

Document:-
A/CN.4/SR.1520

Summary record of the 1520th meeting

Topic:
Most-favoured-nation clause

Extract from the Yearbook of the International Law Commission:-
1978, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

29. Like Mr. Sucharitkul, he thought the word "participation" might in itself be ambiguous, for if participation went beyond mere aid or assistance in an internationally wrongful act committed exclusively by another, that was no longer complicity in but co-authorship of that act. The case to which article 25 was intended to refer should therefore be clearly specified.

30. As to the wording of the article, he thought that the English and French texts would have to be harmonized. Mr. Ushakov had been right to criticize (1518th meeting) the word "permettre" ("enable"), which might refer to an act of an authority repealing a prohibition, whereas article 25 dealt with an entirely different matter. The situation to which he had intended to refer in that article was one where a State made possible or facilitated the commission of an internationally wrongful act by the aid or assistance it provided to another State. For example, if the territory of an aggressor State was separated from that of the victim State by the territory of another State, it was obvious that that other State made aggression possible if it allowed the aggressor State to cross its territory to attack the victim State.

31. Mr. Ushakov had perhaps been right to criticize the word "infraction" ("offence"), because someone might wonder why that term had been used instead of the expression "internationally wrongful act" and interpret it differently, whereas he had in fact used it to mean "internationally wrongful act", but had simply wanted to avoid repetition.

32. The most important objection raised had been that relating to the words "against a third State". He had chosen the classical case in which State A helped State B to commit a wrongful act against State C, but he recognized that there were subjects of international law other than States and that an internationally wrongful act could be committed against an international organization. Moreover, an increasing number of international conventions placed on each party obligations towards the whole international community or towards all the other parties to the convention. For example, if a State breached an international labour convention by not according certain treatment to its own workers, it was not committing an internationally wrongful act against any one State, but against all the States that had ratified the convention. He therefore agreed with Mr. Ushakov, Mr. Njenga and Mr. Pinto (1518th meeting) that the words "against a third State" should be deleted and that reference should be made only to the commission of an internationally wrongful act, without saying against whom the act was committed.

33. He noted that the Commission was hesitant about using the term "complicity" and that some members feared to use it, although they had not objected to the use of the word "crime". He thought the Commission could try to avoid the use of the term, provided that the situation referred to was made perfectly clear, and that it was realized that what was at issue was in fact complicity.

34. In his opinion, the words "assistance ... in the

commission ... of an internationally wrongful act", proposed by Mr. Ushakov,⁴ would be too restrictive, not only because they presupposed that the commission of the internationally wrongful act on the same begun when the aid was given, which was not always the case, but especially because they might give the impression that the State took part in the commission of the internationally wrongful act on the same footing as the principal author of the act. A clear distinction must be made between a case where the purpose of the aid or assistance was to make it possible or easier for another State to commit an internationally wrongful act, and a case where the State actually took part in the commission of an internationally wrongful act and became a co-author of that act. He was grateful to Mr. Yankov, Mr. Sucharitkul and Mr. Thiam for having drawn the Commission's attention to that point.

35. Finally, he wondered whether it would not be dangerous to begin the article with the words "if it is established", as Mr. Ushakov had proposed, since that would suggest a form of judgement by a judicial or other authority, an idea the Commission had so far avoided.

36. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 25 to the Drafting Committee.

*It was so agreed.*⁵

The meeting rose at 1 p.m.

⁴ 1518th meeting, para. 5.

⁵ For consideration of the text proposed by the Drafting Committee, see 1524th meeting, paras. 2-6.

1520th MEETING

Tuesday, 18 July 1978, at 3 p.m.

Chairman : Mr. José SETTE CÂMARA

Members present : Mr. Calle y Calle, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Yankov.

The most-favoured-nation clause (*continued*)*
(A/CN.4/308 and Add.1 and Add.1/Corr.1 and
Add.2, A/CN.4/309 and Add.1 and 2, A/CN.4/
L.280)

[Item 1 of the agenda]

* Resumed from the 1506th meeting.

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE¹

1. The CHAIRMAN thanked the Chairman and members of the Drafting Committee for the care they had taken in finalizing the draft articles on the most-favoured-nation clause.
2. Mr. SCHWEBEL (Chairman of the Drafting Committee) introduced the complete set of draft articles on the topic of the most-favoured-nation clause (A/CN.4/L.280). The draft consisted of 29 articles instead of the 27 adopted by the Commission on first reading in 1976,² because the Drafting Committee had decided to delete article 8 of the 1976 draft and to add three new articles, namely, articles 6, 12 and 14 of the new draft.
3. The Drafting Committee had first considered the articles of the 1976 draft and those incidental to them and had then proceeded to consider the proposals for additional articles made by members of the Commission at the current session. The proposed new articles, namely, articles A and 21 *ter* proposed by Mr. Reuter (A/CN.4/L.264 and A/CN.4/L.265),³ article 21 *bis* proposed by Mr. Njenga (A/CN.4/L.266)⁴ and article 23 *bis* proposed by Sir Francis Vallat (A/CN.4/L.267),⁵ had thus been considered towards the end of the Drafting Committee's work.
4. The Drafting Committee had devoted 20 of the 34 meetings so far held during the session to the draft articles on the most-favoured-nation clause, concluding its examination of the 1976 draft only on the morning of 14 July. For that reason, and also because it had not been in possession of all the necessary elements for a full consideration of the four proposed new articles on an equal basis, and differences of opinion had emerged after a preliminary exchange of views of each of the four proposals, the Drafting Committee had concluded that the most appropriate course of action would be to recommend that the Commission should include the texts of the four proposals, together with a discussion of the arguments advanced for and against each of them, in the introduction to the chapter of its report concerning the most-favoured-nation clause. Accordingly, the Drafting Committee was not submitting articles based on any of the four proposals.
5. He suggested that the Commission should examine the draft article by article.
6. Mr. ŠAHOVIĆ expressed surprise that, although the Drafting Committee had done a great deal of work, it had not managed to consider the few articles proposed by members of the Commission. Regardless of the difficulties to which those proposals might

have given rise in the Drafting Committee, they should have led to more practical results, since their importance had been generally recognized during the Commission's discussion of them.

7. In particular, the Commission had considered article 21 *bis*, proposed by Mr. Njenga, as essential to the success of the draft. It was highly regrettable that the Drafting Committee had not put forward a text corresponding to that proposal. Personally, he would be prepared to take part in a further discussion of article 21 *bis*.

8. Mr. NJENGA said that he would find it very difficult to examine the draft article by article in view of the omission from it of some of the proposals introduced at the current session. It was not clear to him why the Drafting Committee had insisted on associating the four proposals in question, which concerned entirely different matters and had in fact met with very different receptions in the Commission. His own proposal for a new article 21 *bis* introduced a principle that was considered by many, both inside and outside the Commission, as the very core of the issue of the most-favoured-nation clause and had had the support of almost all the Commission's members, as the records of the 1494th, 1495th and 1496th meetings testified. Many members had expressed their views on the text and, on the conclusion of the debate, the Special Rapporteur had suggested an improved wording.⁶ That being so, he did not see what further information the Drafting Committee could have required for a full consideration of the article. Unless the Commission wanted to expose itself to very serious criticism in the Sixth Committee, it should decide, if necessary by voting, to insert the article in the body of the draft.

9. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that the importance of the four proposals in question was not in doubt. It was perfectly correct that article 21 *bis* had received a large measure of support in the Commission, but in the Drafting Committee it had been subjected to vigorous attack. Some members had argued that the proposed provision was desirable, but would be difficult to apply because of the absence of a universally accepted definition of developing countries, in particular, some members had thought that the Group of 77 was not uniformly composed of developing countries and included some oil-rich States that were not entitled to the concessions they would receive under the proposed article. Others had argued that the proposal was not only unworkable but also undesirable, in that it would restrict the application of the most-favoured-nation clause to a small group of developed States and exclude developing countries. Yet others had accepted the proposal in substance but had thought it should be brought more closely into line with the old article 21. Had a vote been taken, the proposal would probably have commanded only a bare majority. In the circumstances, the Drafting Committee had agreed that, in view of the lack of

¹ For the initial debate on the draft articles at the current session, see 1483rd-1500th meetings, 1505th meeting, paras. 13-67, and 1506th meeting.

² *Yearbook... 1976*, vol. II (Part Two), pp. 11 *et seq.*, doc. A/31/10, chap. II, sect. C.

³ See 1495th meeting, paras. 23 and 22.

⁴ See 1494th meeting, para. 25.

⁵ See 1498th meeting, para. 18.

⁶ 1496th meeting, para. 54.

time, it should refrain from recommending the text to the Commission.

10. Mr. PINTO reminded members that in 1976 he had proposed a provision on lines similar to Mr. Njenga's proposal.⁷ In his opinion, a text of that kind should have been incorporated in the body of the draft, not to insert it might amount to excluding one of the provisions that would have received the support of an overwhelming majority of States. The argument had been advanced that such a provision would present insurmountable difficulties of interpretation and application, as there was no objective criterion for deciding which State fell into the category of developing countries for the purposes of the provision. In his view, a country was a developing country if it belonged to the Group of 77 and was not a developing country if it did not belong to that group. The concept of a developing country was essentially political in nature, and rooted in the belief that the economic interests that united developing countries were greater than the interests that divided them. Accordingly, there was no general recognition of gradations of development among developing countries; a category of least developed countries and a category of countries most seriously affected by certain economic forces were recognized only in very specific and limited contexts that had no connexion whatever with the subject of the draft articles under discussion. He fully associated himself with the position taken by Mr. Njenga.

11. Mr. CALLE y CALLE said that, although the draft articles before the Commission represented an improvement on the 1976 draft, they did not deal with the important matters referred to in the proposals made by Mr. Njenga, Mr. Reuter and Sir Francis Vallat. In his opinion the Drafting Committee, even in the little time available to it, should have been able to include in the draft an article reflecting Mr. Njenga's proposal that preferences granted by developing countries to other developing countries should be excluded from the operation of the most-favoured-nation clause. The Drafting Committee should also have taken account of Sir Francis Vallat's proposal for the inclusion of an article on the most-favoured-nation clause in relation to treatment extended by one member of a customs union to another member, for the Commission and the Sixth Committee of the General Assembly would then have had an opportunity to consider whether other similar associations of States should also be excluded from the operation of the most-favoured-nation clause. In addition, the inclusion in the draft of Mr. Reuter's important proposals for articles on treatment extended in accordance with the Charter of Economic Rights and Duties of States⁸ and treatment extended under commodity agreements would have reflected current international concern about the need for measures to correct the widening imbalance between developed and developing countries.

12. Mr. TABIBI remarked that never in the 17 years of his membership of the Commission had a proposal been put aside by the Drafting Committee after receiving general support in the Commission. He agreed with previous speakers that the article proposed by Mr. Njenga should be incorporated in the draft articles and go forward to the Sixth Committee.

13. Mr. QUENTIN-BAXTER did not wish to detract in any way from the Drafting Committee's achievement, but could not help regretting the course it had adopted in respect of the proposals in question. If lack of time were the only reason, the decision would be understandable. What was disturbing was the policy-making element involved. It seemed as though the Drafting Committee were substituting the judgment of its own members for that of the Commission, and that might have serious implications from the point of view of the Commission's standing with the General Assembly. Members' technical qualifications and detachment should enable them to reshape texts even where problematic issues were involved. He strongly felt that the Drafting Committee should have come forward with a text even in the presence of apparently irreconcilable differences.

14. Mr. FRANCIS agreed that it was the Commission's duty to itself as well as to the Sixth Committee to come to some conclusion on Mr. Njenga's proposal, if not necessarily on the three other proposals in question. It was unrealistic to insist on linking the four proposals. The least that could be done for the text of article 21 *bis* would be to place it in square brackets in the body of the draft.

15. Mr. DÍAZ GONZÁLEZ fully supported Mr. Njenga's proposal for the inclusion in the draft of an article 21 *bis* on the most-favoured-nation clause in relation to arrangements between developing countries. Although he had absolutely no doubt about the competence and devotion of the members of the Drafting Committee, he considered that, in the final analysis, it rested with the Commission itself to decide what draft articles should be submitted to the General Assembly. He was therefore unable to accept the Drafting Committee's decision that the draft articles should not include the proposals made by Mr. Njenga, Mr. Reuter and Sir Francis Vallat, which had been supported by the majority of the Commission and were of primary importance to developing countries.

16. Mr. THIAM said that he would fully have supported the article 21 *bis* proposed by Mr. Njenga (A/CN.4/L.266) had he been present at the meeting at which it had been submitted to the Commission. The Drafting Committee, according to its Chairman, had considered the substance of the article, but its members had been unable to reach agreement and had decided to exclude the article. In no event, however, could the Drafting Committee take the place of the Commission. It might of course discuss a matter of substance, but it could not decide that an issue should be set aside. The respective roles of the Drafting Committee and the Commission should be made clear.

⁷ See *Yearbook... 1976*, vol. I, p. 144, 1387th meeting, para. 16.

⁸ General Assembly resolution 3281 (XXIX).

17. The matter referred to by Mr. Njenga in the proposed article was such that it could not be put aside without the Sixth Committee of the General Assembly receiving the impression that it had given rise to a political problem that the Commission had preferred to avoid. It rested with the General Assembly, however, not with the Commission, to define the notion of a developing country and to decide whether the Group of 77 included some developed countries. As he saw it, the international community in fact considered all countries belonging to the Group of 77 to be developing countries. Moreover, it could not be claimed that article 21 *bis* gave rise to insurmountable problems because the notion of a developing country had not been defined, for in article 23 the Commission referred explicitly to developing countries.

18. He therefore expressed the hope that the Commission would reconsider article 21 *bis*.

19. Mr. SUCHARITKUL thought that, given more time, the Drafting Committee would have considered the proposed text of article 21 *bis* and would probably have adopted it. Apart from the reasons mentioned by previous speakers, the proposal deserved to be incorporated in the body of the text because it was tantamount to a new rule of international law in favour of developing countries, as provided for in article 29 of the draft. As for the absence of a definition of the notion of developing countries, the Commission was being asked to approve article 23, which dealt with relations between developed and developing States under generalized systems of preferences; the objection was therefore invalid.

20. Mr. EL-ERIAN shared the views of previous speakers and reminded members of the full support he had given to Mr. Njenga's proposal as well as to a similar one made by Mr. Pinto in 1976.

21. With regard to the difficulty arising from the absence of a definition of developing countries, he endorsed the highly pertinent remarks made by Mr. Thiam. On past occasions, as an exceptional measure, the Commission had relegated provisions that it had not had time to discuss to an annex to the main text. That might still be done in respect of the proposals made by Mr. Reuter and Sir Francis Vallat. Mr. Njenga's proposal, however, had been discussed by the Commission in detail and should appear in the body of the draft.

22. Mr. USHAKOV (Special Rapporteur) did not think there was any need to discuss the respective powers of the Drafting Committee and the Commission. It was quite certain that the Drafting Committee had merely to submit proposals to the Commission and that it could not go against the Commission's will.

23. In summing up the discussion on article 21 and on article 21 *bis* proposed by Mr. Njenga, he had suggested simpler and more precise wording for article 21 *bis*.⁹ However, he had indicated that such a

provision would be applicable only if it were made clear what was meant by developing countries in the sphere of international trade. Personally, he could not accept the criterion of membership of the Group of 77, which was of a political nature. Everyone was aware that among the "economically developing" countries there were States that were relatively highly developed.

24. The proposal that a developed beneficiary State should not be entitled to the preferences granted by developing countries to one another meant, *a contrario*, that a developing beneficiary State would be entitled to such preferences. However, that rule would not be easy for developing countries to apply to one another. For example, a State that was regarded as a developing country from the political point of view might claim the preferences that two other, less wealthy, developing countries granted to one another. Similar difficulties arose in connexion with the generalized system of preferences. In its commentary to article 21 of the draft articles adopted on first reading, the Commission had referred to the case of Hungary, stating that, for that country,

beneficiary countries are those developing countries in Asia, Africa and Latin America whose *per capita* national income is less than Hungary's; which do not apply discrimination against Hungary; which maintain normal trade relations with Hungary and can give reliable evidence of the origin of products eligible for preferential tariff treatment...¹⁰

As the Commission had observed in the same commentary, the generalized system of preferences

is based upon the principle of self-selection, i.e. that the donor countries have the right to select beneficiaries of their system and withhold preferences from certain developing countries.¹¹

Thus, although article 21 referred to developing countries, the situation was entirely different from the one covered by article 21 *bis* since, under article 21, the granting States themselves selected the beneficiary developing States. In another passage of the commentary, moreover, the Commission had taken cognizance of the fact that "there is at present no general agreement among States concerning the concepts of developed and developing States".¹² Accordingly, it could not now be claimed, in connexion with article 21 *bis*, that such an agreement existed in the sphere of international trade.

25. If the Commission adopted article 21 *bis*, it would be promoting the progressive development of international law, not its codification. Mr. Njenga's proposal was based on article 21 of the Charter of Economic Rights and Duties of States, which provided:

Developing countries should endeavour to promote the expansion of their mutual trade and to this end may, in accordance with the existing and evolving provisions and procedures of international agreements where applicable, grant trade preferences to other developing countries without being obliged to extend such preferences to developed countries, provided these arrangements

¹⁰ *Yearbook... 1976*, vol. II (Part Two), p. 61, doc. A/31/10, chap. II, sect. C., art. 21, para. (9) of the commentary.

¹¹ *Ibid.*, p. 63, para. (17) of the commentary.

¹² *Ibid.*, para. (19) of the commentary.

⁹ See 1496th meeting, para. 54.

do not constitute an impediment to general trade liberalization and expansion.

Article 21 *bis* was based on that provision, but those who supported it should be quite certain that it was actually applicable. It was not enough to affirm that, for the purposes of international trade, developing countries were the 120 or so member States of the Group of 77. Nor was it enough to formulate a proposal, for a proposal must be drafted in terms that were precise enough to give it every chance of being properly applied. It was not, therefore, without justification that some members of the Drafting Committee had taken the view that article 21 *bis* should not be included in the draft.

26. Mr. NJENGA said that the absence of an agreed definition of developing countries was not a cogent argument for leaving his proposal aside. The proposal was based on practices followed in UNCTAD and on the principle set forth in article 21 of the Charter of Economic Rights and Duties of States. The Commission would appear in a very bad light if it refused to adopt a useful principle on such formalistic grounds as lack of a definition.

27. The proposal he was asking the Commission to reconsider was the original text of article 21 *bis* as amended by the Special Rapporteur at the 1496th meeting. That text incorporated many drafting points that had been raised during the debate, and the fact that the Drafting Committee had not had a great deal of time to discuss it should therefore not weigh too heavily in the balance. The other new articles had been proposed later in the debate, had been discussed less fully and had not commanded unanimous support. It would therefore be inappropriate to insist on giving equal treatment to all four proposals.

28. He would have no objection to the text appearing in square brackets if that were the Commission's wish.

29. Mr. YANKOV thought that the article 21 *bis* proposed by Mr. Njenga should have been included in the draft articles on the most-favoured-nation clause in view of the broad support it had received both in the Commission and in the Drafting Committee. Moreover, justification for mentioning developing countries was to be found in articles 23 and 29 of the draft under consideration. He was quite certain that the inclusion in the draft of the article proposed by Mr. Njenga would be approved by the Sixth Committee and that its omission would do a great disservice to the Commission.

NEW ARTICLE 23 *bis* (The most-favoured-nation clause in relation to arrangements between developing countries).

30. Mr. NJENGA formally proposed the inclusion in the draft of the following new article 23 *bis*:

"The most-favoured-nation clause in relation to arrangements between developing States

"A developed beneficiary State is not entitled under a most-favoured-nation clause to any prefer-

ential treatment in the field of trade extended by a developing granting State to a developing third State."

31. Mr. SCHWEBEL (Chairman of the Drafting Committee) fully agreed with Mr. Ushakov that there was no need to discuss the respective powers of the Drafting Committee and the Commission.

32. As he had already pointed out, the Drafting Committee had carefully considered the article 21 *bis* proposed by Mr. Njenga but had failed to reach agreement on it. The Drafting Committee had then been informed that there was no precedent for placing a provision of a draft in square brackets on second reading. It had therefore refrained from adopting the solution of placing draft article 21 *bis* in square brackets and had decided to give equal treatment to the proposals of Mr. Njenga, Mr. Reuter and Sir Francis Vallat in the introduction to the chapter of the Commission's report on the most-favoured-nation clause.

33. Turning to the new article 23 *bis* proposed by Mr. Njenga, he said that it did not meet the point about which Mr. Ushakov had expressed well-founded concern and that its wording did not correspond to that of the existing article 23, as adopted by the Drafting Committee, in that it did not refer to the conformity of such an exception with the relevant rules and procedures of a competent international organization. If the wording of the new draft article 23 *bis* were to attract wide support, it should be in line with that of article 23.

34. He therefore proposed that the words "in conformity with the relevant rules and procedures of competent international organizations of which the developing State concerned is a member" should be added at the end of the proposed article 23 *bis*.

35. Mr. NJENGA said that he would have no difficulty in accepting the amendment proposed by the Chairman of the Drafting Committee, particularly if it ensured broad support for the proposed article 23 *bis*.

36. Mr. RIPHAGEN said that, in the case in point, three States were concerned and that, in his opinion, they must all be members of the competent international organization. He therefore proposed that the words "of which the developing State concerned is a member" should be replaced by the words "of which the States concerned are members".

37. Mr. FRANCIS had some doubts about the notion of conformity with the relevant rules and procedures of competent international organizations, as introduced in the amendment to draft article 23 *bis* proposed by Mr. Schwebel. Article 23 referred to a generalized system of preferences recognized by the international community of States as a whole, whereas article 23 *bis* referred not only to arrangements between developing countries under a generalized system of preferences but also to any other arrangements on which they agreed. It seemed to him that article 23 *bis*, as amended by the Chairman of the Drafting Committee, meant that any single grant by one devel-

oping country to another would be required to be in conformity with the relevant rules and procedures of the competent international organization and that, as such, the article would detract from the freedom accorded to developing countries by the draft articles as a whole.

38. Mr. SCHWEBEL (Chairman of the Drafting Committee), referring to the amendment proposed by Mr. Riphagen, suggested that it would be better to retain the wording he himself had proposed. If article 23 *bis* provided that, for the relevant rules and procedures of the competent international organization to apply, all three of the States concerned must be members of that organization, it might not be clear whether or not the developed beneficiary State was entitled to the preferential treatment in question; whereas, if the wording he had proposed were accepted, the exception provided for in article 23 *bis* would apply if either of the developing States concerned was a member of the competent international organization.

39. He also thought that the words "competent international organizations" in his amendment should be replaced by the words "a competent international organization".

40. Mr. PINTO said that he could accept article 23 *bis*, which appeared to be a step in the right direction. He nevertheless had doubts similar to the ones expressed by Mr. Francis and was not certain about the full implications of the first amendment proposed by Mr. Schwebel.

41. Mr. RIPHAGEN still thought that the international organization in question could be competent only if all three of the States concerned were members of it.

42. Mr. EL-ERIAN supported the text proposed by Mr. Njenga, as amended by Mr. Schwebel and Mr. Riphagen.

43. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that he could accept Mr. Riphagen's amendment to the text of article 23 *bis*, which would now read:

Article 23 bis. The most-favoured-nation clause in relation to arrangements between developing States

A developed beneficiary State is not entitled under a most-favoured-nation clause to any preferential treatment in the field of trade extended by a developing granting State to a developing third State in conformity with the relevant rules and procedures of a competent international organization of which the States concerned are members.

44. The CHAIRMAN said that, if there were no objection, he would take it that the Commission decided to adopt the title and the text of article 23 *bis*, as amended.

It was so agreed.

The meeting rose at 6.15 p.m.

1521st MEETING

Wednesday, 19 July 1978, at 10.05 a.m.

Chairman : Mr. José SETTE CÂMARA

Members present : Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

The most-favoured-nation clause (continued)
(A/CN.4/308 and Add.1 and Add.1/Corr.1 and Add.2, A/CN.4/309 and Add.1 and 2, A/CN.4/L.280)

[Item 1 of the agenda]

NEW ARTICLE 23 *bis* (The most-favoured-nation clause in relation to arrangements between developing States)¹ (concluded)

1. Mr. USHAKOV (Special Rapporteur) said that in the commentary to article 23 *bis* it would be essential to indicate that, even more than article 23, the article concerned the progressive development of international law, that it was based on article 21 of the Charter of Economic Rights and Duties of States² and that it would be very difficult to apply in the absence of any classification of countries into developed and developing countries from the point of view of international trade. On the last point, it should be made clear that the Commission had judged that responsibility for formulating proposals for the implementation of certain rules of the draft rested not with the Commission but with the organs competent to establish lists of developing countries or to determine the applicable criteria.

2. Mr. RIPHAGEN said that a foundation in the Charter of Economic Rights and Duties of States could be claimed not only for the further exception to the most-favoured-nation clause adopted by the Commission in article 23 *bis*, but also for other proposals for new draft articles on which the Drafting Committee had not agreed, particularly the proposals relating to treatment extended under commodities agreements and in connexion with customs unions, and the proposal concerning treatment extended in conformity with the Charter of Economic Rights and Duties of States. Hence, although the Commission had covered in its draft articles the subject-matter of articles 18 and 21 of the Charter of Economic Rights and Duties of States, it had not provided for that of articles 5 and 6, which concerned primary commodities, or for that of article 12, which concerned customs unions and similar groupings. The Commission

¹ For text, see 1520th meeting, para. 43.

² General Assembly resolution 3281 (XXIX).