very useful to the Commission. It would be of great benefit to the Commission if the European Committee on Legal Co-operation were likewise to examine topics on the Commission's agenda, in addition to discussing problems of particular interest to Europe.

53. He expressed the Commission's regret at its inability, owing to pressure of work, to send an observer to the meeting of the European Committee held the previous week. He hoped it would be possible for the Commission to send an observer to the meeting to be held in December.

54. In conclusion, he expressed the hope that the close co-operation between the International Law Commission and the European Committee on Legal Co-operation would continue to develop to their mutual benefit.

The meeting rose at 1 p.m.

[11] *Yearbook ... 1954*, vol. II, pp. 149-152.

## 1334th MEETING

*Friday, 20 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]

*(resumed from the previous meeting)*

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 7 (The *ejusdem generis* rule) and

ARTICLE 7 *bis* (The scope of the most-favoured-nation clause regarding persons and things) [3] *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of articles 7 and 7 *bis* submitted by the Special Rapporteur.

2. Mr. TSURUOKA said that, in principle, he agreed with the ideas expressed in those two provisions. The Special Rapporteur seemed to have tried to stress three aspects of the problem: the necessary relationship between the persons and things in question and the beneficiary State; the subject-matter of the clause; and the identity of the relationship between the persons and things and the third State, with the relationship between the persons and things and the beneficiary State.

3. Since the only remarks he had to make related to drafting, he would reserve them for the Drafting Committee, but he would like the Special Rapporteur to explain, at the present stage, what was the difference, if any, between the "subject-matter of the clause", the "scope of the clause" and the "agreed sphere of relations".

4. Mr. PINTO said he understood the revised articles 7 and 7 *bis* to mean that, in addition to the requirement that the rights claimed must relate to the subject-matter of the most-favoured-nation clause, those rights must also be of the same essential character as the rights granted to the third State. If that understanding was correct, he agreed with the remark made at the previous meeting that the expression *ejusdem generis*, which was used in the title, did not convey the intended meaning to an English-speaking lawyer. [4]

5. In the text of article 7, the phrase "relating to the subject-matter of the clause" was inappropriate. In one sense it was too wide, because everything relating to that subject-matter would not necessarily be *ejusdem generis;* in another sense it was too narrow, because it was not only rights relating to the same subject-matter, but also rights having the same essential character which

[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. 1.

[4] *Ibid.*, para. 31.