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Summary record of the 1338th meeting

Topic:
Most-favoured-nation clause

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

1338th MEETING

Thursday, 26 June 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: 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. Thiam, 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 13 (The right of the beneficiary State under a most-favoured-nation clause to national treatment)[3] *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of article 13 in the Special Rapporteur's fifth report (A/CN.4/280).

2. Mr. ELIAS said that the doubts he had previously expressed about article 13 had not been dispelled.[4] The idea behind the article was a logical corollary of earlier provisions of the draft, but the text was framed in too absolute terms.

3. There was much to be said for Mr. Šahović's suggestion that an element of flexibility should be introduced into article 13. It should state explicitly the idea, which Mr. Ushakov appeared to regard as implicit in the present text, that national treatment could be claimed only if the most-favoured-nation clause was agreed by both parties to be unconditional. Unless that point was made clear, the article would be open to the criticism made by Mr. Ago.

4. Another point was that the national treatment to which article 13 referred must relate to the same subject-matter as the most-favoured-nation clause. Unless that limitation was accepted, the most-favoured-nation clause would give the beneficiary State benefits which had never been contemplated at the time of making the agreement.

5. He suggested that the Drafting Committee should reword the article so as to cover those two important points. The text as it stood, and particularly paragraph 2, might deter many States from accepting the draft.

6. The scholarly commentary prepared by the Special Rapporteur showed that there was not much precedent for drafting article 13 in such absolute terms. A qualifying phrase on the lines suggested by Mr. Kearney was essential.[5] The same considerations had led Mr. Tsuruoka to suggest the inclusion in paragraph 1 of the proviso "Subject to the provisions of the present articles".[6] His own view was that the changes would have to go much further.

7. The interesting suggestion by Mr. Pinto, that the first part of the draft should include a provision placing States on notice,[7] deserved careful consideration. In view of the importance of article 13, however, it was not possible to solve the problem entirely in that way; the text of the article would have to be amended.

8. Mr. SETTE CÂMARA said that he had already expressed his support for the idea underlying articles 13 and 14. The question of national treatment could not be ignored; the most-favoured-nation clause and the national treatment clause were the two legs of the same body, as exemplified by the GATT. If the Commission were to omit one of those elements, it would be submitting a lame draft to the General Assembly. The Commission was not concerned with the respective merits of most-favoured-nation clauses and national treatment clauses; its task was to frame rules that conformed with the reality of contemporary international relations.

9. The rule set out in article 13 proceeded from the inexorable logic of the whole draft. If national treatment was granted to a third State, the beneficiary State was certainly entitled to claim that treatment as being most-favoured-nation treatment. That result could not be escaped, unless the Commission were to introduce a contrary rule into the draft—a course no one had proposed.

10. States knew how to protect their interests. It was open to them to exclude national treatment from the operation of the most-favoured-nation clause, but they must do so when negotiating the clause. The same result could not be achieved through the treaty according national treatment to a third State, because for the beneficiary State that treaty was *res inter alios acta*. The whole subject was governed by the law of treaties, in which the will of States was paramount.

11. The same method could be followed in dealing with the case, mentioned by Mr. Pinto, of national treatment accorded by a coastal State to a landlocked State. Beneficiary States would have to waive their right to claim that treatment under the most-favoured-nation clause. A procedure of that kind existed under the GATT.

12. The discussion had shown the need to include article 13 in the draft. Some members had maintained that the rule it contained was self-evident, but others had expressed doubts about its validity. He himself believed that articles 13 and 14 accurately reflected present world conditions. Paragraph 2 of article 13, and possibly also article 14, was already covered by the contents of earlier articles, however, and might perhaps be dropped.

13. As to the doubts expressed by Mr. Elias, it should be remembered that the articles were being discussed on first reading; the Commission would take the reactions of governments into account when it came to the second reading.

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

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

[3] For text see previous meeting, para. 5.

[4] See 1336th meeting, para. 46.

[5] See previous meeting, para. 34.

[6] *Ibid.*, para 28.

[7] *Ibid.*, para. 38.

14. Sir Francis VALLAT observed that paragraph (2) of the commentary to article 13 (A/CN.4/280), referred to the British practice regarding the relation between national treatment and treatment accorded under a most-favoured-nation clause. In a broad sense, it was indeed the British practice that the mere description of a certain treatment as "national treatment" did not exclude it from the operation of the most-favoured-nation clause. That idea, however, was much less absolute than the one expressed in article 13 as it now stood.

15. Because of its excessive rigidity, article 13 would be difficult for many countries, probably including the United Kingdom, to accept. It dealt with national treatment in much too general, isolated and rigid a manner, and States would probably be reluctant to accept the risk of its possible consequences.

16. In the Special Rapporteur's excellent commentary, he thought that undue weight was perhaps given to the views of Mr. Pescatore. He had attended the meeting of the Institute of International Law to which paragraph (8) of the commentary referred, and could vouch for the fact that Mr. Pescatore's general views on *ejusdem generis* had had little appeal for the membership of the Institute as a whole. The discussion had proved that the question was a controversial one. Otherwise, the commentary showed that there was only a very limited amount of national judicial precedent to justify a provision as pointed and as rigid as article 13 in its present form.

17. He believed that the problem underlying article 13, and other similar articles, was that its provisions had emerged from a need for co-operative action in the economic field. Two factors had to be taken into account: the wish of developing countries to get the benefit of economic co-operation, and the fear of States that they might find themselves obliged to grant certain benefits without receiving anything in return. At some stage in its work on the most-favoured-nation clause the Commission would have to face that problem. In any case, governments were bound to raise it in their comments.

18. Governments would undoubtedly wish to know why the absolute rule on national treatment contained in article 13 did not take the question of economic unions into account. The members of such unions were sure to stress that they had established a system under which certain mutual benefits relating to customs, trade or employment, were extended by the members to each other within the context of the institutions they had set up. It was unthinkable that the member States should have to extend those same benefits to any outside State with which they happened to have a most-favoured-nation clause. If an inflexible approach was maintained, something was bound to break, and it would not be the economic unions, but the most-favoured-nation clause. The countries concerned would repudiate the most-favoured-nation clauses by which they were bound and would not enter into any more agreements including such clauses. It had to be recognized that there was a direct link between the treatment accorded by the members of an economic union to each other and the obligations they assumed.

19. There was another reason for caution. Other articles of the draft covered the same ground as article 13, but in another way. In particular, articles 6 *bis* and 6 *ter* clearly differentiated between unconditional and conditional most-favoured-nation clauses. That distinction disappeared in article 13, paragraph 2 of which actually reproduced the terms of paragraph 2 of articles 6 *bis* and 6 *ter*.

20. Since the subject-matter of article 13 was covered by the general articles in the earlier part of the draft, it could safely be relegated to the commentary. Dealing with that subject-matter in a separate article gave it an exaggerated importance against the background of the earlier articles. In addition, that treatment had the even greater drawback of implying that there might be other exceptions to articles 6 and 6 *bis*, apart from the one referred to in article 13.

21. The general trend of the discussion had led him to change views to some extent, and he was now prepared to accept the inclusion in the draft of some provision on national treatment, provided that it did not impose an absolute obligation. That provision should be placed immediately after articles 5, 6, 6 *bis* and 6 *ter* and might be drafted to read: "Unless otherwise provided, national treatment accorded by a State cannot be relied upon by it as such to exclude the application of a most-favoured-nation obligation." Wording of that kind would be less dangerous and less rigid than the present text of article 13, especially paragraph 2.

22. Mr. BILGE said that he had not taken part in the procedural discussion occasioned by article 13, because he had already intimated that he was not opposed to studying national treatment, though only from the point of view of its relationship with the most-favoured-nation clause. [8]

23. He thought the principle stated in paragraph 1 of article 13 was acceptable, provided that the reference to national treatment was regarded as a rule of *renvoi* and that the beneficiary State could benefit from national treatment only under conditions similar to those which would be applicable to most-favoured-nation treatment. In that respect, paragraph 2 of the article was far from satisfactory.

24. If the national treatment clause did fulfil a function of *renvoi*, he saw no objection to mentioning it in article 13; and State practice indicated that that was so. States had shown a desire to obtain favourable treatment for their nationals through the process of *renvoi*. The cumulation of national treatment and most-favoured-nation treatment was evidence of the same desire. In the past, the national treatment clause had performed only two functions; a function of *renvoi*, and a safeguard function where the most-favoured-nation clause did not enable the beneficiary State to obtain treatment as favourable as that which it could obtain through the operation of the national treatment clause. After the Second World War, however, States had shown a tendency to form groups at the continental level, because they wished to obtain sufficiently large markets for their

[8] See 1330th meeting, para. 12.

products. That grouping phenomenon met a modern need which had been felt by both developed and developing countries. Under those conditions, the national treatment clause had to perform a function of unification. It would thus be wrong to place on an equal footing national treatment clauses in agreements establishing economic groups and the national treatment clauses in other treaties, which performed a function of *renvoi*. It would accordingly be advisable to explain in the commentary that article 13 applied to the national treatment clause only in so far as that clause performed a function of *renvoi* only.

25. The conditions for the enjoyment of national treatment should certainly be the same as those for the enjoyment of most-favoured-nation treatment, though subject to a reservation for economic associations of States. For if the promise of most-favoured-nation treatment had been made before the establishment of an association of States, it would naturally cover the benefit of national treatment, where applicable. But that result was contrary to the purpose of such an association. Since it was inconceivable that the granting State could unilaterally amend the most-favoured-nation clause, the fate of that clause must be governed by general international law, which provided either for negotiations between the States concerned or for denunciation of the clause. On that point, he shared the view of the Special Rapporteur. Unlike the Special Rapporteur, however, he considered it necessary to deal separately with the case in which a most-favoured-nation clause was granted after the formation of an association of States, since such a clause was contrary to the purpose of the national treatment which the members of the association granted to each other. It was important to take that case into consideration, because it reflected a phenomenon which was not transitory and was of increasing concern to the developing countries.

26. Mr. RAMANGASOAVINA observed that article 13 was perfectly logical and was the outcome of the reasoning followed by the Special Rapporteur. It was natural for a beneficiary State under a most-favoured-nation clause to receive national treatment when the granting State accorded national treatment to a third State. The discussion which had taken place did not relate to the statement of that principle; it had arisen from the existence of associations of States, which had already been referred to during the consideration of article 8 *bis*. [9] On that occasion, reservations had been made concerning the difficulties in applying the most-favoured-nation clause that might be encountered by granting States which were bound by multilateral agreements providing for the mutual granting of advantages between the parties.

27. His examination of State practice had led the Special Rapporteur to affirm that there were no implicit exceptions for economic unions. It would, indeed, be difficult to provide, in a universally applicable provision, for exceptions in favour of such unions. There was no denying, however, that in its present form article 13 might inconvenience both States that had already formed economic or customs unions and new States that wished to form such unions. For instance, a number of countries in East Africa, which had nothing in common but their youth and the desire to find the economic system most advantageous for their development, might decide to form an economic union and to accord each other national treatment. Far from facilitating trade within the region, that arrangement might complicate it, since each country might be linked to a different State by a most-favoured-nation clause; Mozambique might be linked to Portugal, Tanzania to the Commonwealth and China, Somalia to the Soviet Union, and Madagascar to France.

28. A provision could be logical, like article 13, without necessarily being equitable. Even if countries had, of their own accord, promised most-favoured-nation treatment before entering into a union favourable to their economic development, they should be able to relax their commitments. It was true that in view of the *pacta sunt servanda* principle they could not break their promises, but the maxim *rebus sic stantibus* should, in certain cases, allow them to adapt their commitments to new circumstances. The most-favoured-nation clause, which was an old institution, should not restrain the modern tendency to establish regional economic unions. It was certainly not out of childishness that certain new States had acceded to the GATT, article XXIV of which dealt with questions of most-favoured-nation treatment and even of national treatment. Nevertheless, when they formed a regional union, those States might be hampered by the promises of most-favoured-nation treatment made in accordance with that Agreement.

29. It was certainly difficult to provide for exceptions in favour of unions of that kind, because their status was not well-defined; they might be economic zones, customs unions or free-trade areas. Sir Francis Vallat's suggestion would undoubtedly enable the Commission to relax the rule in article 13 and to allay the fears some States might feel. The draft conventions prepared by the Commission should be accepted by as many members of the international community as possible; and many States might hesitate to accept a convention one provision of which would limit their freedom to form economic unions by not allowing them to review their commitments. Article XXI of the GATT provided a procedure for derogation in favour of economic areas and customs unions which, although it was not applicable *mutatis mutandis* to article 13, could be taken into consideration to make that provision more flexible.

30. With regard to paragraph 2 of article 13, he thought that, like article 14, it contained only principles implicit in other articles of the draft. He would have no objection to retaining those provisions, however, if the Special Rapporteur could show that they provided some clarification.

31. Mr. USHAKOV said that most of the problems raised during the discussion were not genuine problems. In stating the rules in articles 13 and 14, the Commission was carrying out codification, not progressive development of international law. If it affirmed that the national treatment which a granting State could promise to a

[9] See 1334th meeting, paras. 26 *et seq.* and 1335th meeting.

third State did not come within the scope of the most-favoured-nation clause, it would be engaging in regressive development.

32. The rule in article 13 was an absolute rule. The question whether the granting State must accord national treatment through the operation of the most-favoured-nation clause could only be answered affirmatively or negatively; it was inconceivable that the granting State could accord national treatment only in part, or accord it to one beneficiary State under the most-favoured-nation clause and not to another. Since the answer to that question was to be found in contemporary international law, the members of the Commission could not cast doubt on it.

33. Nevertheless, that absolute rule should be distinguished from the practice of States. States which did not wish to grant national treatment to a certain country with which they were linked by a most-favoured-nation clause need only refrain from concluding an agreement with a third State providing for national treatment. They could also, when granting most-favoured-nation treatment, exclude national treatment from their promise to the beneficiary State. In any case, the national treatment promise could not present any great danger, because it was limited, in practice, to a particular sphere, such as shipping. States could be expected not to act like children and to grant only the advantages they really wished to grant.

34. With regard to the example of the economic zone, given by Mr. Pinto, if an exception was made for land-locked countries only, coastal countries would not be able to claim the same treatment by invoking a most-favoured-nation clause. Moreover, the Special Rapporteur intended to draft a special rule in favour of developing countries, which would be applicable to the whole draft.

35. Referring to the comments made by Mr. Ago, who considered that the rules of general international law were not applicable to the member countries of the Common Market, he asked what was the basis of that alleged exception. Before such an exception could be invoked, its existence must be proved.

36. Mr. QUENTIN-BAXTER said he believed that both the discussion on article 13 itself and the procedural discussion on the articles immediately preceding it had been extremely useful and that they were perhaps vital to the place the draft articles would finally attain in codified international law. The Commission should remember that its task was not to advocate or to discourage the use of the most-favoured-nation clause, which was a matter for political judgement, but to review and describe the reality of international practice. It should bear in mind, however, what the international community was likely to do when confronted with a particular rule. It would seem, for example, that if the Commission were merely codifying law, without introducing any progressive element, States would have no difficulty at all in agreeing that the rules proposed should apply to the whole range of existing most-favoured-nation agreements. The belief he shared with other speakers, that States would not so agree, suggested that the rules now proposed did not reflect all the aspects of the complex international heritage the Commission was studying.

37. The members of the Commission should take great care, in discussing the rigidity or flexibility of the rules to be enunciated, not to become mere legal historians rather than contributors to living law. While it was true that they could temper the rigidity of certain rules, for example, by adding special provisions in favour of developing countries, too great a reliance on such exceptions would, again, suggest some defect in the basic rules and militate against their application.

38. In his view, the main problem with rules which, like that in article 13, seemed logical in themselves but had none the less caused concern, was that, as Mr. Ago had said, the facts of international life were far more complex than the rules proposed. In particular, he had the impression that most-favoured-nation treatment agreements had been drawn up, in the past, within a specific sphere of expectation. That was to say that, while States had understood well enough that they must see how the proposed agreement would affect them in other contexts, must be prepared to concede to other States what they conceded to one State, and must weigh up the advantages to themselves, they had not made allowance for the fact that, in its absolute logic, the most-favoured-nation clause had almost infinite repercussions.

39. Agreements had been concluded in a certain climate, so that, as Mr. Ago had also pointed out, there were circumstances in which a distinction could be drawn between national treatment granted conditionally and that granted unconditionally. While it had not always been adequately reflected in the texts of agreements, there had sometimes been a common assumption that there were definite limits to the parallels which could be drawn. It was that fact, more than any other, which would make States reluctant to apply to existing most-favoured-nation treatment agreements rules designed as a simple, logical whole; and if the Commission did not make allowance for that fact, its work would be akin to that of the taxidermist who preserved for display an example of an extinct species. Mr. Pinto had referred to the cigarette packet which carried a warning against the use of its contents; in the same way, codification of the most-favoured-nation clause as an institution might easily serve as a warning to the international community that the clause should not be used, or at least that the first paragraph in the agreement should set aside the Commission's rule.

40. He was far from believing that article 13 had no value, but the Commission should be extremely careful not to draft rules which, as abstract propositions, were of compelling logic, but which a government would not wish to apply to all the relevant agreements in which its country was involved.

41. While he could see merit in the kind of formulation suggested by Mr. Pinto, [10] he hoped that the article would be drafted not as a warning, but in a way which indicated recognition that the rule had its place in a series of obligations and should not be of excessive finality. States

[10] See previous meeting, para. 38.

entering into a most-favoured-nation treatment agreement did so on the basis not only of careful consideration of its foreseeable effects, but also of a belief that the clause would not be turned against them and applied to a situation wholly different from that which they had in mind. They undoubtedly recognized that there would be many situations in which automatic application of the clause would be impossible and it would be necessary to discuss on which of several possible bases the parallel could be drawn; but it was certainly not their intention to forgo, in important matters of State policy, their sovereign right to change their institutions.

42. The articles adopted by the Commission should not encourage States to look to the situation of State succession or to invoke a doctrine as undisciplined as that of *rebus sic stantibus* to escape their obligations. Balance was to be found in existing law, such as the Vienna Convention on the Law of Treaties and the doctrine of national sovereignty over natural resources, and he was very much drawn to Sir Francis Vallat's suggestion concerning the institution of a proper balance in the present context also.

43. Mr. HAMBRO said that, although article 13 might appear harmless on the surface, the discussion had shown that it could be dangerous to the special kind of treaty relations with which the Commission was concerned. He had found Mr. Kearney's remarks and the very wise words of Mr. Pinto particularly pertinent in that respect. At the 1214th meeting of the Commission he had expressed views which were entirely in accordance with those just stated by Mr. Quentin-Baxter. He had said that the whole way in which the question of the most-favoured-nation clause had been approached looked too much to the past, and that for the future it was important to bear in mind both the relationship between the clause and the treatment to be accorded to developing countries and that between the clause and the new forms of customs and economic unions. [11] He had thought that discussion of the clause would otherwise be entirely unrealistic and was therefore very grateful for the Special Rapporteur's announced intention to take those points into account.

44. Mr. Ushakov had said that the Commission should adopt the principle stated in draft article 13 before considering the possible need for exceptions. His own view, however, was that if a large number of the members of the Commission believed that important exceptions would be required, consideration should be given to accommodating them before the rule was approved. Alternatively, the general rule could be adopted subject to the introduction of exceptions at a later stage.

45. He could agree to the article as it stood, on the express understanding that the Commission would revert to it when it came to discuss the problems of the developing countries and economic unions.

46. Mr. USTOR (Special Rapporteur) said that the discussion on article 13 and on the general problems connected with the most-favoured-nation clause had shown how great was the desire of members of the Commission to include in their report to the General Assembly articles and commentaries which would be both valid and in keeping with the requirements of contemporary international life. The articles he had drafted were intended as a supplement to the Vienna Convention on the Law of Treaties and, in dealing with the most-favoured-nation clause, the Commission found itself in a world of legal rules relating to a special kind of treaty. Much had been said during the discussion which somehow went beyond purely legal considerations.

47. It was natural for States contemplating the conclusion of a most-favoured-nation clause, or, indeed, of any treaty, to approach the matter with caution, since whatever the nature of the agreement, they would be held to it. Other features common to all types of treaty were the possibility that later generations would find them too imprecise or too burdensome to apply, and the safeguards provided by the general law of treaties, which could be invoked in the event of a fundamental change of circumstances on the basis of *rebus sic stantibus.*

48. He accordingly believed that there was no difference between treaties which contained most-favoured-nation clauses and those which did not, and that that was a basic point to be borne in mind. It was, of course, true that the operation of the most-favoured-nation clause, which was contingent on the treatment given to a third State, was dependent on things outside the treaty containing the clause, but such a treaty was not basically different from any other undertaking. The danger which Mr. Pinto saw as inherent in the most-favoured-nation clause was inherent in any treaty by reason of the changing pattern of international life. Moreover, some of the rules embodied in the Vienna Convention on the Law of Treaties were quite rigid, but that did not mean that, when circumstances arose which made their application difficult, States could not find a solution through negotiation, arbitration, or the like.

49. He noted that many speakers had agreed that draft article 13 was logical. He accepted Mr. Tammes' criticism that the commentary might be considered somewhat meagre, but he thought it provided adequate proof that the article was in conformity with State practice. No member of the Commission had pointed to an instance of practice contrary to the thesis he defended in the article. It was, of course, possible that a court had given a contrary judgement, but it was his considered opinion that article 13 corresponded to the underlying principles of the most-favoured-nation clause.

50. However incompletely expressed, the rule stated in the first paragraph of article 13 was a rule, and one whose existence the Commission must admit. To submit an alternative version was always a very constructive way of expressing the problems raised by a text and he was grateful for the proposal by Sir Francis Vallat. He agreed with Mr. Tsuruoka that points covered in other articles, such as the *ejusdem generis* rule and the unconditional or conditional nature of the most-favoured-nation clause, would apply to the situation contemplated in article 13.

51. He thought that Mr. Ago, who had been strongly critical of the second paragraph of the article, [12] had

[11] *Yearbook . . . 1973*, vol. I, p. 64, paras. 62-64.

[12] See previous meeting, paras. 14-16.

approached the matter from the standpoint of the now outmoded "American" conditional most-favoured-national clause. Modern thinking held that, unless otherwise specified in the agreement, the operation of the clause depended on the kind of treatment accorded to the third State, not on the conditions under which that treatment arose, and that was what he had had in mind in drafting the paragraph.

52. He believed that the Commission would be doing its duty in regard to the problems raised for economic unions by provisions such as articles 8 and 13 if it described those problems in detail in the commentaries. He did not think the exceptions referred to by Mr. Hambro yet formed part of the body of international law. On the contrary, he believed the present situation was that all economic associations advised their members to make individual arrangements to bring their prior commitments into harmony with their obligations as members of the group. He undertook to reflect both the supporting and the opposing views as fully as possible in the commentary to article 13.

53. The CHAIRMAN suggested that article 13 should be referred to the Drafting Committee.

It was so agreed. [13]

The meeting rose at 1.05 p.m.

[13] For resumption of the discussion see 1352nd meeting, para. 56.

1339th MEETING

Friday, 27 June 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, 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 14

1. The CHAIRMAN invited the Special Rapporteur to introduce article 14 in his fifth report (A/CN.4/280), which read:

Article 14

Cumulation of national treatment and most-favoured-nation treatment

If in an agreed sphere of relations both most-favoured-nation treatment and national treatment are stipulated by the granting State, the beneficiary State has the right to claim that treatment which it deems more favourable.

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

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

2. Mr. USTOR (Special Rapporteur) said that it seemed appropriate to have an article dealing with the not uncommon situation in which the beneficiary State was promised both most-favoured-nation treatment and national treatment in a particular field. The rule in article 14 was in conformity with the generally accepted principle that the beneficiary State could choose between the two standards of treatment. He knew of nothing in legal theory to invalidate the idea underlying article 14. National treatment was usually more favourable than most-favoured-nation treatment, since in most spheres nationals had wider rights than the best-treated foreigners, but there were instances of States granting to foreigners or foreign products special advantages not enjoyed by their nationals.

3. Mr. PINTO said that, since the phrase "agreed sphere of relations" had been used elsewhere, care should be taken to ensure that it was used with the same meaning in all cases. He took it to mean the relations created by treaties between the granting State and third States, on which the effect of the most-favoured-nation clause was in a sense superimposed.

4. There appeared to be some ambiguity about the choice before the beneficiary State. The use of the word "cumulation" in the title seemed to imply that the benefits of most-favoured-nation treatment were added to those of national treatment and that the beneficiary State could pick and choose among the whole range of benefits available under the two clauses, since the article stated that the beneficiary State had the right to claim "that treatment", not "that category of treatment", which it deemed more favourable. If the intended meaning was that the beneficiary State was required to choose between the two categories of treatment—most-favoured-nation treatment and national treatment—the wording should be made more specific.

5. Mr. ELIAS said he shared some of Mr. PINTO's concern about the wording. The underlying principle of article 14 was not as difficult to accept as that of article 13, but it needed to be formulated more clearly. The expression "agreed sphere of relations" had been found too imprecise in another context and an alternative had been found. The drafting Committee might do the same for the present article.

6. He was not sure why the treatment referred to in article 14 was expected to be "stipulated" by the granting State; if the intention of the article was to establish the concept of the co-existence of two types of treatment, it would be better to do so without introducing the notion of stipulation.

7. He assumed that the reference to the beneficiary State's "right to claim" meant that it was entitled to the treatment in question. Although the title spoke of "cumulation", the article itself did not seem to entitle the beneficiary State to claim both types of treatment, but only to choose one or the other. It should be made clear which was intended.

8. Subject to drafting improvements, the article appeared to be acceptable and could be referred to the Drafting Committee.

9. Mr. AGO said he was fully convinced of the validity of the principle stated in article 14, which was merely a