Document:-
A/CN.4/SR.1335

Summary record of the 1335th meeting

Topic:
Most-favoured-nation clause

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

to join such associations, but he also believed that other States, which had concluded treaties with them prior to their joining, had a right to protection. Articles 8 and 8 *bis* were closely linked with article 234 of the Treaty of Rome establishing the European Economic Community,[13] for the idea behind all three articles was that States should exercise their right to associate without causing undue harm to others and that, wherever prior obligations were incompatible with membership of an association, they should be dissolved or amended by agreement between the parties concerned.

43. Mr. PINTO said he was afraid the wording of article 8 might be too simple. It seemed to him that, as it stood, the article could lead to an unfair situation. For example, a State which depended for its survival on the export of low quality copper, which would not be competitive in the open market, might succeed in persuading an importing State to make its product the sole beneficiary of a low tariff. There was nothing in the article to prevent the importing State from subsequently extending most-favoured-nation treatment to another State which exported better quality copper, although the consequences of such action would be disastrous to the low quality exporter.

44. Mr. USTOR (Special Rapporteur) reminded the Commission that in introducing the articles under discussion he had said that they were general rules and that he hoped to introduce later an exception applying to international trade associations of developing countries. As could be seen from Annex I to his second report, he had more or less reached agreement on that point with UNCTAD and discussions were continuing.

45. Mr. PINTO said he was grateful for the clarification provided by the Special Rapporteur, but he would still prefer the Commission to wait until the next meeting before referring articles 8 and 8 *bis* to the Drafting Committee.

46. The CHAIRMAN said it seemed to be the general wish that the articles should be referred to the Drafting Committee forthwith. Members of the Commission would still be free to comment on them after that step had been taken. Since time was short and many matters were still outstanding, the Commission should take every opportunity of speeding up its work.

47. Mr. PINTO said he would agree to immediate reference of the articles to the Drafting Committee, on the understanding that that did not imply acceptance of their substance.

48. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that, while he was most embarrassed at having to oppose the Chairman's efforts to hasten progress, he thought the discussion had shown that it would be advisable to allow more time for comment on the articles. That would not delay the Drafting Committee, which already had a good deal of work on hand.

49. He had much sympathy with what other speakers had said about the articles. It was easy to make and justify comparatively neat rules, but as the Special Rapporteur himself had often pointed out, no rule could actually solve the problem of applying one situation agianst another. What had been expressed with regard to article 8 *bis* was not opposition to its restatement of a proposition too basic to be queried, but concern that in some way it might alter the climate in which judgements would be made. It was for those reasons that he thought more time was required.

50. Mr. USHAKOV said that reference of articles 8 and 8 *bis* to the Drafting Committee would not mean that those articles had been adopted by the Commission. Hence the discussion on them would not be closed.

51. Mr. AGO said he was opposed to referring articles 8 and 8 *bis* to the Drafting Committee immediately; they were very important articles which required more thorough discussion.

52. The CHAIRMAN said that the articles would remain open for discussion until the Commission had adopted its report.

The meeting rose at 12.45 p.m.

[13] United Nations, *Treaty Series*, vol. 298, p. 91.

1335th MEETING

Monday, 23 June 1975, at 3.15 p.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Most-favoured-nation clause

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

[Item 3 of the agenda]

(*continued*)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 8 (The most-favoured-nation clause and benefit-restricting stipulations (*clauses réservées*)) and

ARTICLE 8 *bis* (The most-favoured-nation clause and multilateral agreements)[3] (*continued*)

1. Mr. SETTE CÂMARA said that he was basically in agreement with the texts of articles 8 and 8 *bis* as proposed by the Special Rapporteur. The sound and thorough examination of the evolution of doctrine and State practice which the Special Rapporteur had made in his fourth and sixth reports (A/CN.4/266 and A/CN.4/286) left no room for doubt as to the validity of the principles underlying the articles.

2. The old ideas concerning *clauses réservées*, such as those of Nolde and the League of Nations Economic Committee,[4] had rightly been discarded by the Special Rapporteur as inconsistent with modern thinking on the

[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. 26.

[4] *Yearbook ... 1973*, vol. II, p. 108, para. (4).

very nature of the most-favoured-nation clause. A *clause réservée* was *res inter alios acta* and could not affect the operation of a most-favoured-nation clause unless the beneficiary State waived its rights after appropriate negotiations. He agreed with the Special Rapporteur's decision to omit the saving clause contained in the original version of article 8,[5] since the express exception it had referred to would in any case represent a new agreement, which would prevail over the previous agreement establishing most-favoured-nation treatment, regardless of any special provision in the general rule the Commission was now trying to draft. He noted that the Special Rapporteur had said that the provisions of article 8 did not constitute *jus cogens* and that, as amply illustrated in the commentary, States could choose another course of action if they wished.

3. The principle stated in article 8 *bis*, that a State benefiting from most-favoured-nation treatment could claim any favours accorded by the granting State under multilateral conventions, whether open or closed, was also beyond dispute. As the Special Rapporteur had pointed out, that principle was supported both by the fact that it had been thought necessary expressly to preclude the extension of certain treaties to States receiving most-favoured-nation treatment, and by the fact that the benefits of such treatment were usually waived on the basis of negotiation and express consent. The conclusion stated by the Special Rapporteur in the second sentence of paragraph (16) of the commentary to articles 8 and 8 *bis* in his sixth report applied also in the case of customs unions and similar associations. The situation would, of course, be different in the event of a uniting of States, since, as the Special Rapporteur had explained, it would no longer be a question of the exchange of treatment between two or more independent States.

4. Mr. PINTO said that, while he had no desire to delay the Commission's work or the reference of the articles to the Drafting Committee, he wished to place on record his apprehension concerning article 8.

5. It seemed to him that if a granting State A concluded a treaty containing a most-favoured-nation clause with a number of States, which might be designated B, B1, B2, and so on, and subsequently concluded a treaty with a State C, under which it accorded that State the exclusive right to favours such as low tariffs, the States in the B group would be able, under the terms of article 8, to claim the same favours. That would be so because it could be assumed that the granting State A, in concluding its agreement with State C, could not have been unaware of the obligations it had already incurred through its agreements with States B, B1 and B2.

6. If that were the only effect of article 8, he could accept it, despite the fact that it seemed to constitute a limitation on the contractual freedom of States. The situation could, however, be disastrous for State C if the first agreement concluded was that with itself; for the subsequent conclusion of most-favoured-nation treatment agreements between State A and the States in the B group would make it obligatory for the supposedly exclusive favours, on which the economy of State C might depend, to be extended to the B states. Where the agreement between States A and C provided for reciprocal treatment and State A subsequently concluded most-favoured-nation treatment agreements with other States, both A and C would suffer, and their treaty and political relations might be disrupted. State C might suffer damage as a consequence of action it had taken on the basis of its belief in the good faith of State A, for which A could be held responsible.

7. He welcomed the Special Rapporteur's intention to submit articles designed to protect the developing countries from some of the side effects of other articles, and asked whether article 8, in its present form, would preserve the position the developing countries hoped to attain by their request for preferential treatment, rather than equal treatment, under a most-favoured-nation clause. The Commission might wish to consider including an article stipulating that nothing in the draft was to be interpreted as preventing the inclusion in treaties of provisions granting preferential treatment to developing countries in their dealings with developed countries, and that the draft articles did not apply to treaties concluded by developing countries *inter se*. The definition in law of the developing countries to which such a protective clause might extend would, admittedly, be extremely difficult, but the terms of article 8 were absolute and clear.

8. Mr. TAMMES said that article 8 caused him no particular difficulties, though he had found Mr. Pinto's comments very apposite. As it stood, the article seemed to be an application of the general rule that the acquired rights of States could not be negatively affected by agreements concluded between other parties, which constituted *res inter alios acta.*

9. The rule stated in article 8 *bis* seemed almost as obvious, although it was the subject of controversy. The operation of existing most-favoured-nation clauses was threatened not so much by restrictive stipulations as by the restrictive interpretation of agreements with third parties, or of what was a customary rule of international law. As he had said before, he found it inadmissible to rely on the pretext that a treaty was closed and aimed at securing integration, to restrict, retroactively, the operation of a most-favoured-nation clause between parties which had not had the possibility of such integration in mind when concluding their agreement. Where the possibility of such integration, the so-called "regional phenomenon", was recognized in advance, limitations and exceptions designed to protect customs unions and like associations could be included in the most-favoured-nation clause, and that was becoming an increasingly common practice.

10. With regard to the possible formulation of a customary rule excluding customs unions and the like from the operation of most-favoured-nation clauses, he thought the inclusion of article 8 *bis* would have the great merit of showing, through the reactions of States, whether or not there was now in being an *opinio juris* contrary to the provisions of that article. The existence of such an opinion would mean that escape clauses relating to the associations in question, which were now the rule rather than the exception, would come within the scope of

[5] *Ibid.*, p. 108.

article 38 of the Vienna Convention on the Law of Treaties, which laid down that:

> Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such. [6]

11. That was a typical problem of codification, but the Special Rapporteur had also confronted the Commission with two problems relating to the progressive development of international law. With regard to the first, raised in paragraph 58 of the Special Rapporteur's sixth report (A/CN.4/286), he agreed that the Commission should not make what would be a value judgment of an economic, rather than a legal nature. With regard to the second problem, which concerned the possible recognition, in the draft articles, of the special situation of developing countries in regard to the operation of the most-favoured-nation clause, he reminded the Commission of the old principle of equity, according to which it was unjust to treat equals as unequals and even more unjust to treat unequals as equals.

12. Mr. RAMANGASOAVINA said he had the same difficulties with articles 8 and 8 *bis* as Mr. Pinto. In his opinion, it would have been premature to refer those two articles to the Drafting Committee immediately, because they raised a number of problems which could not be solved by the Drafting Committee.

13. The analysis made by the Special Rapporteur in his sixth report showed that the difficulties to which articles 8 and 8 *bis* gave rise were due not only to the wording of the rules contained in those articles, but also to the rules themselves, which were highly controversial. International practice in the matter was very vague and there were considerable differences in international opinion, particularly in regard to the effects of the most-favoured-nation clause on multilateral treaties or agreements. States which belonged to regional groups—customs unions or free-trade areas—did not subscribe to the principles stated in articles 8 and 8 *bis*. It was true, as the Special Rapporteur himself had stressed, that those were optional, not mandatory provisions, since States parties to a multilateral agreement granting most-favoured-nation treatment could make whatever stipulations they considered necessary to protect their interests.

14. He himself thought it was well to state the principles set out in articles 8 and 8 *bis*, and he was grateful to the Special Rapporteur for introducing them. Those articles would be submitted to governments and to the Sixth Committee, and would certainly give rise to differences of opinion. For instance, according to the Executive Secretary of the European Economic Community, the members of that Community maintained that, since it was a customs union, the EEC constituted a legitimate exception to the obligation to apply the most-favoured-nation clause. On the other hand, some writers and certain governments considered that there was not yet any customary rule according to which a multilateral agreement concluded within the framework of a customs union, free-trade area or other regional group constituted a derogation from a most-favoured-nation clause granted by a State before it had become a party to the multilateral agreement.

15. In its present form, the wording of the principles set out in articles 8 and 8 *bis* was rather sibylline. The mechanism of the most-favoured-nation clause was, indeed, difficult to understand, especially when other treaties conflicted with the application of the clause. The difficulties caused by articles 8 and 8 *bis* were due to the fact that those articles might run counter to the current tendency to form regional groups. It would therefore be necessary to examine the consequences the articles might have and try to determine, through the application of the various regional agreements—particularly those concluded by young countries—whether the granting of most-favoured-nation treatment might hinder the establishment of customs areas designed to facilitate intra-regional or extra-regional trade.

16. He was grateful to the Special Rapporteur for having provided, in the last chapter of his sixth report, for special derogations in favour of developing countries. As the Special Rapporteur had pointed out, the Special Committee on Preferences had formulated a number of principles, which had been accepted by the great majority of Members of the United Nations and were designed to establish a more equitable system of co-operation between industrialized and developing countries (A/CN.4/286, para. 66). The adoption of those principles, which were intended to promote the industrialization of developing countries, to increase their export earnings and to raise their rate of economic growth, was to be welcomed.

17. It was true that, despite the generous principles adopted in UNCTAD, it might be very difficult for developing countries to penetrate the markets of the developed countries, because of their industrial lead. But the intention was there, and the Special Rapporteur had promised to devote several articles to that aspect of relations between developed and developing countries. It would, however, be difficult to state principles having any permanence, because preference agreements were of a temporary nature and liable gradually to disappear over the years, as the developing countries became industrialized in order to diversify their production and thus achieve a faster rate of growth.

18. He was not opposed to the rules stated in articles 8 and 8 *bis*, since it was understood that they could be submitted to governments and to the Sixth Committee. In his opinion, however, the present wording of those rules was rather difficult to understand and should be carefully reviewed.

19. Mr. ŠAHOVIĆ said he thought the Special Rapporteur had been obliged to state the rules in articles 8 and 8 *bis*, because it seemed impossible to conceive of draft articles on the most-favoured-nation clause which did not deal with the relationship between the obligations inherent in the clause and obligations deriving from agreements concluded with third States. In his opinion, the Special Rapporteur had been right to divide the original article 8 into two separate articles, and he had

[6] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 294.

explained very clearly why he had done so. He had shown that the new article 8 covered the case in which the granting State had concluded, with one or more third States, an agreement expressly restricting the application of most-favoured-nation treatment to their mutual relations, whereas article 8 *bis* covered the case in which most-favoured-nation treatment had been granted by the granting State to third States by virtue of a multilateral treaty which did not contain any benefit-restricting stipulations. The Special Rapporteur had been fully aware of the problems raised by certain special situations. He had envisaged two types of special situation: in article 8, the situation of developing countries, and in article 8 *bis*, the situation of regional organizations, such as customs unions. It was for the Commission to decide what value should be attached to the rules proposed by the Special Rapporteur in articles 8 and 8 *bis*.

20. He noted that, in the revised text of article 8, the Special Rapporteur had omitted the benefit-restricting stipulation "unless the beneficiary State expressly consents to the restriction of its right in writing", which had appeared in the original text of article 8. [7] He understood why the Special Rapporteur had dropped that clause, but, taking certain exceptional situations into account, he wondered whether it would not be possible to introduce a safeguard clause into articles 8 and 8 *bis*, in order to define the conditions for their application more precisely. It was, indeed, necessary to take account of the situation of developing countries and of certain regional organizations of a special nature, whose existence raised certain problems in regard to the application of the most-favoured-nation clause in its unconditional and general form.

21. In the title of the revised article 8, it might not be necessary to include the expression "*clauses réservées*", which the Special Rapporteur had found difficult to translate into English. If that expression was used, it would be necessary to define its meaning.

22. Mr. AGO said that the simplicity of the texts of articles 8 and 8 *bis* did not match the complexity of the international reality. There was no end to the variety of situations which a multilateral treaty could create. It might let normal international relations subsist between the States parties to it; in that case, the rule stated in article 8 *bis* was perfectly acceptable. But it was also possible for a multilateral treaty to create a federation of States; and in that case a plurality of subjects of international law would be replaced by a single subject of international law. Then the relations between the member States of the federation would no longer be international relations, but constitutional relations. Between those two extremes lay an infinite range of intermediate cases, for multilateral treaties could bring about the formation of international unions of States of very diverse forms. Was the rule laid down in article 8 *bis* acceptable in such cases? Could it be affirmed that States forming an international union of States must accord to third States, under a most-favoured-nation clause, the same treatment as they accorded to States members of the union? In his opinion any such rule would be absolutely inadmissible.

23. If the principle stated in article 8 *bis* was retained in its present inflexible form, it would be liable either to obstruct the formation of international unions of States or to make States extremely cautious about granting a most-favoured-nation clause to another State, knowing that their hands would be tied if they wished to form a union of States in the future.

24. What he had said about multilateral treaties might apply in some cases to bilateral treaties, for a bilateral treaty could also establish a union of States. For example, in the case of the Belgo-Luxembourg Union, which had been established by a bilateral agreement, would the privileges accorded to Luxembourg by Belgium also have had to be accorded to France under the most-favoured-nation clause, if such clause had been in effect between Belgium and France? He did not think so. Consequently, it seemed obvious that the rule stated in articles 8 and 8 *bis* could not hold good for all types of treaty, especially multilateral treaties.

25. Mr. TSURUOKA observed that articles 8 and 8 *bis* attempted to settle a very difficult and highly controversial question: that of the implicit exceptions to the most-favoured-nation clause. He agreed, in theory, with the idea expressed by the Special Rapporteur, for it was consistent with the principles stated in articles 26 and 34 of the Vienna Convention on the Law of Treaties—*pacta sunt servanda* and *res inter alios acta* which were the very foundations of international law.

26. The idea underlying articles 8 and 8 *bis* was confirmed by the practice of a number of States, but an unduly strict application of those two articles, as they stood, might create difficulties for States which intended to conclude international agreements for regional integration—especially as it was difficult, when concluding a treaty containing a most-favoured-nation clause, to foresee what kind of international arrangements one or other of the contracting parties might conclude with third States in the future. Hence the question dealt with in articles 8 and 8 *bis* called for very thorough study. In his opinion the rules formulated by the Special Rapporteur in those two articles should be kept in the draft.

27. He agreed with those who would prefer the implicit exceptions to the most-favoured-nation clause not to be expressly mentioned in the body of the draft articles, for the very existence of those exceptions was controversial, and jurists who recognized their existence differed as to what kind of advantages the exceptions should cover. He feared that exceptions of that kind, badly formulated and ill-defined, would lead to abuses. Moreover, in international practice the problem was solved in most cases by explicit exceptions; and in the absence of explicit exceptions, the interested parties could agree on a settlement by negotiation. For instance, the EEC countries had come to an agreement with other interested States that the latter would not claim the advantages of the most-favoured-nation clause. He thought the Commission should be guided by the wise practice of settling the question in accordance with the two great rules of international law: *pacta sunt servanda* and *res inter alios acta*.

[7] *Yearbook ... 1973*, vol. II, p. 108.

28. He noted that the Special Rapporteur intended to submit some draft articles on general preferences for developing countries.

29. Mr. KEARNEY said that the discussion was an excellent example of the way in which the Commission operated, with gradual development of a position through the interplay of ideas. He had at first thought that article 8 was very simple, but the comments of Mr. Pinto, Mr. Tammes and Mr. Ago had made him realize the complexity of the underlying problems. He was quite willing to have the articles referred to the Drafting Committee, but he wondered whether the Commission was yet sure to which of the various obligations involved it wished to give precedence.

30. With regard to the case mentioned by Mr. Pinto, of a State being accorded exclusive preferences which were subsequently extended to other States under most-favoured-nation clauses, he thought that according to the general principles of international law it would be the first commitment of the granting State that should prevail. Thus if the Commission was seeking to lay down a general principle of treaty law, article 8 should say that the right of a beneficiary State to most-favoured-nation treatment would be subject to limitations undertaken by the granting State in a prior agreement with a third State. It seemed to him that, according to basic treaty law, the granting State might incur a responsibility to make recompense if it took action which violated the rights accorded exclusively, and that it would not have the legal right subsequently to accord to other States most-favoured-nation treatment in a field in which it had given a pledge in a treaty not to accord such treatment.

31. On the other hand, and again as a matter of general law, he believed that where most favoured-nation-clauses had been granted first, they would prevail over any subsequent agreement. The determining element seemed to be the time when the various agreements were concluded, for he doubted whether there was yet sufficient evidence to prove the existence of a customary rule which would prevail over the treaty principle, as Mr. Tammes had suggested might be the case.

32. As he had said before, he did not see much difference between article 8 and article 8 *bis*, and doubted whether the latter article really threw much light on the problems at issue. Article 8 *bis* might be given point if special articles on the problems of economic union, preferential treatment for developing countries and the like were included. As a general principle, he believed that the application of article 8 *bis* should be subject to the same temporal conditions as that of article 8—a belief which necessitated consideration of what was meant by the vague term "multilateral agreement".

33. Mr. USHAKOV said that the revised article 8 was confined to stipulating that a granting State, when concluding an agreement with another State, could not decide that that other State would not be considered as a third State for the purposes of the application of the most-favoured-nation clause. Thus the States parties to that agreement could not agree to restrict the enjoyment of certain advantages to the sphere of their mutual relations alone. In itself, that rule was not subject to any kind of exception—for example, an exception in favour of developing countries. In addition, the rule did not apply to customs unions and similar associations of States, such as the Common Market.

34. With regard to the drafting of the revised article 8, which provided that the right of the beneficiary State to most-favoured-nation treatment "is not affected" by an agreement between the granting State and one or more third States confining treatment to their mutual relations, he found that negative formulation rather unsatisfactory. It would be better to stress the fact that the beneficiary State could claim most-favoured-nation treatment regardless of such an agreement, and draft article 8 on the following lines:

> "The beneficiary State enjoys treatment not less favourable than the treatment accorded by the granting State to a third State, irrespective of the fact that the latter treatment is accorded under an agreement confining its application to the relations between the granting State and the third State."

Exceptions to that principle, such as that recognized in favour of developing countries, were rules of general international law which governed the whole of the draft. For the purposes of article 8 it mattered little whether the agreement in question was a bilateral or a multilateral agreement.

35. Article 8 *bis* provided that the beneficiary State must receive all the advantages accorded to a third State, whether they derived from a bilateral, a multilateral or a universal agreement applicable to the relations between the granting State and the third State. If there were exceptions to that principle—for example, in the case of economic associations—they applied not only to article 8 *bis*, but to the whole of the draft.

36. The members of the Commission who had dwelt on what they considered to be exceptions to the two articles under consideration had thus been wrong in doing so. Later on, the Special Rapporteur should try to establish general rules to facilitate the development of non-industrialized countries. For instance, a State benefiting from a most-favoured-nation clause could not claim the preferential part of the treatment which the granting State might accord to a developing country. As exceptions of that kind came under general international law and States could not change them by agreement, it would be useless to continue the discussion on articles 8 and 8 *bis* mainly with reference to the exceptions to those provisions. It would be better to refer the two articles to the Drafting Committee.

37. Sir Francis VALLAT said that the further discussion on articles 8 and 8 *bis* at the present meeting had revealed the existence of problems which had not at first been apparent. It had confirmed his serious doubts about the inclusion of those articles in the draft. The rigid form in which they were cast could distort the application of rules of international law which, as all members agreed, there was no intention to alter.

38. Where a treaty containing benefit-restricting stipulations had been concluded before a treaty containing a most-favoured-nation clause, the relationship between the two treaties must clearly be governed by the general

rules of international law, including the rules of interpretation. The later treaty might be completely silent regarding the earlier treaty, but it might nevertheless be the true intention of the parties not to cut across pre-existing benefit-restricting stipulations. Other examples could no doubt be given. Article 8, as proposed, was drafted in completely absolute terms and it was therefore essential to amend its wording so as to permit the application of the relevant rules of international law in the proper cases.

39. Those remarks applied even more forcefully to article 8 *bis*. It was significant that in his fourth report, the Special Rapporteur had discussed at length the question of reliance on multilateral agreements to avoid obligations under a most favoured nation clause, [8] but had not proposed any provision on the lines of the present article 8 *bis*. That approach had been wiser than that adopted in his sixth report (A/CN.4/286), in which article 8 *bis* was proposed.

40. The proposed article 8 *bis* established an unnecessary and undesirable distinction between multilateral agreements, covered in that article, and bilateral agreements covered in article 8. No such distinction was made in the earlier articles of the draft. Thus the term "treaty" was defined in article 2 (*a*) without any distinction between bilateral and multilateral treaties. On that basis, article 4 defined the most-favoured-nation clause as a "treaty provision" granting most-favoured-nation treatment, without making any distinction between multilateral and bilateral treaties.

41. The inclusion of an article providing that multilateral agreements did not affect the right of the beneficiary State to most-favoured-nation treatment could lead to difficulties of interpretation. It might be argued that legislation or administrative practice were outside the rule laid down in article 8 *bis*, and that the granting State was therefore free to adopt legislative or administrative measures which affected the right of the beneficiary State.

42. Article 8 *bis* was framed in such general terms that it seemed to suggest that in no circumstances could a multilateral treaty of any kind affect most-favoured-nation treatment. A federation of States could be formed by a multilateral treaty, however, and it could certainly not be argued that the rule in article 8 *bis* ought to be applied in that case. He suggested that article 8 *bis* should be dropped.

43. Mr. HAMBRO said that as a result of the present discussion he had reached the same conclusion as Sir Francis Vallat. He hoped that the Drafting Committee would be able to produce a more satisfactory solution, but he would be relieved if article 8 *bis* were eliminated.

44. Mr. ELIAS said he agreed with the underlying intention of articles 8 and 8 *bis*, but thought that perhaps they did not express the Special Rapporteur's ideas fully and satisfactorily.

45. He agreed that it was difficult to draw the line between the two situations contemplated in articles 8 and 8 *bis* respectively, and to distinguish between bilateral and multilateral agreements in so far as they might affect the operation of the most-favoured-nation clause. Little would be gained by attempting to deal separately with the two cases, and a careful reformation of article 8 should make it possible to dispense with article 8 *bis*.

46. Many of the points discussed, especially those raised by Mr. Pinto and Mr. Ramangasoavina, were probably covered by the provisions on interpretation in theVienna Convention on the Law of Treaties.

47. He suggested that the Drafting Committee should be asked to draft a single article stating the rule that the right of the beneficiary State to most-favoured-nation treatment was not affected by any agreement between the granting State and one or more third States, whether the agreement was bilateral or multilateral. The Drafting Committee would be greatly assisted in that task by the oral suggestion made by Mr. Ushakov.

48. Mr. BILGE said that he regarded articles 8 and 8 *bis* from the same point of view as Sir Francis Vallat. He believed, however, that those provisions were acceptable only in regard to a right of a beneficiary State which had come into being before the agreement between the granting State and the third State. Where the right of the beneficiary State had arisen after conclusion of that agreement, it seemed that a distinction should be made between the different kinds of multilateral treaty referred to in the Vienna Convention on the Law of Treaties.

49. Mr. PINTO said that as a result of informal consultations he gathered that there was no intention in article 8 to ignore any possible right of the third State. He suggested that that point should be explicitly covered by introducing into the article a second sentence reading: "The right of a third State under a treaty with the granting State confining treatment accorded thereunder to their mutual relations is not affected by a right conferred on a beneficiary under a most-favoured-nation clause".

50. Mr. USTOR (Special Rapporteur) confirmed that article 8 simply restated the relevant rule of the law of treaties. Clearly, if a State made a promise to another State, the validity of that promise was not affected in any way by any conflicting promise which the first State might make to a third State. His drafting of article 8, however, had naturally been centred on that rule in so far as it related to most-favoured-nation treatment.

51. The basic idea of article 8 was that the granting State could not be relieved of its undertaking to grant most-favoured-nation treatment to the beneficiary State simply by making an agreement with a third State whereby certain advantages granted to that State were excepted from the operation of the clause. If those advantages fell within the scope of the clause, the agreement with the third State would be a breach of the granting State's commitments.

52. He welcomed the suggestion by Mr. Ushakov for drafting improvements.

53. As to the special situations mentioned by a number of speakers, they did not affect the validity of the rule stated in article 8. There had been some discussion on the question of exceptions granted to developing countries, and it had been suggested that the concept of a developing country was not clear. He would not

[8] *Ibid.*, p. 111, paras. (14) *et seq.*

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

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

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

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

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

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

It was so agreed. [9]

The meeting rose at 6 p.m.

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

1336th MEETING

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

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Most-favoured-nation clause

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

[Item 3 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLES 9 AND 10

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

Article 9

National treatment clause

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

Article 10

National treatment

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

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

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

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

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

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