

**Draft Articles on most-favoured-nation clauses**  
**with commentaries**  
**1978**

Text adopted by the International Law Commission at its thirtieth session, in 1978, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 74). The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 1978*, vol. II, Part Two.



72. Finally, the Commission wishes to indicate that it considers that its work on most-favoured-nation clauses constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's Statute. The articles it has formulated contain elements both of progressive development and of codification of the law and, as in the case of several previous drafts, it is not practicable to determine into which category each provision falls.

### B. Recommendation of the Commission

73. At the 1522nd meeting, on 20 July 1978, the Commission decided, in conformity with article 23 of its Statute, to recommend to the General Assembly that the draft articles on most-favoured-nation clauses should be recommended to Member States with a view to the conclusion of a convention on the subject.

### C. Resolution adopted by the Commission

74. At its 1522nd meeting, on 20 July 1978, the Commission adopted by acclamation the following resolution:

*The International Law Commission,*

*Having adopted* the draft articles on most-favoured-nation clauses,

*Desires to express* to the Special Rapporteur, Professor Nikolai A. Ushakov, its deep appreciation of the outstanding contribution he has made to the treatment of the topic by this scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its work on most-favoured-nation clauses.

### D. Draft articles on most-favoured-nation clauses

#### *Article 1. Scope of the present articles*

The present articles apply to most-favoured-nation clauses contained in treaties between States.

#### *Commentary*

(1) This article corresponds to article 1 of the Vienna Convention; its purpose is to define the basic scope of the present articles.

(2) It gives effect to the Commission's decision that the scope of the present articles should be mainly restricted to most-favoured-nation clauses contained in treaties concluded between States. It therefore emphasizes that the provisions that follow are designed for application to most-favoured-nation clauses contained in treaties between States. This restriction also finds expression in article 2, paragraph 1 (a), which gives to the term "treaty" the same meaning as in the Vienna Convention, a meaning that specifically limits the term to "an international agreement concluded between States".

(3) It follows from the use of the term "treaty" and from the meaning given to it in article 2, paragraph 1 (a), that article 1 restricts the scope of the articles to most-favoured-nation clauses contained in international agree-

ments between States in written form. Consequently, the present articles have not been drafted so as to apply to clauses contained in oral agreements between States. Under article 6 of the present draft, and as explained below in the commentary to that article, the present articles apply to the relations of States as between themselves under international agreements containing clauses on most-favoured-nation treatment concluded between States and other subjects of international law. At the same time, the Commission recognized that the principles contained in the articles might also be applicable in some measure to clauses in international agreements falling outside the scope of the present articles. Accordingly, in article 3 it has made a general reservation on this point.

#### *Article 2. Use of terms*

##### 1. For the purposes of the present articles:

(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "granting State" means a State which has undertaken to accord most-favoured-nation treatment;

(c) "beneficiary State" means a State to which a granting State has undertaken to accord most-favoured-nation treatment;

(d) "third State" means any State other than the granting State or the beneficiary State;

(e) "condition of compensation" means a condition providing for compensation of any kind agreed between the granting State and the beneficiary State, in a treaty containing a most-favoured-nation clause or otherwise;

(f) "condition of reciprocal treatment" means a condition of compensation providing for the same or, as the case may be, equivalent treatment by the beneficiary State of the granting State or of persons or things in a determined relationship with it as that extended by the granting State to a third State or to persons or things in the same relationship with that third State.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

#### *Commentary*

(1) Following the example of many international conventions concluded on the basis of previous drafts elaborated by the Commission, the Commission has specified in article 2 the meaning of the expressions most frequently used in the draft.

(2) As the introductory words of the article indicate, the definitions contained therein are limited to the draft articles. They state only the meanings in which the expressions listed in the article should be understood for the purposes of the draft articles.

(3) Paragraph 1 (a) reproduces the definition of the term "treaty" given in article 2, paragraph 1 (a), of the Vienna

Convention. It results from the general conclusions reached by the Commission concerning the scope of the present draft articles and their relationship with the Vienna Convention.<sup>71</sup> Consequently, the term "treaty" is used throughout the present draft articles, as in the Vienna Convention, as a general term covering all forms of international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation.

(4) *Subparagraphs (b) and (c) of paragraph 1* define the terms "granting State" and "beneficiary State". These expressions denote the States parties to a treaty that contains a "most-favoured-nation" clause, parties which are promisors and promisees, respectively, of the most-favoured-nation treatment. The verbal form "has undertaken to accord" has been used to convey the meaning not only of an actual according or enjoyment of the treatment but also the creation of the legal obligation and corresponding right to that treatment. A State party to a treaty including a most-favoured-nation clause may be a granting State and a beneficiary State at the same time if, by the same clause, it has undertaken to accord to another State most-favoured-nation treatment and that other State has undertaken to accord it the same treatment.

(5) *Paragraph 1 (d)*, in defining the term "third State", departs from the meaning assigned to that term by article 2, paragraph 1 (h), of the Vienna Convention. According to that subparagraph, "third State" means a State not a party to the treaty. In cases where a most-favoured-nation clause is contained in a bilateral treaty, that definition could have been applicable. However, most-favoured-nation clauses can be—and indeed are—included in multilateral treaties. In such clauses the parties undertake to accord each other the treatment extended by them to any third State. In such cases, the third State is not necessarily outside the bounds of the treaty: it may also be one of the parties to the multilateral treaty in question. It is for this reason that article 2 defines the term "third State" as meaning "any State other than the granting State or the beneficiary State".

(6) *Paragraph 1 (e)* defines the term "condition of compensation". Although the meaning of the term is more fully explained below,<sup>72</sup> the Commission believed that it would be useful to include in the text of the articles themselves a definition of that term. As to the word "compensation", it is a generic term, intended to cover all possible concessions that the beneficiary State agrees to give to the granting State in exchange for the undertaking by the granting State to accord to it most-favoured-nation treatment.

(7) *Paragraph 1 (f)* gives the meaning of the term "condition of reciprocal treatment". Although this meaning is likewise more fully explained below,<sup>73</sup> the Commission considered it also useful to include in the present article a definition of that term.

(8) As conceived by the Commission, the condition of reciprocal treatment is a category of the condition of compensation defined in subparagraph (e). The expression "reciprocal treatment" corresponds to the expression "material reciprocity", which is often found in the literature on most-favoured-nation clauses.<sup>74</sup> Although the meaning of the two expressions is deemed to be analogous, the Commission decided not to employ in the present draft the expression "material reciprocity" because of the ambiguity created by the use of the word "material" and the absence of an express reference to treatment. In the expression "reciprocal treatment", the emphasis is properly on "treatment". The word "reciprocal", qualifying "treatment", is intended to indicate clearly that, in order for the beneficiary State to be accorded the treatment to which it is entitled under a most-favoured-nation clause, its own treatment of the granting State must be the *same* as, or *equivalent* to, the treatment extended by that granting State to a third State.

(9) An explanation of the expression "material reciprocity" ("réciprocité trait pour trait") is given by one author, according to whom:

Material reciprocity means that a given right claimed by one party shall not be accorded to it unless that party itself executes a consideration which must be identical.

...

Material reciprocity may be defined as the mutual consideration stipulated by States in a treaty, where such consideration relates to a certain specific right which must be the same for both parties. This is somewhat like a vehicle that needs two wheels; each State supplies one wheel, but the two must match to within a fraction of an inch.<sup>1</sup>

<sup>1</sup> Some "tolerance" must, of course, be allowed; otherwise the condition could not be met. Each party therefore allows that equivalence is sufficient, but the outer limits of equivalence are impossible to specify in advance. This will depend on the factual circumstances and on the liberality of those who will have to interpret the treaty.<sup>75</sup>

(10) For the present purposes there is no need to enter into a detailed discussion of reciprocal treatment. Because of the differences in individual national legal systems, cases may occur where doubts arise whether the treatment offered by the beneficiary State is "equivalent" to that accorded by the granting State. Such doubts have to be dispelled by the parties themselves, and the possible disputes settled.

(11) Reciprocal treatment is normally stipulated when treatment of nationals or things, like ships and possibly aircraft, is in question. In commercial treaties dealing with the exchange of goods, reciprocal treatment, by the nature of things, is practically never required.

(12) Lastly, *paragraph 2* follows paragraph 2 of article 2 of the Vienna Convention. The provision is designed to safeguard in matters of terminology the position of States in regard to international law and usages.

<sup>74</sup> See, for example, I. Szászy, *International and Civil Procedure (A Comparative Study)*, Budapest, Akademia Kiado, 1967, pp. 187 and 188, and A. Piot, "La clause de la nation la plus favorisée", *Revue critique de droit international privé*, Paris, vol. 45 No. 1 (January-March 1956), pp. 9 and 10.

<sup>75</sup> J.-P. Niboyet, *Traité de droit international privé français*, 2nd ed., Paris, Sirey, 1951, vol. II, pp. 308 and 309.

<sup>71</sup> See para. 59 above.

<sup>72</sup> See articles 11, 12 and 13 below, paras. (23)-(25) of the commentary.

<sup>73</sup> *Ibid.*, paras. (31)-(38) of the commentary.

**Article 3. Clauses not within the scope of the present articles**

The fact that the present articles do not apply to a clause on most-favoured treatment other than a most-favoured-nation clause referred to in article 4 shall not affect:

(a) the legal effect of such a clause;

(b) the application to it of any of the rules set forth in the present articles to which it would be subject under international law independently of the present articles.

*Commentary*

(1) This article is drafted on the pattern of article 3, paragraphs (a) and (b), of the Vienna Convention. Its first purpose is to prevent any misconception that might result from the limitation of the basic scope of the draft articles to clauses contained in treaties concluded between States and in written form.

(2) Article 3 recognizes that the present articles do not apply to a clause on most-favoured treatment other than a most-favoured-nation clause referred to in article 4. However, it preserves the legal effect of such a clause and the possibility of the application to such a clause of any of the rules set forth in the present articles to which it would be subject under international law independently of the articles.

(3) Article 3 follows in this respect the system of the Vienna Convention which, in its article 3, preserves the legal force of certain agreements and the possibility of the application to them of certain rules of the Vienna Convention. Article 3, however, does not refer to types of international agreements, as does the Vienna Convention. Having in mind that, as indicated in article 4, a most-favoured-nation clause is a treaty provision (a treaty being defined in article 2, paragraph 1 (a), as, *inter alia*, an international agreement between States in written form), the Commission found it appropriate to deal separately with the case of clauses on most-favoured-nation treatment contained in agreements to which other subjects of international law are also parties. This is done in article 6 of the present draft. On the other hand, the Commission found it unnecessary to make reference in article 3 to clauses on most-favoured-nation treatment contained in an international agreement not in written form, in view of the virtual nonexistence and highly hypothetical nature of such clauses. In any event, article 3 of the Vienna Convention would apply to such clauses.

(4) The expression "clause on most-favoured treatment", used in article 3, as distinct from the expressions "clause on most-favoured-nation treatment" used in article 6 and "most-favoured-nation clause" used in article 4, is intended to cover those situations where either the promisor or the promisee, or both, are subjects of international law other than States. The expression "clause on most-favoured treatment" is generic in character and is intended to cover the wide variety of possible situations that may exist involving such other subjects of international law. For example, in specific cases, such clauses might appropriately be termed "most-favoured-international organization clauses", or "most-favoured-free city clauses".

**Article 4. Most-favoured-nation clause**

A most-favoured-nation clause is a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations.

*Commentary*

(1) Articles 4 and 5 establish, for the purposes of the present draft, the juridical meaning of "most-favoured-nation clause" and "most-favoured-nation treatment", which are the corner-stones of these articles.

(2) As to the expressions "most-favoured-nation clause" and "most-favoured-nation treatment", it may be said that they are not legally precise. They refer to a "nation" instead of a State and to "most-favoured" nation, although the "most-favoured" third State in question may in fact be less favoured than the beneficiary State.<sup>76</sup> Nevertheless, the Commission has retained these expressions as they are those traditionally employed, it being understood, however, that, for the purposes of the present draft, the word "nation" refers to a State. There are other expressions in international law, such as the very term "international law" itself, which could be criticized as imprecise, but which, having been sanctioned by practice, remain in constant use.

(3) As to the use of the word "clause", there are cases where a whole treaty consists of nothing else but a more or less detailed stipulation of most-favoured-nation pledges. It is the understanding of the Commission that the word "clause" covers both single provisions of treaties or other agreements and any combination of such provisions, including entire treaties, when appropriate. From the point of view of the present articles, it is irrelevant whether a most-favoured-nation clause is short and concise or long and detailed, or whether it amounts to the whole content of a treaty or not.

(4) A "treaty provision" is understood to be a conventional provision. The articles apply to clauses in treaties in the sense of the word "treaty" as defined in article 2 of the Vienna Convention and in article 2 of the present draft. This definition, however, does not affect the provision in article 6 according to which the present articles are also applicable to the clauses described in that article.

(5) Article 4 explains the contents of the clause as a treaty provision whereby a State undertakes the special obligation towards another State to accord most-favoured-nation treatment. In the simplest form of the clause, one State—the granting State—makes this undertaking, and the other State—the beneficiary State—accepts it. This constitutes a unilateral clause, which is today a rather exceptional phenomenon. Most-favoured-nation pledges are usually undertaken by the States parties to a treaty in a synallagmatic way.

(6) Unilateral most-favoured-nation clauses were found in capitulatory régimes and have largely disappeared with them. They were also provided, for a short period, in favour of the victorious Powers in the peace treaties

<sup>76</sup> See article 5 below, para. (5) of the commentary.

concluding the world wars. Those clauses were justified by the fact that the war had terminated the commercial treaties between the contesting parties and the victorious Powers wanted to be treated by the vanquished, even before the conclusion of a new commercial treaty, at least on an equal footing with the allies of the latter. The usual practice today is for States parties to a treaty to accord to each other most-favoured-nation treatment. There are, however, exceptional situations in which, in the nature of things, only one of the contracting parties is in a position to offer most-favoured-nation treatment in a certain sphere of relations, possibly against a different type of concession. Such unilateral clauses occur, for example, in treaties by which most-favoured-nation treatment is accorded to the ships of a land-locked State in the ports and harbours of the granting maritime State. The land-locked State not being in a position to offer in return the same kind of treatment, the clause remains unilateral. The same treaty may of course provide for another type of concession against the granting of most-favoured-nation treatment. There are other exceptional situations: the States associated with the European Economic Community have accorded to the Community, against special preferences, unilateral most-favoured-nation treatment of imports and exports in certain agreements on association and commerce.<sup>77</sup>

(7) Usually, both States parties to a treaty or, in the case of a multilateral treaty, all States parties, accord each other most-favoured-nation treatment, thereby becoming granting and beneficiary States at the same time. The expressions "granting" and "beneficiary" then become somewhat artificial. These expressions are useful, however, in the examination of the situations that may arise from each individual pledge.

(8) Although most-favoured-nation treatment is usually granted by States parties to a treaty mutually, this form of reciprocity is in the simplest and unconditional type of the most-favoured-nation clause only a formal reciprocity. There is no guarantee that States granting each other most-favoured-nation treatment will receive the same kind of advantages. The grant of most-favoured-nation treatment is not necessarily a great advantage to the beneficiary State. It may be no advantage at all if the granting State does not extend any favours to third States in the domain covered by the clause. All that the most-favoured-nation clause promises is that the contracting party concerned will treat the other party as well as it treats any third State—which may be very badly. It has been rightly said in this connexion that, in the absence of any undertakings to third States, the clause remains but an empty shell.

(9) A clause is usually drafted in a positive form, i.e. the parties promise each other most favourable treatment. An example of this is the most-favoured-nation clause of

article I, paragraph 1, of the General Agreement on Tariffs and Trade.<sup>78</sup> The clause may be formulated in a negative way when the pledge is for the least unfavourable treatment. An example of the latter formula is article 4 of the Treaty of Trade and Navigation between the Czechoslovak Republic and the German Democratic Republic of 25 November 1959:

... natural and manufactured products imported from the territory of one Contracting Party ... shall not be liable to any duties, taxes or similar charges other or higher, or to regulations other or formalities more burdensome, than those imposed on similar natural and manufactured products of any third State.<sup>79</sup>

(10) Article 4 is intended to cover most-favoured-nation clauses in bilateral as well as multilateral treaties. Traditionally, most-favoured-nation clauses appear in bilateral treaties. However, with the increase of multilateralism in international relations, such clauses have found their way into multilateral treaties. The most notable examples of the latter are the clauses of the General Agreement on Tariffs and Trade, of 30 October 1947, and the clause of the Treaty establishing a Free Trade Area and instituting the Latin American Free Trade Association, signed at Montevideo on 18 February 1960. The most important most-favoured-nation clause in the General Agreement (article I, paragraph 1) reads as follows:

With respect to customs duties and charges of any kind imposed on or in connexion with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connexion with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of article III [i.e. matters of internal taxation and quantitative and other regulations], any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Contracting Parties.<sup>80</sup>

The most-favoured-nation clause of the Montevideo Treaty reads as follows:

#### Article 18

Any advantage, benefit, franchise, immunity or privilege applied by a Contracting Party in respect of a product originating in or intended for consignment to any other country shall be immediately and unconditionally extended to the similar product originating in or intended for consignment to the territory of the other Contracting Parties.<sup>81</sup>

Unless multilateral treaties containing a most-favoured-nation clause stipulate otherwise, the relations created by such clauses are essentially bilateral, i.e. every party to the treaty may demand from any other party to accord to it treatment equal to that extended to any third State,

<sup>78</sup> See para. (10) below.

<sup>79</sup> United Nations, *Treaty Series*, vol. 374, p. 116.

<sup>77</sup> Convention of Yaoundé (article 11), Agreements of Arusha (article 8), Rabat (article 4, para. 1) and Tunis (article 4, para. 1). Cited in D. Vignes, "La clause de la nation la plus favorisée et sa pratique contemporaine" *Recueil des cours de l'Académie de droit international de La Haye*, 1970-II, Leyden, Sijthoff, 1971, vol. 130, p. 324. See also the pledge of Cyprus, quoted in para. (14) below.

<sup>80</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (*op. cit.*), p. 2. The texts of the relevant articles of the General Agreement are referred to in *Yearbook ... 1970*, vol. II, pp. 218 *et seq.*, doc. A/CN.4/228 and Add.1, paras. 131 *et seq.*

<sup>81</sup> United Nations, *Multilateral Economic Co-operation in Latin America*, vol. I, *Text and documents* (United Nations publication, Sales No. 62.II.G.3), p. 59. (Quoted in *Yearbook ... 1970*, vol. II, p. 222, doc. A/CN.4/228 and Add.1, para. 149.)

irrespective of whether that third State is a party to the treaty or not. Under the GATT system (under article II of the General Agreement), each contracting party is obliged to apply its duty reductions to all other parties. The General Agreement goes beyond the most-favoured-nation principle in this respect. Each member granting a concession in the most-favoured-nation part of its schedule is generally bound to grant the same concession to all other members in their own right; that is not the same thing as obligating all other members to rely on continued agreement between the party granting the concession and the party that negotiated it.<sup>82</sup> Thus the operation of the GATT clause differs in this respect from that of the usual bilateral most-favoured-nation clause, although the concession can be withdrawn from all members by the granting State subject to any temporal commitment in effect.

(11) Article 4 expresses the idea that a most-favoured-nation pledge is an international, i.e. inter-State, undertaking. As such, the beneficiary of this undertaking is the beneficiary State and only through the latter State do the persons in a particular relationship with that State, usually its nationals, or the things in a similar relationship with it, enjoy the treatment stipulated by the granting State.<sup>83</sup>

(12) It follows from the notion of the most-favoured-nation clause, as described in article 4, that the undertaking of an obligation to accord most-favoured-nation treatment is the constitutive element of a most-favoured-nation clause. Consequently, clauses which do not contain this element will fall outside the scope of the present articles even if they aim at an effect similar to that of a most-favoured-nation clause. A case in point is article XVII, paragraph 2, of the General Agreement on Tariffs and Trade, where "fair and equitable treatment" is demanded from the contracting parties with respect to imports of products for immediate or ultimate consumption in governmental use.<sup>84</sup> Other examples are article XIII, paragraph 1, of the General Agreement, which requires that the administration of quantitative restrictions shall be "non-discriminatory",<sup>85</sup> and article 23 of the Montevideo Treaty.<sup>86</sup> While a most-favoured-nation clause insures the beneficiary against discrimination, a clause promising non-discrimination will not necessarily yield the same advantages as a most-favoured-nation clause. Cases in point are article 47 of the Vienna Convention on Diplomatic Relations, article 72 of the Vienna Convention on Consular Relations, article 49 of the Convention on Special Missions and article 83 of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a

Universal Character.<sup>87</sup> These clauses, while assuring the States parties to the Conventions of non-discrimination by other parties to the treaty, do not give any right to most-favoured-nation treatment.

(13) Whether a given treaty provision falls within the purview of a most-favoured-nation clause is a matter of interpretation. Most-favoured-nation clauses can be drafted in the most diverse ways, and that is why an eminent authority on the matter stated:

Although it is customary to speak of *the* most-favoured-nation clause, there are many forms of the clause, so that any attempt to generalize upon the meaning and effect of such clauses must be made, and accepted, with caution.<sup>88</sup>

Expressed in other words: "Speaking strictly, there is no such thing as *the* most-favoured-nation clause: every treaty requires independent examination... There are innumerable m.f.n. clauses, but there is only *one* m.f.n. standard".<sup>89</sup> These considerations were taken into account in drafting article 4. In that article stress is laid upon most-favoured-nation treatment, the essence of the notion being that any treaty stipulation according most-favoured-nation treatment is a most-favoured-nation clause.

(14) Article 4 states that the grant of most-favoured-nation treatment to another State by a most-favoured-nation clause shall be in "an agreed sphere of relations". Most-favoured-nation clauses have been customarily categorized as "general" or "special" clauses. A "general" clause means a clause which promises most-favoured-nation treatment in all relations between the parties concerned, whereas a "special" one refers to relations in certain limited areas. Although States are free to agree to grant to each other most-favoured-nation treatment in all fields which are susceptible to such agreements, this is rather an exception today. A recent case in point is a stipulation (annex F, part II) in the Treaty concerning the establishment of the Republic of Cyprus signed at Nicosia on 16 August 1960, which is rather a *pactum de contrahendo* concerning future agreements on most-favoured-nation grants:

The Republic of Cyprus shall, by agreement on appropriate terms, accord most-favoured-nation treatment to the United Kingdom, Greece and Turkey in connexion with all agreements whatever their nature.<sup>90</sup>

(15) The usual type of a "general clause", however, does not embrace all relations between the respective countries. It refers to all relations in certain areas; thus, for example, "in all matters relating to trade, navigation and all other economic relations...".<sup>91</sup> Most-favoured-nation clauses

<sup>82</sup> H. C. Hawkins, *Commercial Treaties and Agreements: Principles and Practice*, New York, Rinehart, 1951, p. 226.

<sup>83</sup> See paras. (2) and (3) of the commentary to article 5 below.

<sup>84</sup> See GATT, *Basic Instruments and Selected Documents*, vol. IV (*op. cit.*), p. 28. (Quoted in *Yearbook ... 1970*, vol. II, p. 224, doc. A/CN.4/228 and Add.1, para. 162.)

<sup>85</sup> *Ibid.*, p. 21. (Quoted in *Yearbook ... 1970*, vol. II, pp. 223 and 224, doc. A/CN.4/228 and Add.1, para. 160.)

<sup>86</sup> United Nations, *Multilateral Economic Co-operation in Latin America*, vol. I (*op. cit.*), p. 60 (quoted in *Yearbook ... 1970*, vol. II, p. 224, document A/CN.4/228 and Add.1, para. 161).

<sup>87</sup> See para. 50 above.

<sup>88</sup> A. D. McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1962, p. 273.

<sup>89</sup> G. Schwarzenberger, *International Law and Order*, London, Stevens, 1971, pp. 138 (quoting in part, A. D. McNair), and 159.

<sup>90</sup> United Nations, *Treaty Series*, vol. 382, p. 144. This provision was embodied in the Constitution of Cyprus as article 170 (see A. Peaslee, *Constitutions of Nations*, The Hague, Nijhoff, 1968, vol. III, p. 201).

<sup>91</sup> Treaty of Trade and Navigation between the Czechoslovak Republic and the German Democratic Republic, article 2 (United Nations, *Treaty Series*, vol. 374, p. 114).

may be less broad but still general, the "general clause" of article I, paragraph 1 of the General Agreement on Tariffs and Trade being a well-known example.<sup>92</sup>

(16) The areas in which most-favoured-nation clauses are used are extremely varied. A tentative classification of the areas in question, which does not claim to be exhaustive, may be given as follows:

(a) International regulation of trade and payments (exports, imports, customs tariffs);

(b) Transport in general and treatment of foreign means of transport (in particular, ships, airplanes, trains, motor vehicles, etc.);

(c) Establishment of foreign physical and juridical persons, their personal rights and obligations;

(d) Establishment of diplomatic, consular and other missions, their privileges and immunities and treatment in general;

(e) Intellectual property (rights in industrial property, literary and artistic rights);

(f) Administration of justice, access to courts and to administrative tribunals in all degrees of jurisdiction, recognition and execution of foreign judgements, security for costs (*cautio judicatum solvi*), etc.

A most-favoured-nation clause can apply to one or more of the areas enumerated above. The important point is that the clause always applies to a determined sphere of relations agreed upon by the parties to the treaty concerned.

(17) The *ejusdem generis* rule, according to which no other rights can be claimed under a most-favoured-nation clause than those falling within the limits of the subject-matter of the clause, is dealt with below in connexion with articles 9 and 10.

#### Article 5. *Most-favoured-nation treatment*

**Most-favoured-nation treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.**

#### Commentary

(1) While article 4 establishes the juridical meaning of "most-favoured-nation clause" by reference to "most-favoured-nation treatment", article 5 establishes the juridical meaning of the latter. In some languages most-favoured-nation treatment is expressed as most favourable treatment, as in the Russian term: "rezhim naibolshego blagopriatsvovaniya". The Commission wishes to retain in English, French, Russian and Spanish, the customary forms of expression: "most-favoured-nation treatment"; "traitement de la nation la plus favorisée"; "rezhim naibolee blagopriatzenoi natzii"; and "trato de la nación más favorecida". In addition, the Commission decided to use in this article, and systematically throughout the

draft, the verb "to accord", and its equivalents in the other languages, when referring to the treatment applied by the granting State to the beneficiary State, and the verb "to extend", and its equivalents in the other languages, when referring to the treatment applied by the granting State to a third State.

(2) While the obligation to accord most-favoured-nation treatment is undertaken by one State vis-à-vis another, the treatment promised thereby is one actually given in most cases to persons or things, and only in some cases to States themselves (e.g. in cases promising most-favoured-nation treatment to embassies or consulates).<sup>93</sup> By what methods and under what circumstances the persons or things concerned will come to enjoy the treatment depends on the intention of the parties to the treaty in question and on the internal law of the granting State. The High Commissioner of Danzig, in his decision of 8 April 1927 regarding the jurisdiction of Danzig courts in actions brought by railway officials against the Railway Administration, explained the relationship between a treaty and the application of its provisions to individuals as follows:

It is a rule of law generally recognized in doctrine and in practice that international treaties do not confer direct rights on individuals, but merely on the governments concerned. Very often a government is obliged, under a treaty, to accord certain benefits or rights to individuals, but in this case the individuals do not themselves automatically acquire these rights. The government has to introduce certain provisions into its internal legislation in order to carry out the obligations into which it has entered with another government. Should it be necessary to insist on the carrying out or application of this obligation, the only Party to the case who can legally take action is the other government. That government moreover would not institute proceedings in civil courts but would take diplomatic action or apply to the competent organs of international justice.

The case in question is not comparable to that of an undertaking on behalf of a third Party ... which figures in certain civil codes, precisely because international treaties are not civil contracts under which governments assume obligations at private law on behalf of the persons concerned. To give an example: "the most-favoured-nation" clause in a treaty of commerce does not entitle an individual to refuse to pay customs duties on the ground that in his opinion they are too high to be compatible with the clause; he can only base his action on the internal customs legislation which should be drafted in conformity with the clauses of the treaty of commerce.<sup>94</sup>

Although the Court reversed the decision of the High Commissioner in the case in question, referring to the intention of the parties and the special characteristics of the case, the situation in countries where treaties are not self-executing is primarily the one described by the High Commissioner of Danzig. This is the case with regard to treaties in general, and most-favoured-nation clauses in particular, in the United Kingdom and Australia.<sup>95</sup> The

<sup>93</sup> See article 3, para. 1, of the United Kingdom-Norway Consular Convention of 1951, according to which "either High Contracting Party may establish and maintain consulates in the territories of the other at any place where any third State possesses a consulate..." (United Nations, *Treaty Series*, vol. 326, p. 214).

<sup>94</sup> Jurisdiction of the Courts of Danzig Case, *P.C.I.J.*, Series B, No. 15, p. 31.

<sup>95</sup> See the statements quoted in the Secretariat Digest (*Year-book ... 1973*, vol. II, pp. 117 and 118, doc. A/CN.4/269, footnote 2).

<sup>92</sup> Quoted in para. (10) above.



situation is similar in the Federal Republic of Germany, where the courts have explicitly refused in several instances to recognize a direct application of article III of the General Agreement on Tariffs and Trade (on national treatment on internal taxation and regulation), on the ground that this commitment binds the States parties to the Agreement alone and that individuals may therefore derive no rights from this provision.<sup>96</sup> In the United States, however, self-execution is the rule for treaties embodying most-favoured-nation clauses, for the following reasons:

... Unconditional most-favoured-nation clauses ... [provide] for United States private interests the benefit in a particular country of the best economic opportunity given by that country to any alien goods or alien capital, whether arising before or after the treaty with the United States has come into effect. But trade and establishment treaties, including the most-favored-nation clauses in them, must run both ways, for States will not enter into such arrangements on any other basis. This means that the United States must be able at any given moment to show that the goods and capital of the other party may claim unconditional most-favored-nation treatment in this country. It would be difficult for the United States to be able to give the required reciprocity, considering the fact that unconditional most-favored-nation clauses are open-ended (i.e. they promise the best treatment given in any other treaty, regardless of whether the other treaty is later or earlier in time) if in each instance implementing legislation by the Congress had to be obtained to extend the benefit of a treaty with a third country to the country claiming most-favored-nation rights. Self-execution is the only feasible answer to the problem...<sup>97</sup>

(3) According to article 5, most-favoured-nation treatment is that which is accorded by a State to another State (e.g. with respect to its embassy or consulates) or to persons or things. The expression "persons or things" is also used throughout the present draft. As used in the draft, the expression "persons or things" includes any person or any thing that can constitute the object of treatment. The Commission was conscious of the almost insurmountable difficulties of attempting to draft an abstract definition of persons or things. It did not find that it would be likely to arrive at a generally acceptable definition of that expression which would be sufficiently comprehensive and clear, for inclusion in article 2 (Use of terms), even if it was merely by reference to the subject-matter of the draft articles. In the view of the Commission, the expression "persons or things" must be understood as covering persons and things in the natural and juridical meaning attributed to those words in the different languages and legal systems of the world. In particular, the word "things" embraces not only corporeal and incorporeal things but, *inter alia*, activities and services. Indeed, activities such as the exercise of certain trades and professions, entry into port of ships, etc., can also

be objects of most-favoured-nation treatment.<sup>98</sup> The Commission, however, decided not to refer to activities in the articles because activities might be ultimately related to persons and things, so that an express reference was deemed not to be indispensable.

(4) Article 5 states that the persons or things whose treatment is in question have to be in a "determined relationship" with the beneficiary State and that their treatment is contingent upon the treatment extended by the granting State to persons or things which are in the "same relationship" with a third State. A "determined relationship" in this context means that the relationship between the States concerned and the persons or things concerned is determined by the clause, i.e. by the treaty. The clause embodied in the treaty between the granting and the beneficiary State has to determine the persons or things to whom and to which the most-favoured-nation treatment is applicable and this determination has to include, obviously, the link between the beneficiary State and the persons or things concerned. Such relationships are nationality or citizenship of persons, place of registry of vessels, State of origin or products, etc. Under article 5, the beneficiary State can claim most-favoured-nation treatment in respect of its nationals, ships, products, etc., only to the extent that the granting State confers the same benefits upon the nationals, ships, products, etc., of a third State. The beneficiary State is normally not entitled to claim for its residents the benefits which the granting State extends to the nationals of the third State. Although residence creates also a certain relationship between a person and a State, this is not the same relationship as that of the link of nationality. These two relationships are not interchangeable. This example explains the meaning of the expression "same relationship" as used in article 5. However, the expression "same relationship" has to be used with caution because, to continue the example, the relationship between State A and its nationals is not necessarily the "same" as the relationship between State B and its nationals. Nationality laws of States are so diverse that the sum total of the rights and obligations arising from one State's nationality laws might be quite different from that arising from another State's nationality laws. The meaning of the word "same" in this context might perhaps be better expressed by the expressions "the same type of" or "the same kind of". The Commission came to the conclusion, however, that the wording of article 5 was clear enough and that an overburdening of the text would not be desirable.

(5) Article 5 describes the treatment to which the beneficiary State is entitled as "not less favourable" than the treatment extended by the granting State to a third State. The Commission considered whether it should not use the adjective "equal" to denote the relationship between the terms of the treatment enjoyed by a third State and those promised by the granting State to the

<sup>96</sup> See G. Bebr, "Directly applicable provisions of community law: the development of a community concept", *International and Comparative Law Quarterly*, London, vol. 19, April 1970, p. 257.

<sup>97</sup> *Restatement of the Law, Second, Foreign Relations Law of the United States*, St. Paul, Minn., American Law Institute Publishers, 1965, para. 154, Reporters' Note 3.

<sup>98</sup> An understanding was reached between Bolivia and Germany in 1936 to the effect that the operation of the most-favoured-nation clause included in article V of the Treaty of Friendship between the two countries should also cover marriages celebrated by consuls (see *Reichsgesetzblatt*, 1936, II, p. 216, quoted in L. Raape, *Internationales Privatrecht*, Berlin, Vahlon, 1961, p. 20).



beneficiary State. Arguments in favour of the use of the word "equal" are based on the fact that the notion of "equality of treatment" is particularly closely attached to the operation of the most-favoured-nation clause. It has been argued that the clause represents and is the instrument of the principle of equality of treatment and that the clause is a means to an end: the application of the rule of equality of treatment in international relations. The arguments against the use of the adjective "equal" admit that "equal" is not as rigid as "identical" and not as vague as "similar", and is therefore more appropriate than those expressions. However, although a most-favoured-nation pledge does not oblige the granting State to accord to the beneficiary State treatment more favourable than that extended to the third State, it does not exclude the possibility that the granting State may accord to the beneficiary State additional advantages beyond those extended to the most-favoured third State. In other words, while most-favoured-nation treatment excludes preferential treatment of third States by the granting State, it is fully compatible with preferential treatment of the beneficiary State by the granting State, although it may be required to accord such preferential treatment under other most-favoured-nation clauses. Consequently, the treatment accorded to the beneficiary State and that accorded to the third State are not necessarily "equal". This argument is countered by the obvious truth that, if the granting State accords preferential treatment to the beneficiary State, i.e. treatment beyond that extended to the third State, which it need not do on the strength of the clause, such treatment will be accorded independently of the operation of the clause. Ultimately, the Commission accepted the term "not less favourable", because it believed it to be the expression commonly used in most-favoured-nation clauses.

(6) Most-favoured-nation clauses may define exactly the conditions for the operation of the clause, namely, the kind of treatment extended by the granting State to a third State that will give rise to the actual claim of the beneficiary State to similar, the same, equal or identical treatment. If, as is the usual case, the clause itself does not provide otherwise, the clause begins to operate, i.e. a claim can be raised under the clause if the third State (or persons or things in the same relationship with the third State as are the persons or things mentioned in the clause with the beneficiary State) has actually been extended the favours that constitute the treatment. It is not necessary for the beginning of the operation of the clause that the treatment actually extended to the third State, with respect to itself or the persons or things concerned, be based on a formal treaty or agreement. The mere fact of favourable treatment is enough to set in motion the operation of the clause. However, the fact of favourable treatment may consist also in the conclusion or existence of an agreement between the granting State and the third State by which the latter is entitled to certain benefits. The beneficiary State, on the strength of the clause, may also demand the same benefits as were extended by the agreement in question to the third State. The mere fact that the third State has not availed itself of the benefits which are due to it under the agreement concluded with the granting State cannot absolve the

granting State from its obligation under the clause. The arising and the termination or suspension of rights under the clause are dealt with in articles 20 and 21 below.

(7) Article 5 brings in the notion of third State. The term "third State" also appears in the Vienna Convention, and the reasons for not using the expression "third State" in the present articles in the same manner as in the Vienna Convention have been set out in connexion with article 2, paragraph 1 (d).<sup>99</sup> In earlier history there was a practice whereby the States parties to the clause explicitly named the third State enjoying the treatment that might be claimed by the beneficiary State. Thus the treaty of 17 August 1417 concluded between Henry V of England and the Duke of Burgundy and Count of Flanders specified that the masters of the ships of the contracting parties should enjoy in their respective ports the same favours as the "François, Hollandois, Zellois et Eschois".<sup>100</sup> Similarly, in the Anglo-Spanish Treaty of Commerce of 1886, Spain accorded to England most-favoured-nation treatment in all matters of commerce, navigation, consular rights and privileges under the same terms and with the same advantages as were extended to France and Germany by virtue of the treaties of 6 February 1882 and 12 July 1883.<sup>101</sup> This way of drafting does not necessarily produce a "most-favoured" nation clause, because the States mentioned in the clause as *tertium comparationis* are not necessarily those most favoured by the granting State. In the instances quoted, and in most similar cases, they were the "most favoured", and it was precisely because of their favoured position that they were selected and explicitly indicated in the clauses in question. In modern practice, most-favoured-nation clauses are usually drafted in such a way that they refer as *tertium comparationis* to "any State".

(8) What often happens is rather an indication or enumeration of determined third States which, under the operation of the most-favoured-nation clause, will remain in an exceptional position, i.e. the treatment granted to them will not be attracted by the operation of the clause. This question is examined in greater detail below, in connexion with article 29. In addition, articles 23, 24 and 30 and the commentaries thereto deal with the most-favoured-nation clause in relation to treatment extended to developing States under a generalized system of preferences or in relation to arrangements between developing States, as well as with new rules of international law in favour of developing States.

**Article 6. Clauses in international agreements between States to which other subjects of international law are also parties**

**Notwithstanding the provisions of articles 1, 2, 4 and 5, the present articles shall apply to the relations of States**

<sup>99</sup> See article 2 above, para. (5) of the commentary.

<sup>100</sup> G. Schwarzenberger, "The most-favoured-nation standard in British State practice", *The British Year Book of International Law*, 1945, London, vol. 22, p. 97.

<sup>101</sup> Cited in B. Nolde, "Droit et technique des traités de commerce", *Recueil des cours...*, 1924-II, Paris, Hachette, 1925, vol. 3, p. 413.

as between themselves under an international agreement containing a clause on most-favoured-nation treatment to which other subjects of international law are also parties.

#### Commentary

(1) Article 6 has its basis in article 3, paragraph (c), of the Vienna Convention. That article basically deals in its introductory paragraph with two kinds of international agreements, namely, those concluded by States not in written form and those to which subjects of international law other than States are also parties.

(2) As has already been explained in the commentary to article 3,<sup>102</sup> the Commission, taking into account that, as indicated in article 4, a most-favoured-nation clause is a treaty provision (treaty being defined in article 2 as, *inter alia*, an international agreement between States in written form), deemed it appropriate to deal separately in the present article with the case of clauses on most-favoured-nation treatment contained in agreements to which other subjects of international law are also parties.

(3) Article 3, paragraph (c), of the Vienna Convention concerns the relations of States as between themselves under international agreements to which other subjects of international law are also parties. Similarly, the present article refers to such relations of States under an international agreement containing a clause on most-favoured-nation treatment to which other subjects of international law are also parties.

(4) Article 6 is intended to extend the application of the rules set forth in the draft articles to the relations of States as between themselves under clauses by which States undertake to accord most-favoured-nation treatment to other States, when such clauses are contained in international agreements in written form to which other subjects of international law are also parties. The article uses the expression "clause on most-favoured-nation treatment", rather than "most-favoured-nation clause", in view of the juridical meaning attributed to that notion in article 4 by reference to the term "treaty" as defined in article 2. The expression employed in the present article is intended to make clearer the distinction between clauses which, although similar in nature and in the way they operate, are nevertheless found in international agreements that differ from one another as a result of the different character of the parties to them—States or other subjects of international law. As in the parallel paragraph (c) of article 3 of the Vienna Convention, the present text does not refer to clauses contained in international agreements in written form. The provisions of the present articles will obviously not be applicable to clauses contained in international agreements concluded by States and other subjects of international law not in written form. That, however, is such a hypothetical case that the Commission has not found it necessary to provide for it in the articles. The Commission wishes further to stress that the expression "relations of States as between themselves" refers to the legal relations arising for the parties under the treaty containing the clause on most-favoured-nation treatment. Finally, the inclusion, at the beginning

of the article, of the phrase, "notwithstanding the provisions of articles 1, 2, 4 and 5", is required in view of the contents of the provisions of those articles.

#### Article 7. Legal basis of most-favoured-nation treatment

**Nothing in the present articles shall imply that a State is entitled to be accorded most-favoured-nation treatment by another State otherwise than on the basis of an international obligation undertaken by the latter State.**

#### Commentary

(1) Article 7 states in negative form the obvious rule that no State is entitled to most-favoured-nation treatment by another State unless that State has undertaken an international obligation to accord such treatment. The rule follows from the principle of the sovereignty of States and their liberty of action. This liberty includes the right of States to grant special favours to some States and not to be bound by customary law to extend the same favours to others. This right is not impaired by the general duty of non-discrimination. The general duty not to discriminate between States is not breached by treating another State, its nationals, ships, products, etc., in a particularly advantageous way. Other States do not have the right to challenge such behaviour and to demand for themselves, for their nationals, ships, products, etc., the same treatment as that granted by the State concerned to a particularly favoured State. Such a claim can rightfully be made only if it is proved that the State in question has undertaken an international obligation to accord to the claiming State the same treatment as that extended to the particularly favoured State or to its nationals, ships, products, etc.

(2) In practice, such an obligation cannot normally be proved otherwise than by means of a most-favoured-nation clause, i.e. a conventional undertaking by the granting State to that effect. Indeed, legal literature is practically unanimous that, while there is no most-favoured-nation clause without a promise of most-favoured-nation treatment (such a promise being the constitutive element of the clause), States have no right to claim most-favoured-nation treatment without being entitled to it by a most-favoured-nation clause.<sup>103</sup>

(3) The question whether States can claim most-favoured-nation treatment from each other as a right was discussed in the Economic Committee of the League of Nations but only with respect to customs tariffs. The Economic Committee did not reach any agreement in the matter beyond declaring that "... the grant of most-

<sup>102</sup> See article 3 above, para. (3) of the commentary.

<sup>103</sup> See, *inter alia*, E. T. Usenko, "Formy regulirovaniya sotsialisticheskogo mezhdunarodnogo razdeleniya truda" [Forms of the regulation of the socialist international division of labour], *Mezhdunarodnye otnosheniya* [International relations], Moscow, 1965, p. 238 (German edition, *Sozialistische internationale Arbeitsteilung und ihre rechtliche Regelung*, Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1966, p. 200); Vignes (*loc. cit.*), p. 224; E. Sauvignon, *La clause de la nation la plus favorisée*, Grenoble, Presses universitaires de Grenoble, 1972, p. 7; K. Hasan, *Equality of Treatment and Trade Discrimination in International Law*, The Hague, Nijhoff, 1968, p. 33.

favoured-nation treatment ought to be the normal...".<sup>104</sup> Although the grant of most-favoured-nation treatment is frequent in commercial treaties, there is no evidence that it has developed into a rule of customary international law. Hence it is widely held that only treaties are the foundation of most-favoured-nation treatment.<sup>105</sup>

(4) It might be maintained that the rule of article 7 could be embodied in a provision simply stating that most-favoured-nation treatment cannot be claimed except on the basis of a most-favoured-nation clause, i.e. under a provision of a treaty (as defined in article 2, paragraph 1 (a)) promising most-favoured-nation treatment. Although a rigid statement to this effect would to a large extent satisfy all practical purposes, it nevertheless would not be in complete conformity with the legal situation as it exists and would not cover possible future development. While most-favoured-nation clauses, i.e. treaty provisions, constitute in most cases the basis for a claim to most-favoured-nation treatment, it is not impossible even at present that such claims might be based on oral agreements. Among other possible sources of such claims that might be mentioned are binding resolutions of international organizations and legally binding unilateral acts, and as a potential source, a possible evolution of regional customary law to that effect. The Commission therefore decided to adopt the rule in more general terms, i.e. that a State is not entitled to most-favoured-nation treatment by another State unless there exists an international obligation undertaken by the latter to accord such treatment. The expression "an international obligation undertaken by the latter State" is intended to avoid any interpretation that the obligation in question could arise from agreements, not international in character, involving States and private persons.

(5) The Commission further concluded that a rule stating directly that most-favoured-nation treatment could not be claimed unless there existed an international obligation to accord it would, as such, appear to fall outside the scope of the articles on most-favoured-nation clauses. The purpose of such articles can only be to state the rules of the operation and application of such a clause if it exists. It is not for these articles to state the conditions under which States can claim most-favoured-nation treatment from each other. It is for these reasons that the Commission, while not wishing to omit the rule from the articles because of its theoretical and practical importance, decided to state it in negative form as a general saving clause.

(6) As to the question whether or not a State would violate its international obligations if it granted most-favoured-nation treatment to most of its partners in a certain area but refused to make similar agreements with others, the Commission took the view that, while such behaviour could be considered by the States not granted

most-favoured-nation treatment as an unfriendly act, the articles under consideration could not establish a legal title to such claims, which might perhaps be based on a general rule of non-discrimination. The answer to this question is thus clearly beyond the scope of the present articles.

### **Article 8. The source and scope of most-favoured-nation treatment**

**1. The right of the beneficiary State to most-favoured-nation treatment arises only from the most-favoured-nation clause referred to in article 4, or from the clause on most-favoured-nation treatment referred to in article 6, in force between the granting State and the beneficiary State.**

**2. The most-favoured-nation treatment to which the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, is entitled under a clause referred to in paragraph 1, is determined by the treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.**

### *Commentary*

(1) This article sets out the basic structure of the operation of the most-favoured-nation clause. It states that the right of the beneficiary State to receive from the granting State most-favoured-nation treatment is anchored in the most-favoured-nation clause referred to in article 4 or, as the case may be, in the clause on most-favoured-nation treatment referred to in article 6, in other words, that any such clause is the source of the beneficiary State's rights. Paragraph 1 of the article emphasizes that, in either case, the essential factor is that the clause in question should be in force for both the granting and beneficiary States. The requirement of being "in force" explains the need to refer expressly in the text of the paragraph to the two kinds of clauses envisaged in articles 4 and 6 of the present draft contained, respectively, in treaties between States and in international agreements to which subjects of international law other than States are also parties. In the present and subsequent commentaries, however, when reference is made to a "most-favoured-nation clause" alone, it must be understood as also covering, as appropriate, a clause on most-favoured-nation treatment. The article also states that the treatment, i.e. the extent of benefits to which the beneficiary State may lay claim for itself or for persons or things in a determined relationship with it, depends upon the treatment extended by the granting State to a third State or to persons or things in the same relationship with a third State. The rule is important and its validity is not dependent on whether the treatment extended by the granting State to a third State, or to persons or things in a determined relationship with the latter, is based upon a treaty, another agreement or a unilateral, legislative, or other act, or mere practice.

(2) When two treaties exist, one between the granting and the beneficiary State containing the most-favoured-nation clause and the other between the granting State and a third State entitling the latter to certain favours, the question arises as to which is the basic treaty. That question was thoroughly discussed in the *Anglo-Iranian*

<sup>104</sup> League of Nations, "Recommendations of the Economic Committee relating to tariff policy and the most-favoured-nation clause" (E.805.1933.II.B.1), quoted in *Yearbook ... 1969*, vol. II, p. 175, doc. A/CN.4/213, annex I.

<sup>105</sup> See, for example, G. Schwarzenberger, "The principles and standards of international economic law", *Recueil des cours...*, 1966-I, Leyden, Sijthoff, 1967, vol. 117, p. 74.

*Oil Company case* before the International Court of Justice. It was contended before the Court that:

... A most-favoured-nation clause is in essence by itself a clause without content; it is a contingent clause. If the country granting most-favoured-nation treatment has no treaty relations at all with any third State, the most-favoured-nation clause remains without content. It acquires its content only when the grantor State enters into relations with a third State, and its content increases whenever fresh favours are granted to third States.<sup>106</sup>

Against this argument it was maintained that the most-favoured-nation clause:

... involves a commitment whose object is real. True, it is not determined and is liable to vary in extent according to the treaties concluded later, but that is enough to make it determinable. Thus the role of later treaties is not to give rise to new obligations towards the State beneficiary of the clause but to alter the scope of the former obligation. The latter nevertheless remains the root of the law, the source of the law, the origin of the law, on which the United Kingdom Government is relying in this case.<sup>107</sup>

The majority of the Court held that:

The treaty containing the most-favoured-nation clause is the basic treaty... It is this treaty which establishes the juridical link between the United Kingdom [the beneficiary State] and a third party treaty and confers upon that State the rights enjoyed by the third party. A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom [the beneficiary State] and Iran [the granting State]: it is *res inter alios acta*.<sup>108</sup>

The decision of the Court contributed, to a great extent, to the clarification of legal theory. Before the Court's decision there was no lack of legal writers who presented the operation of the most-favoured-nation clause (or more precisely that of the third-party treaty) as an exception to the rule *pacta tertiis nec nocent nec prosunt*, i.e. that treaties produce effects only as between the contracting parties.<sup>109</sup> Legal theory seems now unanimous in endorsing the finding of the majority of the Court.<sup>110</sup>

(3) The solution adopted by the Court is in accordance with the rules of the law of treaties relating to the effect of treaties on States not parties to a particular treaty. The view that the third-party treaty (the treaty by which the granting State extends favours to a third State) is the origin of the rights of the beneficiary State (a State not party to the third-party treaty) runs counter to the rule embodied in article 36, paragraph 1, of the Vienna Convention. As explained in the commentary of the

Commission to article 32 of the 1966 draft (which, with insignificant drafting changes, became article 36 of the Convention):

"Paragraph 1 lays down that a right may arise for a State from a provision of a treaty to which it is not a party under two conditions. First, the parties must intend the provision to accord the right either to the particular State in question, or to a group of States to which it belongs, or to States generally. *The intention to accord the right is of cardinal importance*," since it is only when the parties have such an intention that a legal right, as distinct from a mere benefit, may arise from the provision ..."<sup>111</sup>

It seems evident that the parties to a third-party treaty do not have such an intention. They may be aware that their agreement can have an indirect effect through the operation of the most-favoured-nation clause (to the advantage of the State beneficiary of the clause), but any such indirect effect is unintentional. It follows that the right of the beneficiary State to a certain advantageous treatment does not derive from the treaty concluded between the granting State and the third State.

(4) The United Nations Conference on the Law of Treaties upheld that view. At the fourteenth plenary meeting, held on 7 May 1969, the President of the Conference stated that article 32, paragraph 1 (of the 1966 draft of the International Law Commission), "did not affect the interests of States under the most-favoured-nation system".<sup>112</sup>

(5) By the adoption of article 8, the Commission has maintained its previous position. Article 8 reflects the view that the basic act (*acte règle*) is the agreement between the granting State and the beneficiary State. Under this agreement, i.e. under the most-favoured-nation clause, the beneficiary State will benefit from the favours extended by the granting State to the third State, but only because this is the common wish of the granting State and the beneficiary State. The agreement between the granting State and a third State creating obligations in their mutual relations does not create obligations in the relations between the granting State and the beneficiary State. It is nothing more than an act creating a condition ("acte condition").

(6) The relationship between the treaty containing the most-favoured-nation clause and the subsequent, third-party treaty has been characterized as follows:

If the later treaty can be compared to the hands of a clock that point to the particular hour, it is the earlier treaty which constitutes the mechanism that moves the hands round.<sup>113</sup>

(7) If there is no treaty or other agreement between the granting State and the third State, the rule stated in the article is even more evident. The root of the right of the beneficiary State is obviously the treaty containing the

<sup>106</sup> *I.C.J. Pleadings, Anglo-Iranian Oil Co. case (United Kingdom v. Iran) (1952) p. 533.*

<sup>107</sup> *Ibid.*, p. 616.

<sup>108</sup> *Anglo-Iranian Oil Co. case (Preliminary objection), Judgment of 22 July 1952 (I.C.J. Reports 1952, p. 109).*

<sup>109</sup> See e.g. P. Fauchille, *Traité de droit international*, Paris, Rousseau, 1926, vol. I, 3rd part, p. 359, and L. Oppenheim, *International Law: A Treatise*, 8th ed. [Lauterpacht], London, Longmans, Green, 1955, vol. I, para. 522. See however the contrary views of H. Accioly, *Traité de droit international public*, Paris, Recueil Sirey, 1941, vol. II, p. 479, and M. Sibert, *Traité de droit international public*, Paris, Dalloz, 1951, vol. II, p. 255.

<sup>110</sup> G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 3rd ed., London, Stevens, 1957, p. 243; P. Guggenheim, *Traité de droit international public*, 2nd rev. ed., Geneva, Georg, 1967, vol. I, pp. 208 and 209; and Sauvignon, *op. cit.*, p. 78.

<sup>111</sup> *Yearbook ... 1966*, vol. II, p. 229, doc. A/6309/Rev.1, part II, article 32, para. (7) of the commentary.

<sup>112</sup> *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 63, Fourteenth plenary meeting, para. 36.

<sup>113</sup> Sir Gerald Fitzmaurice, "The law and procedure of the International Court of Justice, 1951-4: Points of substantive law, part II", *The British Year Book of International Law, 1955-56*, London, 1957, vol. 32, p. 88.

clause. The extent of the favours to which the beneficiary of that clause may lay claim will be determined by the actual favours extended by the granting State to the third State.

(8) The parties stipulating the clause, i.e. the granting State and the beneficiary State, can, however, restrict in the treaty or agreement itself the extent of the favours that can be claimed by the beneficiary State. For example, the restriction can consist in the imposition of a condition, a matter that is dealt with below.<sup>114</sup> If the clause contains a restriction, the beneficiary State cannot claim any favours beyond the limits set by the clause, even if this extent does not reach the level of the favours extended by the granting State to a third State. In other words, the treatment granted to the third State by the granting State is applicable only within the framework set by the clause. This is the reason for the wording of paragraph 2 of article 8, which expressly states that the most-favoured-nation treatment to which the beneficiary State—for itself or for the benefit of the persons or things in a determined relationship with it—is entitled *under a clause referred to in paragraph 1*, is determined by the treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State. Paragraph 2 reflects in general the *ejusdem generis* rule, whose substance is developed in articles 9 and 10 that follow.

#### *Article 9. Scope of rights under a most-favoured-nation clause*

1. Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause.

2. The beneficiary State acquires the rights under paragraph 1 only in respect of persons or things which are specified in the clause or implied from its subject-matter.

#### *Article 10. Acquisition of rights under a most-favoured-nation clause*

1. Under a most-favoured-nation clause the beneficiary State acquires the right to most-favoured-nation treatment only if the granting State extends to a third State treatment within the limits of the subject-matter of the clause.

2. The beneficiary State acquires rights under paragraph 1 in respect of persons or things in a determined relationship with it only if they:

(a) belong to the same category of persons or things as those in a determined relationship with a third State which benefit from the treatment extended to them by the granting State and

(b) have the same relationship with the beneficiary State as the persons and things referred to in subparagraph (a) have with that third State.

<sup>114</sup> See articles 11, 12 and 13 below, and the commentary thereto.

#### *Commentary to articles 9 and 10*

##### *Scope of the most-favoured-nation clause regarding its subject-matter*

(1) The rule which is sometimes referred to as the *ejusdem generis* rule is generally recognized and affirmed by the jurisprudence of international tribunals and national courts and by diplomatic practice. The essence of the rule has been explained in the following graphic way:

Suppose that a most-favoured-nation clause in a commercial treaty between State A and State B entitled State A to claim from State B the treatment which State B gives to any other State, that would not entitle State A to claim from State B the extradition of an alleged criminal on the ground that State B has agreed to extradite alleged criminals of the same kind to State C, or voluntarily does so. The reason, which seems to rest on the common intention of the parties, is that the clause can only operate in regard to the subject-matter which the two States had in mind when they inserted the clause in their treaty.<sup>115</sup>

Although the meaning of the rule is clear, its application is not always simple. From the abundant practice the following selection of cases may illustrate the difficulties and solutions.

(2) In the *Anglo-Iranian Oil Company case* (1952), the International Court of Justice stated:

The United Kingdom also put forward, in a quite different form, an argument concerning the most-favoured-nation clause. If Denmark, it is argued, can bring before the Court questions as to the application of her 1934 Treaty with Iran, and if the United Kingdom cannot bring before the Court questions as to the application of the same Treaty to the benefit of which she is entitled under the most-favoured-nation clause, then the United Kingdom would not be in the position of the most-favoured-nation. *The Court needs only observe that the most-favoured-nation clause in the Treaties of 1857 and 1903 between Iran and the United Kingdom has no relation whatever to jurisdictional matters between the two Governments.\** If Denmark is entitled under Article 36, paragraph 2, of the Statute, to bring before the Court any dispute as to the application of its Treaty with Iran, it is because that Treaty is subsequent to the ratification of the Iranian Declaration. This cannot give rise to any question relating to most-favoured-nation treatment.<sup>116</sup>

(3) In the *Ambatielos case*,<sup>117</sup> the Commission of Arbitration, in its award of 6 March 1956, held the following views on article X (most-favoured-nation clause) of the Anglo-Greek Treaty of Commerce and Navigation of 1886:

The Commission [of Arbitration] does not deem it necessary to express a view on the general question as to whether the most-favoured-nation clause can never have the effect of assuring to its beneficiaries treatment in accordance with the general rules of international law, because in the present case the effect of the clause is expressly limited to "any privilege, favour or immunity which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State",

<sup>115</sup> McNair, *op. cit.*, p. 287.

<sup>116</sup> *Anglo-Iranian Oil Co. case (Preliminary objection)*, Judgment of 22 July 1952, I.C.J. Reports 1952, p. 110. For the facts and other aspects of the case, see *Yearbook ... 1970*, vol. II, pp. 202 and 205, doc. A/CN.4/228 and Add.1, paras. 10-30.

<sup>117</sup> *The Ambatielos case (merits: obligation to arbitrate)*, Judgment of 19 May 1953, I.C.J. Reports 1953, p. 10.

which would obviously not be the case if the sole object of those provisions were to guarantee to them treatment in accordance with the general rules of international law.

On the other hand, the Commission [of Arbitration] holds that the most-favoured-nation clause can *only attract matters belonging to the same category of subject as that to which the clause itself relates*\*.

The Commission [of Arbitration] is, however, of the opinion that in the present case the application of this rule can lead to conclusions different from those put forward by the United Kingdom Government.

In the Treaty of 1886 the field of application of the most-favoured-nation clause is defined as including "all matters relating to commerce and navigation". It would seem that this expression has not, in itself, a strictly defined meaning. The variety of provisions contained in Treaties of commerce and navigation proves that, in practice, the meaning given to it is fairly flexible. For example, it should be noted that most of these Treaties contain provisions concerning the administration of justice. That is the case, in particular, in the Treaty of 1886 itself, Article XV, paragraph 3, of which guarantees to the subjects of the two Contracting Parties "free access to the Courts of Justice for the prosecution and defence of their rights". That is also the case as regards the other Treaties referred to by the Greek Government in connexion with the application of the most-favoured-nation clause.

It is true that "the administration of justice", when viewed in isolation, is a subject-matter other than "commerce and navigation", but this is not necessarily so when it is viewed in connexion with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by Treaties of commerce and navigation.

Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes "all matters relating to commerce and navigation". The question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty.<sup>118</sup>

In summing up its views with respect to the interpretation of article X of the Treaty of 1886, the Commission of Arbitration stated that it was of the opinion:

(1) that the Treaty concluded on 1st August 1911 by the United Kingdom with Bolivia cannot have the effect of incorporating in the Anglo-Greek Treaty of 1886 the "principles of international law", by the application of the most-favoured-nation clause;

(2) that the effects of the most-favoured-nation clause contained in Article X of the said Treaty of 1886 can be extended to the system of the administration of justice in so far as concerns the protection by the courts of the rights of persons engaged in trade and navigation;

(3) that none of the provisions concerning the administration of justice which are contained in the Treaties relied upon by the Greek Government can be interpreted as assuring to the beneficiaries of the most-favoured-nation clause a system of "justice", "right", and "equity" different from that for which the municipal law of the State concerned provides;

(4) that the object of these provisions corresponds with that of Article XV of the Anglo-Greek Treaty of 1886, and that the only question which arises is, accordingly, whether they include

more extensive "privileges", "favours" and "immunities" than those resulting from the said Article XV;

(5) that it follows from the decision summarized in (3) above that Article X of the Treaty does not give to its beneficiaries any remedy based on "unjust enrichment" different from that for which the municipal law of the State provides.

... the Commission [of Arbitration] is of the opinion that "free access to the Courts", which is vouchsafed to Greek nationals in the United Kingdom by Article XV of the Treaty of 1886, includes the right to use the Courts fully and to avail themselves of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.

The Commission [of Arbitration] is therefore of the opinion that the provisions contained in other Treaties relied upon by the Greek Government do not provide for any "privileges, favours or immunities" more extensive than those resulting from the said Article XV, and that accordingly the most-favoured-nation clause contained in Article X has no bearing on the present dispute...<sup>119</sup>

(4) Decisions of national courts also testify to the general recognition of the rule. In an early French case (1913), the French Court of Cassation had to decide whether certain procedural requirements for bringing suit, as provided in a French-Swiss Convention on jurisdiction and execution of judgement, applied also to German nationals as a result of a most-favoured-nation clause in a Franco-German commercial treaty concluded at Frankfurt on 10 May 1871. The Franco-German treaty guaranteed most-favoured-nation treatment in their commercial relations, including the "admission and treatment of subjects of the two nations". The decision of the Court was based in part on the following propositions: that these provisions pertain exclusively to the commercial relations between France and Germany, considered from the viewpoint of the rights under international law, but they do not concern, either expressly or implicitly, the rights under civil law, particularly, the rules governing jurisdiction and procedure that are applicable to any disputes that develop in commercial relations between the subjects of the two States, and that

the most-favoured-nation clause may be invoked only if the subject of the treaty stipulating it is the same as that of the particularly favourable treaty the benefit of which is claimed.<sup>120</sup>

(5) In *Lloyds Bank v. de Ricqlès and de Gaillard* before the Commercial Tribunal of the Seine, Lloyds Bank, which as plaintiff had been ordered to give security for costs (*cautio judicatum solvi*), invoked article I of an Anglo-French Convention of 28 February 1882.<sup>121</sup> That Convention intended, according to its preamble, "to regulate the commercial maritime relations between the

<sup>118</sup> United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), pp. 106 and 107.

<sup>119</sup> *Ibid.*, pp. 109 and 110.

<sup>120</sup> M. Whiteman, *Digest of International Law*, Washington, D. C., U. S. Government Printing Office, 1970, vol. 14, pp. 755 and 756, quoting the decision of the French Court of Cassation, 22 December 1913, in the case of *Braunkohlen Briket Verkaufsverein Gesellschaft c. Goffart, ès qualités*. The decision is also quoted by P. Level, "Clause de la nation la plus favorisée", *Encyclopédie Dalloz - Droit International*, Paris, Dalloz, 1968, vol. I, p. 338, para. 38, and by H. Batiffol, *Droit international privé*, 4th ed. Paris, Librairie générale de droit et de jurisprudence, 1967, p. 216, No. 189.

<sup>121</sup> *British and Foreign State Papers, 1881-1882* (London, Ridgway, 1889), vol. 73, p. 22.



two countries, as well as the status of their subjects", and article I provided, with an exception not relevant here, that:

... each of the High Contracting Parties engages to give the other immediately and unconditionally the benefit of every favour, immunity or privilege in matters of commerce or industry which have been or may be conceded by one of the High Contracting Parties to any third nation whatsoever, whether within or beyond Europe.<sup>122</sup>

On the basis of that article, Lloyds Bank claimed the benefit of the provisions of a Franco-Swiss Treaty of 15 June 1889, which gave Swiss nationals the right to sue in France without being required to give security for costs. The court rejected that claim, holding that a party to a convention of a general character such as the Anglo-French Convention regulating the commercial and maritime relations of the two countries could not claim under the most-favoured-nation clause the benefits of a special convention such as the Franco-Swiss Convention, which dealt with one particular subject, namely, freedom from the obligation to give security for costs.<sup>123</sup>

(6) Drafters of a most-favoured-nation clause are always confronted with the dilemma either of drafting the clause in too general terms, risking thereby the loss of its effectiveness through a rigid interpretation of the *ejusdem generis* rule, or of drafting it too explicitly, enumerating its specific domains, in which case the risk consists in the possible incompleteness of the enumeration.

(7) The rule is observed also in the extra-judicial practice of States, as shown by the case concerning the Commercial Agreement of 25 May 1935 between the United States of America and Sweden, article I of which provided as follows:

Sweden and the United States of America will grant each other unconditional and unrestricted most-favored-nation treatment in all matters concerning the customs duties and subsidiary charges of every kind and in the method of levying duties, and, further, in all matters concerning the rules, formalities and charges imposed in connexion with the clearing of goods through the customs, and with respect to all laws or regulations affecting the sale or use of imported goods within the country.<sup>124</sup>

A request was submitted in 1949 to the Department of State that it inform the New York State Liquor Authority that a liquor licence to sell imported Swedish beer in New York should be issued to a certain firm of importers. The Office of the Legal Adviser, Department of State, interpreted the treaty provisions as follows:

Since the most-favored-nation provision in the Reciprocal Trade Agreement between the United States and Sweden signed in 1935 is designed only to prevent discrimination between imports

from and exports to Sweden as compared with imports from and exports to other countries, I regret that this Department would be unable to send to the New York Liquor Authority a letter such as you suggest to the effect that the Agreement accords to Swedish *nationals* the same treatment as is accorded to the nationals of other countries.

All of the countries listed in the enclosure to your letter (countries, nationals of which are held by the New York State Liquor Authority to be entitled to liquor licences) have treaties with the United States which grant either national or most-favored-nation rights as to engaging in trade to nationals of those countries. Thus existence of the trade agreements to which you refer in addition to these treaties is irrelevant.<sup>125</sup>

(8) In the following examples, the question of the application of the rule arose under extraordinary circumstances. In the case of *Nyugat-Swiss Corporation Société Anonyme Maritime et Commerciale v. State* (Kingdom of the Netherlands), the facts were as follows. On 13 April 1941, the steamship *Nyugat* was sailing outside territorial waters of the former Dutch East Indies. It sailed under the Hungarian flag. The Netherlands destroyer *Kortenaar* stopped it, searched it and took it into Surabaya, where it was sunk in 1942. The plaintiffs claimed that the action taken with regard to the *Nyugat* was illegal. The vessel was Swiss property. It had formerly belonged to a Hungarian company, but the Swiss corporation became the ship's owner in 1941, when it already held all shares in the Hungarian company. The Hungarian flag was a neutral flag. Defendant relied upon the fact that on 9 April 1941 diplomatic relations between the Netherlands and Hungary were severed, that on 11 April 1941 Hungary, as an ally of Germany, attacked Yugoslavia, and that consequently on the basis of certain relevant Dutch decrees the capture of the ship was legal. Plaintiffs contended that those decrees were in conflict with the Treaty of Friendship, Establishment and Commerce concluded with Switzerland at Berne on 19 August 1875<sup>126</sup> and with the Treaty of Commerce concluded with Hungary on 9 December 1924,<sup>127</sup> and notably with the most-favoured-nation clause contained in those treaties. Plaintiffs referred to the Treaty of Friendship, Navigation and Commerce signed on 1 May 1829 with the Republic of Colombia, providing that, "if at any time unfortunately a rupture of the ties of friendship should take place", the subjects of the one party residing in the territory of the other party "will enjoy the privilege of residing there and of continuing their business... as long as they behave peacefully and do not violate the laws; their property ... will not be subject to seizure and attachment".<sup>128</sup> The Court held:

The invoking of this provision fails, since it is unacceptable that a rupture of friendly relations, as understood in the year 1829, can be assimilated to a severance of diplomatic relations as it occurred during the Second World War; in the present case the determination of the flag was also based upon the assumption by

<sup>122</sup> *Ibid.*, pp. 23-24.

<sup>123</sup> H. Lauterpacht, ed., *Annual Digest of Public International Law Cases, 1929-30*, London, vol. 5, 1935, Case No. 252, p. 404; *Journal du droit international*, Paris, 58th year, 1931, p. 1018, digested by McNair, *op. cit.*, p. 287. Other cases before French courts based on the *ejusdem generis* rule are cited by A.-Ch. Kiss, "La convention européenne d'établissement et la cause de la nation la plus favorisée", *Annuaire français de droit international*, 1957, Paris, vol. III, p. 478, and for cases before American courts, by G. H. Hackworth, *Digest of International Law*, Washington, D. C., U. S. Government Printing Office, vol. V, 1943, pp. 292 and 293.

<sup>124</sup> League of Nations, *Treaty Series*, vol. CLXI, p. 111.

<sup>125</sup> Legal Adviser Fisher, Department of State, 3 November 1949, MS. Department of State, quoted by Whiteman, *op. cit.*, p. 760.

<sup>126</sup> Netherlands, *Staatsblad van het Koninkrijk der Nederlanden*, No. 137, 1878, Decree of 19 September 1878.

<sup>127</sup> *Ibid.*, No. 36, 1926, Decree of 3 March 1926.

<sup>128</sup> *British and Foreign State Papers, 1829-1830*, London Ridgway, 1832, p. 902.



Hungary of an attitude contrary to the interests of the Kingdom by collaborating in the German attack against Yugoslavia. This case surely does not fit in with the provisions of the 1829 Treaty. From the preceding it follows that the shipowners are wrong in their opinion that the Court should not apply the Decree as being contrary to international provisions.<sup>129</sup>

(9) According to one source, "some authority exists" for the view that rights and privileges obtained in the course of a territorial and political arrangement or a peace treaty

cannot be claimed under a most-favoured-nation clause... The reason presumably is that such concessions are not commercial, while most-favoured-nation clauses are usually concerned with trade and commerce.<sup>130</sup>

The author quotes an opinion of a law officer given in 1851, which denied to Portugal and Portuguese subjects the right "to dry on the coast of Newfoundland the codfish caught by them on the banks adjoining thereto". The claim was based on a most-favoured-nation clause in a treaty of 1842 between Great Britain and Portugal designed to secure the same privileges as were granted by Britain to France and to the United States of America by the treaties of 1783. Those treaties formed part of a general arrangement made at the termination of a war. The law officer stated:

... I am of opinion that the stipulation of the 4th Article of the Treaty of 1842 cannot justly be considered as applicable to the permission which he [the Portuguese Chargé d'Affaires] claims on behalf of Portuguese subjects.

I consider that these privileges were conceded to France and the United States of America as part of a territorial and political arrangement extorted from Great Britain at the termination of a war which had been successfully carried on against her by those nations.<sup>131</sup>

(10) No writer would deny the validity of the *ejusdem generis* rule which, for the purposes of the most-favoured-nation clause, derives from its very nature. It is generally admitted that a clause conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can attract the rights conferred by other treaties (or unilateral acts) only in regard to the same matter or class of matter.<sup>132</sup>

(11) The effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another. Unless this process is strictly confined to cases where there is a substantial identity between the subject-matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting State obligations it never contemplated.<sup>133</sup> Thus the rule follows clearly from the general principles of treaty interpretation. States cannot be regarded as being bound beyond the obligations they have undertaken.

<sup>129</sup> Judgment of 6 March 1959 by the Supreme Court of the Netherlands (*Nederlandse Jurisprudentie* 1962, No. 2, pp. 18 and 19).

<sup>130</sup> McNair, *op. cit.*, p. 302.

<sup>131</sup> *Ibid.*, p. 303.

<sup>132</sup> See *Yearbook* ... 1970, vol. II, p. 210, doc. A/CN.4/228 and Add.1, para. 68.

<sup>133</sup> *Ibid.*, p. 211, doc. A/CN.4/228 and Add.1, para. 72.

(12) The essence of the rule is that the beneficiary of a most-favoured-nation clause cannot claim from the granting State advantages of a kind other than that stipulated in the clause. For instance, if the most-favoured-nation clause promises most-favoured-nation treatment solely for fish, such treatment cannot be claimed under the same clause for meat.<sup>134</sup> The granting State cannot evade its obligations, unless an express reservation so provides,<sup>135</sup> on the ground that the relations between itself and the third country are friendlier than or "not similar" to those existing between it and the beneficiary. It is only the subject-matter of the clause that must belong to the same category, the *idem genus*, and not the *relation* between the granting State and the third State on the one hand and the relation between the granting State and the beneficiary State on the other. It is also not proper to say that the *treaty* or *agreement* including the clause must be of the same category (*ejusdem generis*) as that of the benefits that are claimed under the clause.<sup>136</sup> To hold otherwise would seriously diminish the value of a most-favoured-nation clause.

#### *Scope of the most-favoured-nation clause regarding persons or things*

(13) In respect of the subject-matter, the right of the beneficiary State is restricted in two ways: first, by the clause itself, which always refers to a certain matter,<sup>137</sup> and secondly by the right conferred by the granting State on the third State.

(14) The situation is similar, although not identical, in respect of the subjects in the interest of which the beneficiary State is entitled to claim most-favoured-nation treatment. The clause itself may indicate those persons, ships, products, etc., to which it applies, but it may not necessarily do so. The clause may simply state that the beneficiary State is accorded most-favoured-nation treatment in respect of customs duties, or in the sphere of commerce, shipping, establishment, etc., without specifying the persons or the things that will be given most-favoured-nation treatment. In such cases the indication of the sphere of operation for the clause implicitly denotes the class of persons or things in whose interest the beneficiary State may exercise its rights.

<sup>134</sup> In connexion with the problem of "like products", see the relevant passage in the excerpts from the conclusions of the Economic Committee of the League of Nations in regard to the most-favoured-nation clause annexed to the Special Rapporteur's first report (*Yearbook* ... 1969, vol. II, p. 178, doc. A/CN.4/213, annex 1), and articles I, II and XIII of the General Agreement on Tariffs and Trade (GATT, *Basic Instruments and Selected Documents*, vol. IV, *op. cit.*, pp. 2-5 and 21-23). Notable efforts are being made to facilitate the identification and comparison of products by setting up uniform standards for the purpose; these efforts include the Brussels Convention of 15 December 1950 establishing a Customs Co-operation Council (United Nations, *Treaty Series*, vol. 157, p. 129) and the Convention on the Nomenclature for the Classification of Goods in Customs Tariffs of 15 December 1950 (*ibid.*, vol. 347, p. 127).

<sup>135</sup> See article 29 below, and commentary thereto.

<sup>136</sup> Vignes, *loc. cit.*, p. 282.

<sup>137</sup> With very rare exceptions, there is no clause in modern times that would not be restricted to a certain sphere of relations, e.g. commerce, establishment and shipping. See article 4 above, paras. (14) and (15) of the commentary.

(15) The beneficiary State may claim most-favoured-nation treatment only for the category of persons or things (merchants, commercial travellers, persons taken into custody, companies, vessels, distressed or wrecked vessels, products, goods, textiles, wheat, sugar, etc.) that receives or is entitled to receive certain treatment, certain favours, under the right of a third State. And, further, the persons or things in respect of which most-favoured-nation treatment is claimed must be in the same relationship with the beneficiary State as are the comparable persons or things with the third State (nationals, residents in the country, companies having their seat in the country, companies established under the law of the country, companies controlled by nationals, imported goods, goods manufactured in the country, products originating in the country, etc.).<sup>138</sup>

(16) The following French case may serve as an illustration of the proposed rule. Alexander Serebriakoff, a Russian subject, brought an action against Mme. d'Oldenbourg, also a Russian subject, alleging the nullity of a will under which she was a beneficiary. The defendant, after having obtained French citizenship by naturalization, obtained an *ex parte* decision from the Court of Appeal of Paris ordering Serebriakoff to furnish 100,000 francs security. Serebriakoff appealed, against that *ex parte* decision, claiming *inter alia* that he was exempt from furnishing security by the terms of the Franco-Soviet agreement of 11 January 1934. The Court held that the appeal must be dismissed. The Court stated:

Whereas the Decree of 23 January 1934 ordering the provisional application of the trade agreement concluded on 11 January 1934 between France and the USSR ... is not applicable in the current case; and Alexander Serebriakoff is not entitled to claim the benefit of that agreement; and, while the agreement does provide, on the basis of reciprocity, free and unrestricted access by Russian subjects to French courts, the privilege thus granted to such subjects is limited strictly to merchants and industrialists; and this conclusion results inevitably both from the agreement as a whole and from the separate consideration of each of its provisions; and the agreement in question is entitled "Trade Agreement"; and the various articles of which it is composed confirm that description, and its article 9, on which Serebriakoff specifically relies, in determining the beneficiaries of the provisions in question, begins with the words: "Save in so far as may be otherwise provided subsequently, French merchants and manufacturers, being natural or legal persons under French law, shall not be less favourably treated ... than nationals of the most-favoured-nation..."<sup>139</sup>

(17) In another case, the Tribunal de Grande Instance de la Seine held that the most-favoured-nation clause embodied in the Franco-British Convention of 28 February 1882, as supplemented by an exchange of letters of interpretation of 21 and 25 May 1929, by which British subjects were entitled to rely on treaties stipulating the assimilation of foreigners to nationals, applied solely to British subjects who settled in France. The Tribunal stated:

... [a] British national domiciled in Switzerland may not rely on a treaty of establishment which grants the benefit of the most-favoured-nation clause only to British nationals established in

France and therefore entitled to carry on a remunerative activity there on a permanent basis."<sup>140</sup>

(18) Article 10, when referring to the same category of things, implicitly states the rule regarding the controversial notion of "like articles" or "like products". It is not uncommon for commercial treaties to state explicitly that, in respect to customs duties or other charges, the products, goods, articles, etc., of the beneficiary State will be accorded any favours accorded to like products, etc., of the third State.<sup>141</sup> Obviously, even in the absence of such an explicit statement, the beneficiary State may claim most-favoured-nation treatment only for the goods specified in the clause or belonging to the same category as the goods enjoying most-favoured-nation treatment by the third State.

(19) The Commission did not wish to delve into all the intricacies of the notion of "like products". The following paragraphs supply a brief explanation. As to exactly what is meant by the expression as it appears in commercial treaties, it has been said that:

One test in such cases is a comparison of the intrinsic characteristics of the goods concerned. Such a test would prevent the classification of articles on the basis of external characteristics. If products are intrinsically alike, they should be considered to be like products, and differing rates of duty on them would contravene the most-favored-nation clause. For example, in the Swiss Cow case [<sup>142</sup>], the question arises whether a cow raised at a certain elevation is "like" a cow raised at a lower level. Applying the intrinsic characteristics test gives a simple answer to the question. The cows are intrinsically alike, and a tariff classification based on such an extraneous consideration as the place where the cows are raised is clearly designed to discriminate in favour of a particular country.

In other situations the application of the intrinsic characteristics test would show clearly that a classification was *not* objectionable. To invent such a case: under the tariff law of the United States, apples are dutiable and bananas are free of duty. If Canada and the United States have a treaty providing that products of either party will be accorded treatment no less favorable than that accorded to "like articles" of any third country, Canada might argue that apples should be free of duty. Any such claim would have to be based on the argument that since both bananas and apples are used for the same purpose, i.e. eating, they are "like articles". Applying the test of intrinsic characteristics in this case would promptly settle the question, since apples and bananas are intrinsically different products.<sup>143</sup>

(20) With regard to the "Swiss Cow" case, mentioned in the text quoted in the preceding paragraph, the Special Rapporteur in his second report had the following to say:

The difficulties inherent in the expression "like product" can *ad oculos* be demonstrated in the following manner. In the working paper on the most-favoured-nation clause in the law of treaties, submitted by the Special Rapporteur on 19 June 1968, the following classical example of an unduly specialized tariff was cited under the heading "Violations of the clause".<sup>144</sup> In 1904 Germany granted a duty reduction to Switzerland on

<sup>137</sup> Yearbook ... 1968, vol. II, p. 170, doc. A/CN.4/L.127, para. 31.

<sup>140</sup> *Ibid.*, pp. 145 and 146, doc. A/CN.4/269, para. 78.

<sup>141</sup> See article I, para. 1, of the General Agreement on Tariffs and Trade, quoted above (article 4, para. 10) of the commentary.

<sup>142</sup> See para. (20) below.

<sup>143</sup> Hawkins, *op. cit.*, pp. 93 and 94.

<sup>138</sup> See article 5 above, para. (4) of the commentary.

<sup>139</sup> See Secretariat Digest, Yearbook ... 1973, vol. II, p. 132, doc. A/CN.4/269, para. 40.

"large dappled mountain cattle or brown cattle reared at a spot at least 300 metres above sea level and which have at least one month's grazing each year at a spot at least 800 metres above sea level".<sup>143</sup>

Sources quoting this example generally consider a cow raised at a certain elevation "like" a cow raised at a lower level. This being so, they believe—and the working paper followed this belief—that a tariff classification based on such an extraneous consideration as the place where the cows are raised is clearly designed to discriminate in favour of a particular country, in the case in question, in favour of Switzerland and against, for example, Denmark.<sup>144</sup> However, the Food and Agriculture Organization of the United Nations, being an interested agency and having special expertise in matters of animal trade, in its reply to the circular letter of the Secretary-General, made the following comment on the example given in the working paper:

"In view of the background situation relating to the case cited in the example, it would seem that the specialized tariff may have been technically justified because of the genetic improvement programme which was carried out in Southern Germany at that time. At present, this specialized tariff would presumably have been worded in a different way, but in 1904 terms like Simmental or Brown Swiss were probably not recognized as legally valid characteristics [...]. Apart from this, it must be recognized that unduly specialized tariffs and other technical or sanitary specifications have been—and continue to be—used occasionally for reasons that may be regarded as discriminatory."

<sup>143</sup> League of Nations, Economic and Financial Section, *Memorandum on Discriminatory Classifications* (Ser. L.O.N.P. 1927.II.27), p. i.

<sup>144</sup> H. C. Hawkins, *Commercial Treaties and Agreements; Principles and Practice* (New York, Rinehart, 1951, pp. 93-94; J. E. S. Fawcett, "Trade and Finance in International Law", ... *Recueil des cours* ... 1968 (Leyden, Sijthoff, 1969), vol. 123, p. 263.<sup>144</sup>

(21) That the difficulties caused by the interpretation of the phrase "like products" are not insurmountable between parties acting in good faith is shown by an exchange of views made in the Preparatory Committee of the International Conference on Trade and Employment:

... the United States said:

"This phrase had been used in the most-favored-nation clause of several treaties. There was no precise definition, but the Economic Committee of the League of Nations had put out a report that 'like product' meant 'practically identical with another product'."

This lack of definition, however, in the view of the British delegate,

"has not prevented commercial treaties from functioning, and I think it would not prevent our Charter from functioning until such time as the ITO is able to go into this matter and make a proper study of it. I do not think we could suspend other action pending that study..."

and Australia further noted:

"All who have had any familiarity with customs administration know how this question of 'like products' tends to sort itself out. It is really adjusted through a system of tariff classification, and from time to time disputes do arise as to whether the classification that is placed on a thing is really a correct classification. I think while you have provision for complaints

procedure through the Organization you would find that this issue would be self-solving."<sup>145</sup>

(22) The Commission is aware that in certain cases the application of the rule contained in article 9 and 10 can cause considerable difficulties. It has stated already that the expression "same relationship" has to be used with caution because, for example, the relationship between State A and its nationals is not necessarily the "same" as the relationship between State B and its nationals. Nationality laws of States are so diverse that the sum total of the rights and obligations arising from one State's nationality laws might be quite different from that arising from another State's nationality laws.<sup>146</sup> Similar difficulties can be encountered when treaties refer to internal law in other instances; for example, where the right of establishment of legal persons is concerned. The case of legal persons can raise a particularly difficult problem because they are defined by internal law. When, for example, a treaty expressly grants to a third State favourable treatment for a category of legal persons specified according to the internal law of the third State, e.g. a particular kind of German limited liability company ("Gesellschaft mit beschränkter Haftung") that is unknown to the Anglo-Saxon countries, could the United Kingdom invoke the most-favoured-nation clause to claim the same advantages for the British type of company that most closely resembles the German type of company referred to in the treaty, or would it be debarred from doing so? Similarly, if a treaty grants some advantage to French companies of the type known as "association en participation", which corresponds to the "joint venture" of the common law countries, would an Anglo-Saxon country be able to invoke the most-favoured-nation clause to claim the same advantages for those of its companies which are of the "joint venture" type?

(23) A similar problem may arise in connexion with the nationality of companies, which is not determined by international law. For when, under a treaty of establishment, a State grants to another advantages for its national companies, it is the law of that State that determines the nationality of those companies. That being so, could the State that claims the benefit of the most-favoured-nation clause claim it for all the companies defined as national under its own law? Under that law a company might be regarded as national merely if it had its registered offices or principal place of business in the territory of the State in question, or if that State controlled a substantial part of the registered capital. Might not then the granting State be able to object that the national companies of a third State to which it had extended advantages were defined much more restrictively under the law of that third State? Hence, the granting State might refuse to accord the benefit of the clause, arguing that it had extended to the third State a specific kind of advantage which, if it

<sup>144</sup> *Yearbook* ... 1970, vol. II, pp. 221-222, doc. A/CN.4/228 and Add.1, para. 148.

<sup>145</sup> J. H. Jackson, *World Trade and the Law of GATT (A Legal Analysis of the General Agreement on Tariffs and Trade)*, Indianapolis, Bobbs-Merrill, 1969, pp. 260 and 261. Excerpts from the reports of the Economic Committee of the League of Nations are annexed to the Special Rapporteur's first report (see *Yearbook* ... 1969, vol. II, p. 175, doc. A/CN.4/213, annex I).

<sup>146</sup> See article 5 above, para. (4) of the commentary.

were transposed into the law of another State, would become more extensive.

(24) Some of the cases quoted above testify to the difficulties that are encountered when it comes to the question whether a particular right falls within the limits of the subject-matter of the clause or is outside it. All these difficulties are inherent in the application of a most-favoured-nation clause and do not detract from the usefulness of articles 9 and 10 which, as a general rule, state and elucidate the mechanism of the most-favoured-nation clause.

(25) On the basis of the foregoing, article 9, entitled "Scope of rights under a most-favoured-nation clause", indicates indeed the *potential* scope of the clause. Its paragraph 1 provides that the beneficiary State acquires only those rights which fall within the limits of the subject-matter of the clause, and paragraph 2 gives a further precision to the rule in stating that the beneficiary State acquires the rights falling within the limits of the subject-matter of the clause only in respect of those persons or things which are specified in the clause or implied from the subject-matter of that clause. If the clause refers simply, e.g. to shipping or to consular matters or to commerce in general, then these general references imply in a more or less precise fashion the persons or things in respect of which the beneficiary State acquires the rights under a most-favoured-nation clause.

(26) Article 10, which appears under the heading "Acquisition of rights under a most-favoured-nation clause", indicates the *actual* scope of the clause. The general rule concerning the acquisition by the beneficiary State of most-favoured-nation treatment is stated in paragraph 1, whereas paragraph 2 provides the further specification of that rule regarding such acquisition in respect of persons or things in a determined relationship with that beneficiary State. Paragraph 1 provides that, even if the beneficiary State wishes to claim rights falling within the limits of the subject-matter of the clause, it will acquire those rights only if a condition is fulfilled, namely, that the granting State extends to a third State treatment which falls within the same limits of the subject-matter. Paragraph 2 of the article provides that, if the beneficiary State makes claim to rights in respect of persons or things, it will acquire the rights under paragraph 1 only if the persons or things in question: (a) fall into the same category of persons or things as those in a determined relationship with a third State which benefit from the treatment extended to them by the granting State, and (b) have the same relationship with the beneficiary State as those persons or things have with that third State.

**Article 11. *Effect of a most-favoured-nation clause not made subject to compensation***

**If a most-favoured-nation clause is not made subject to a condition of compensation, the beneficiary State acquires the right to most-favoured-nation treatment without the obligation to accord any compensation to the granting State.**

**Article 12. *Effect of a most-favoured-nation clause made subject to compensation***

**If a most-favoured-nation clause is made subject to a condition of compensation, the beneficiary State acquires the right to most-favoured-nation treatment only upon according the agreed compensation to the granting State.**

**Article 13. *Effect of a most-favoured-nation clause made subject to reciprocal treatment***

**If a most-favoured-nation clause is made subject to a condition of reciprocal treatment, the beneficiary State acquires the right to most-favoured-nation treatment only upon according the agreed reciprocal treatment to the granting State.**

*Commentary to articles 11, 12 and 13*

*The conditional form and the conditional interpretation*

(1) For the explanation of the necessity of the provisions of articles 11, 12 and 13 reference has to be made to the development of the most-favoured-nation clauses historically known as "conditional" and to the "conditional" interpretation of clauses which in their terms made no reference to conditions.

(2) It was in the eighteenth century that the "conditional" form made its first appearance, in the treaty of amity and commerce concluded between France and the United States of America on 6 February 1778. Article II of that treaty read as follows:

The Most Christian King and the United States engage mutually not to grant any particular favour to other nations, in respect of commerce and navigation, which shall not immediately become common to the other Party, who shall enjoy the same favour, freely, if the concession was freely made, or on allowing the same compensation, if the concession was conditional.<sup>147</sup>

It has been held that the "conditional" clause was inserted in the treaty of 1778 at French insistence. Even if it were true that the idea was of French origin, the "conditional" form of the clause seemed peculiarly suited to the political and economic interests of the United States for a long period.<sup>148</sup>

(3) The phrase "freely, if the concession was freely made, or on allowing the same compensation [or the equivalent], if the concession was conditional" was the model for practically all commercial treaties of the United States until 1923. Prior to that year, the commercial treaties of the United States contained (with only three exceptions) conditional rather than unconditional pledges on the part of that country.<sup>149</sup>

<sup>147</sup> W. M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909*, Washington, D. C., United States Government Printing Office, 1910, vol. I, p. 468.

<sup>148</sup> V. G. Setser, "Did Americans originate the conditional most-favored-nation clause?", *The Journal of Modern History*, Chicago, vol. V (September 1933), pp. 319-323.

<sup>149</sup> C. C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, 2nd rev. ed., Boston, Little, Brown, 1947, vol. II, p. 1504.

(4) The difference between the unconditional clause and the conditional form of the clause as it appeared in United States practice until 1923 was well explained by the United States Department of State in 1940:

Under the most-favored-nation clause in a bilateral treaty or agreement concerning commerce, each of the parties undertakes to extend to the goods of the country of the other party treatment no less favorable than the treatment which it accords to like goods originating in any third country. The unconditional form of the most-favored-nation clause provides that any advantage, favor, privilege, or immunity which one of the parties may accord to the goods of any third country shall be extended immediately and unconditionally to the like goods originating in the country of the other party. In this form only does the clause provide for complete and continuous nondiscriminatory treatment. Under the conditional form of the clause, neither party is obligated to extend immediately and unconditionally to the like products of the other party the advantages which it may accord to products of third countries in return for reciprocal concessions; it is obligated to extend such advantages only if and when the other party grants concessions "equivalent" to the concessions made by such third countries...<sup>150</sup>

(5) The conditional form of the clause was also dominant in Europe after the Napoleonic period. It has been asserted that perhaps 90 per cent of the clauses written into treaties during the years 1830 to 1860 were conditional in form.<sup>151</sup> However, in the treaty of commerce between Great Britain and France of 23 January 1860,<sup>152</sup> often called the Cobden treaty or the Chevalier-Cobden treaty, the two countries reduced their tariffs substantially, abolished import prohibitions and granted each other unconditionally the status of a most-favoured-nation.

(6) The Chevalier-Cobden treaty was a signal for starting the negotiation of many commercial agreements embodying the unconditional clause with a wider scope of application than at any time in its history. A wave of liberal economic sentiment carried the unconditional clause to the height of its effectiveness. In the period following the Chevalier-Cobden treaty, the unconditional form and interpretation of the clause were entirely dominant in intra-European relations.<sup>153</sup>

(7) The conditional clause served the purposes of the United States as long as it was a net importer and its primary aim was to protect a growing industrial system. When the position of the United States in the world economy changed after the First World War, the conditional clause was inadequate. The essential condition for successful access to international markets, that is, the elimination of discrimination against American prod-

ucts, could be achieved only through the unconditional clause.<sup>154</sup>

(8) The departure of the United States from the practice of employing the conditional type of the most-favoured-nation clause was explained by the United States Tariff Commission as follows:

... the use by the United States of the conditional interpretation of the most-favored-nation clause has for half a century occasioned and, if it is persisted in, will continue to occasion frequent controversies between the United States and European countries.<sup>155</sup>

(9) Urging the Senate to approve the change in the policy of the United States in matters of trade, Secretary of State Hughes wrote in 1924:

... It was the interest and fundamental aim of this country to secure equality of treatment, but the conditional most-favored-nation clause was not in fact productive of equality of treatment and could not guarantee it. It merely promised an opportunity to bargain for such treatment. Moreover, the ascertaining of what might constitute equivalent compensation in the application of the conditional most-favored-nation principle was found to be difficult or impractical. Reciprocal commercial arrangements were but temporary makeshifts; they caused constant negotiation and created uncertainty. Under present conditions, the expanding foreign commerce of the United States needs a guarantee of equality of treatment which cannot be furnished by the conditional form of the most-favored-nation clause.

While we were preserving in the following of the policy of conditional most-favored-nation treatment, the leading commercial countries of Europe, and in fact most of the countries of the world, adopted and pursued the policy of unconditional most-favored-nation treatment. Each concession which one country made to another became generalized in favor of all countries to which the country making the concession was obligated by treaty to extend most-favored-nation treatment... As we seek pledges from other foreign countries that they will refrain from practising discrimination, we must be ready to give such pledges, and history has shown that these pledges can be made adequate only in terms of unconditional most-favored-nation treatment.<sup>156</sup>

(10) The use of the conditional clause, as practised until 1923 by the United States, has almost disappeared from the international scene. The reasons for this have been stated to be as follows:

... the elimination of automatism from the most-favoured-nation clause, ostensibly better to ensure reciprocity, fails to achieve its aim and renders the clause itself completely useless. That fact, together with the trade expansion which currently characterizes the trade policy of all States, explains why the conditional clause has generally been abandoned in recent treaty practice.<sup>157</sup>

(11) The "conditional" form of the clause is now largely of historical significance. Many sources agree that this

<sup>150</sup> United States of America, Department of State, *Bulletin* No. 58 of 3 August 1940, quoted in Whiteman, *op. cit.*, p. 751.

<sup>151</sup> L. E. Visser, "La clause de la nation la plus favorisée dans les traités de commerce", *Revue de droit international et de législation comparée*, Brussels, 2nd series, vol. IV (1902), pp. 66, 159 and 270. Quoted by R. C. Snyder, *The Most-Favored-Nation Clause: An Analysis with Particular Reference to Recent Treaty Practice and Tariffs*, New York, King's Crown Press, Columbia University, 1948, p. 41.

<sup>152</sup> *British and Foreign State Papers, 1859-1860*, London, Ridgway, 1867, vol. 50, p. 13.

<sup>153</sup> A. Nussbaum, *A Concise History of the Law of Nations*, rev. ed., New York, MacMillan, 1954, p. 202.

<sup>154</sup> Snyder, *op. cit.*, p. 243; and E. T. Usenko, chapter on commercial treaties in: State Institute of Law of the Academy of Sciences of the Soviet Union, *Kurs mezhdunarodnogo prava* [Course on international law], edited by F. I. Kozhevnikov et al. Moscow, Nauka, 1968, vol. IV, p. 251.

<sup>155</sup> Quoted by Hyde, *op. cit.*, p. 1506, foot-note 13.

<sup>156</sup> Hackworth, *op. cit.*, p. 273.

<sup>157</sup> M. Virally, "Le principe de réciprocité en droit international contemporain", *Recueil des cours...*, 1967-III, Leiden, Sijthoff, 1969, vol. 122, p. 74.

form of the clause has definitely fallen into disuse.<sup>158</sup> Nevertheless, the possibility cannot and should not be excluded for States to agree on clauses made subject to conditions of compensation.

*The conditional interpretation of an unconditional clause*

(12) In the nineteenth century and in the first decades of the twentieth century, international doctrine and practice were divided on the interpretation of a most-favoured-nation clause that did not explicitly state whether it was conditional or unconditional.<sup>159</sup> The division was due to the then constant practice of the United States of construing the clause as conditional even if the character of the clause was not spelled out explicitly.<sup>160</sup>

(13) The United States position can be traced back to the time of the Louisiana Purchase, i.e. to the treaty of 30 April 1803 by which France ceded Louisiana to the United States. Article 8 of that treaty provided that "the ships of France shall be treated upon the footing of the most favoured nations" in the ports of the ceded territory. By virtue of that provision, the French Government asked in 1817 that the advantages granted to Great Britain in all the ports of the United States should be secured to France in the ports of Louisiana. The advantages accorded to Great Britain were based upon an Act of Congress of 3 March 1815. That Act exempted the vessels of foreign countries from discriminating duties in ports of the United States on condition of a like exemption of American vessels in the ports of such countries. This exemption was granted by Great Britain but not by France, with the result that French vessels continued to pay discriminating duties in the ports of the United States, while British vessels became exempt. The French claim was rejected on the ground that the clause did not mean that France should enjoy as a free gift that which was conceded to other nations for a full equivalent. The United States position was explained as follows:

"It is obvious", said Mr. Adams, "that if French vessels should be admitted into the ports of Louisiana upon the payment of the same duties as the vessels of the United States, they would be treated, not upon the footing of the most-favored-nation, according to the article in question, but upon a footing more favored than any other nation; since other nations, with the exception of England, pay higher tonnage duties, and the exemption of English vessels is not a free gift, but a purchase at a fair and equal price." France, however, did not concede the correctness of that position and maintained its claim in diplomatic correspondence until 1831, when it was settled by a treaty which in effect accepted the American interpretation.<sup>161</sup>

<sup>158</sup> Snyder, *op. cit.*, p. 56. See also G. Jaenicke, "Meistbegünstigungsklausel" in K. Strupp, *Wörterbuch des Völkerrechts*, 2nd ed. [Schlochauer], Berlin, de Gruyter, 1961, vol. II, p. 498; Level, *loc. cit.*, p. 333, para. 5; Sauvignon, *op. cit.*, p. 23.

<sup>159</sup> S. Basdevant, "Clause de la nation la plus favorisée", in A. G. de Lapradelle and J. P. Niboyet, *Répertoire de droit international*, Paris, Sirey, 1929, vol. III, p. 479, para. 73.

<sup>160</sup> See C. C. Hyde, "Concerning the interpretation of treaties", *American Journal of International Law*, Washington, D. C., vol. 3, No. 1 (January 1909), p. 57.

<sup>161</sup> J. B. Moore, *A Digest of International Law*, Washington, D. C., United States Government Printing Office, 1906, vol. V, pp. 257-260. See also G. W. Wickersham, Rapporteur, Committee of Experts for the Progressive Codification of International Law, League of Nations document C.205.M.79.1927.V., p. 7.

(14) Not only did the commercial policy of the United States and the relevant treaty practice change from the use of conditional to that of unconditional clauses; a shift in the interpretation of the remaining conditional clauses also took place. At the same time of the conclusion of the Treaty of Friendship, Commerce and Consular Rights of 8 December 1923 between the United States and Germany, the American position was stated by Secretary of State Hughes as follows:

There is one apparent misapprehension which I should like to remove. It may be argued that by the most-favored-nation clauses in the pending treaty with Germany we would automatically extend privileges given to Germany to other Powers without obtaining the advantages which the treaty with Germany gives to us. This is a mistake. We give to Germany explicitly the unconditional most-favored-nation treatment which she gives to us. We do not give unconditional most-favored-nation treatment to other Powers unless they are willing to make with us the same treaty, in substance, that Germany has made. Most-favored-nation treatment would be given to others Powers only by virtue of our treaties with them, and these treaties, so far as we have them, do not embrace unconditional most-favored-nation treatment. We cannot make treaties with all the Powers at the same moment, but if the Senate approves the treaty which we have made with Germany we shall endeavour to negotiate similar treaties with other Powers and such other powers will not obtain unconditional most-favored-nation treatment unless they conclude with us treaties similar to the one with Germany.<sup>162</sup>

Ten years later, however, Secretary of State Hull took the less rigid position that the according of a benefit to a country pursuant to an unconditional most-favoured-nation clause constituted the according of it freely within the terms of a conditional most-favoured-nation clause, with the result that the benefit should be accorded immediately and without compensation pursuant to the conditional clause. Consistent with that interpretation, when in 1946 the United States sought waivers from most-favoured-nation clauses in existing treaties for tariff preferences to be extended on the basis of reciprocity to most Philippine products following Philippine independence, such waivers were sought from countries with which the United States had treaties containing clauses that were conditional as well as from countries the treaties with which contained clauses that were unconditional.<sup>163</sup> The consequence of this change in interpretation was to produce a system in which conditional treatment was merged to a certain extent with unconditional treatment.

(15) The British and continental position at the turn of the century was that concessions granted for consideration could properly be claimed under a most-favoured-nation clause. According to that view:

... The basis of the American theory is to be found in the Anglo-Saxon system of contracts and the requirement that advantages must be reciprocal for the formation of a contract (consideration). However, this application of the theory is not justified here, for the nation which has acquired equal treatment has paid in advance for the third-party rights which it may thus acquire, since it has granted to the other contracting party the same equal treatment and the right to receive the advantages of third parties... The search for "equivalents" designed to pay for the third-party right by conventional means imposed on the contracting parties is tantamount to stating that the most-favoured-nation clause in

<sup>162</sup> Whiteman, *op. cit.*, p. 754.

<sup>163</sup> *Ibid.*, p. 753.



itself has absolutely no effect. Lastly, from the customs point of view, the American system leads to a preferential system based on favours granted to some nations and refused to others, for States which have amended their tariffs no longer have any equivalents to offer.<sup>164</sup>

#### *More recent practice and doctrinal views*

(16) The Economic Committee of the League of Nations, basing its views on economic considerations, strongly favoured the use of unconditional most-favoured-nation clauses in customs matters. The following are excerpts from its conclusions of 1933 and 1936:

The most-favoured-nation clause implies the right to demand and the obligation to concede all reductions of duties and taxes and all privileges of every kind accorded to the most-favoured-nation, no matter whether such reductions and privileges are granted autonomously or in virtue of conventions with third parties.

Regarded in this way, the clause confers a whole body of advantages, the extent of which actually depends on the extent of the concessions granted to other countries. At the same time, it constitutes a guarantee, in the sense that it provides completely and, so to speak, automatically, for full and entire equality of treatment with the country which is most favoured in the matter in question.

However, in order that the clause may produce these results it must be understood to mean that a government which has granted most-favoured-nation treatment is bound to concede to the other contracting party every advantage which has been granted to any third country, immediately and as a matter of right, without the other party being required to give anything by way of compensation. In other words, the clause must be unconditional.

As is generally known, conditional most-favoured-nation clauses have in some cases been inserted in treaties, while in other cases existing most-favoured-nation clauses have been construed in a conditional sense, with the effect that a reduction of duties granted to a given country in exchange for a given concession may not be accorded to a third country except in exchange for the like or equivalent concessions. This opinion is based on the conception that a country which has not, in some given respect, made the same concessions as another is not entitled to obtain, in this respect, the same advantages, even if it has made wider concessions in other respects. It cannot, however, be too often repeated that a conditional clause of this kind—in justification of which it is argued that, if it does not grant equality of tariffs, it offers at any rate equality of opportunity—has nothing whatever in common with the sort of clause which the [1927] International Economic Conference and the Economic Consultative Committee recommended for the widest possible adoption.

It is in fact the negation of such a clause, for the very essence of the most-favoured-nation clause lies in its exclusion of every sort of discrimination, whereas the conditional clause constitutes, by its very nature, a method of discrimination; it does not offer any of the advantages of the most-favoured-nation clause proper, which seeks to eliminate economic conflicts, to simplify international trade and establish it on firmer foundations. Moreover, it is open to the very grave objection of being unfair to countries which have very few, or very low, duties and which are thus less favourably situated for negotiating than those which possess heavy or numerous duties.

<sup>164</sup> S. Basdevant, *loc. cit.*, pp. 479 and 480, para. 77, quoting, *inter alia*, P. L. E. Pradier-Fodéré, *Traité de droit international public européen et américain, suivant les progrès de la science et de la pratique contemporaines*, Paris, Durand et Pédone-Lauriel, 1888, vol. IV, p. 394.

Moreover, it has very rightly been observed that the granting of the conditional clause really amounts to a polite refusal to grant the most-favoured-nation clause, and that the real significance of this "conditional clause" is that it constitutes a *pactum de contrahendo*, by which the contracting States undertake to enter later into negotiations to grant each other certain advantages similar or correlative to those previously granted to third countries.

... We may therefore conclude that the first fundamental principle, implicit in the conception of most-favoured-nation treatment, is that this treatment must be *unconditional*.<sup>165</sup>

(17) The Institute of International Law, in paragraph 1 of its 1936 resolution entitled "The effects of the most-favoured-nation clause in matters of commerce and navigation", expressed the view that:

The most-favoured-nation clause is unconditional, unless there are express provisions to the contrary.

Consequently, in matters of commerce and navigation, the clause confers upon the nationals, goods and ships of the contracting countries as a matter of right and without compensation, the régime enjoyed by any third country.<sup>166</sup>

(18) Other sources state this rule in general terms not restricted to the sphere of commerce:

If there is any doubt, the most-favoured-nation clause should be considered unconditional.<sup>167</sup>

Since it is liable to limit the application of the clause, the condition cannot be implied.<sup>168</sup>

The clause is, in principle, unconditional ... Although the high contracting parties have the option of stating that the clause is conditional, its conditional nature is not presumed and is thus not an essential feature of the clause...<sup>169</sup>

... If it is not expressly stated that the clause is conditional, it is agreed ... that it shall be considered unconditional.<sup>170</sup>

(19) In the commercial treaty practice of the Soviet Union and other socialist countries the most-favoured-nation clause is always applied in its unconditional and gratuitous form. This is expressly provided for in many treaties, but even without express provision to this effect most-favoured-nation clauses are understood to grant most-favoured-nation treatment unconditionally and without compensation. This follows from the fact that the treaties in question do not contain any reservation concerning compensation or countervalue.<sup>171</sup>

<sup>165</sup> See *Yearbook ... 1969*, vol. II, pp. 175 *et seq.*, doc. A/CN.4/213, annex I.

<sup>166</sup> *Ibid.*, p. 181, doc. A/CN.4/213, annex II.

<sup>167</sup> Guggenheim, *op. cit.*, p. 211.

<sup>168</sup> Level, *loc. cit.*, p. 333, para. 5, citing the North Atlantic Coast Fisheries Case of 7 September 1910 before the Permanent Court of Arbitration (see United Nations, *Reports of International Arbitral Awards*, vol. XI (United Nations publication, Sales No. 61.V.4), p. 167), and J. Basdevant, "L'affaire des pêcheries des côtes septentrionales de l'Atlantique", *Revue générale de droit international public*, Paris, vol. XIX (1912), pp. 538 *et seq.*

<sup>169</sup> Level, *loc. cit.*, p. 338, para. 35.

<sup>170</sup> Vignes, *loc. cit.*, p. 219, who also quotes in support of this view D. P. O'Connell, *International Law*, London, Stevens, 1970, vol. I, p. 268, and J. Dehaussy, *Juris-classeur de droit international*, fasc. 12-B, *Sources du droit international - Les traités (Effets : Situation des États tiers et de leurs ressortissants)*, Paris, Editions techniques, 1959, vol. 5, p. 7, para. 15.

<sup>171</sup> See State Institute of Law of the Academy of Sciences of the Soviet Union, *op. cit.*, p. 251.



(20) As to the British practice, it has been stated that:

... in principle, m.f.n. clauses ought to be interpreted unconditionally ... "those clauses have the same meaning whether that word [unconditionally] be inserted or not". ...

This rule of interpretation must, however, be qualified by the exception that it cannot be applied against a country which, as a matter of common knowledge, has adopted the conditional type of m.f.n. clause as part and parcel of its national treaty policy.<sup>172</sup>

(21) On that matter another view was taken before the International Court of Justice by the agent of the United States in the *Case concerning rights of nationals of the United States of America in Morocco* (1952):

The United States is entirely in agreement that the meaning of the clause should be determined by reference to the intent of the parties at the time. The only difference that we have with our distinguished opponents is that they would construe the clause as conditional by referring only to the practice of the United States in interpreting *other* treaties signed under *other* circumstances, and not by what the United States and Morocco intended when they signed the treaties which are in issue before this court.<sup>173</sup>

The following excerpt from a memorandum of the Counsellor for the Department of State (Moore) of 8 October 1913 is also of relevance:

It is proper to advert to the fact that the so-called most-favoured-nation clause does not bear an invariable form. In two instances during the past twenty-five years the United States has been obliged to yield its interpretation when confronted with documentary proof that the most-favoured-nation clauses then in question were, during the negotiation of the particular treaties, expressly understood and agreed to have the wider effect claimed by the other contracting parties.<sup>174</sup>

(22) It can be safely said that both doctrine and State practice today favour the presumption of the unconditionality of the most-favoured-nation clause.

#### *Conditions of compensation*

(23) In the previous paragraphs of the present commentary, as in the literature and practice concerning most-favoured-nation clauses generally, a clause is referred to as being "conditional" if it was couched in a form such as appeared in the practice of the United States until 1923. That this form, as has been shown above, has virtually disappeared, does not mean that States cannot agree to couple their most-favoured-nation agreement with conditions which make the existence of the right of the beneficiary State to most-favoured-nation treatment dependent upon the according by the beneficiary State to the granting State of an agreed form of compensation in exchange.

(24) An agreement by which, for example, most-favoured-nation treatment is promised to the beneficiary State on condition that the latter will accord certain

economic (e.g. a long-term loan) or political advantages to the granting State is perfectly feasible. Similarly, conditions can be set as to the beginning or the end of the enjoyment of most-favoured-nation treatment, etc. Obviously such or other conditions have to be inserted in the clause, or in the treaty containing it, or be otherwise agreed between the granting and beneficiary States.

(25) The articles adopted by the Commission do not deal explicitly with the so called American form of the conditional clause. However, in view of the possibility that exists for States to agree on conditions that are "separate from the favored interest and relating only to something the other party must do or not do to qualify as the most-favored-nation,"<sup>175</sup> the Commission decided to provide in the present draft for the effect of most-favoured-nation clauses made subject to a "condition of compensation", a term which has been defined in article 2. In particular, there is one type of clause made subject to a condition of compensation to which the Commission paid special attention, namely, the most-favoured-nation clause coupled with the condition of reciprocal treatment.

#### *The clause and reciprocity*

(26) When speaking of reciprocity in relation to the most-favoured-nation clause, it has to be kept in mind that normally most-favoured-nation clauses are granted on a reciprocal basis, i.e. both parties to a bilateral treaty or all parties to a multilateral treaty accord each other most-favoured-nation treatment in a defined sphere of relations. This form of reciprocity is a normal feature of the most-favoured-nation clause; it could be said to be the clause's essential ingredient. Unilateral most-favoured-nation clauses occur only exceptionally at the present time.

(27) A case in point is the treaty of 13 October 1909 by which Switzerland unilaterally granted most-favoured-nation treatment to Germany and Italy regarding the use of the railway built on the Gotthard, in Switzerland.<sup>176</sup> Such a unilateral clause can occur, as noted above,<sup>177</sup> in a treaty by which most-favoured-nation treatment is accorded to the ships of a land-locked State in the ports and harbours of the granting State. Thus in article 11 of the Treaty of Trade and Navigation between the Czechoslovak Republic and the German Democratic Republic of 25 November 1959, the latter State unilaterally granted most-favoured-nation treatment to "Czechoslovak merchant vessels and their cargoes ... on entering and leaving, and while lying in, the ports of the German Democratic Republic".<sup>178</sup> A similar situation may arise if the treaty regulates specifically the trade and the customs tariff regarding one particular kind of product only (e.g. oranges) in respect of which there is but one-way traffic between the two contracting parties.

(28) A unilateral promise, or rather a *pactum de contrahendo* concerning future agreements on unilateral

<sup>172</sup> Schwarzenberger, *International Law and Order* (op. cit.), p. 137, quoting *British and Foreign State Papers, 1885-1886*, London, Ridgway, 1893, vol. 77, p. 796.

<sup>173</sup> Rejoinder of 26 July 1952, *I.C.J. Pleadings, Morocco Case* (France v. United States of America), 1950, vol. II, p. 318. For a fuller reference, see *Yearbook ... 1970*, vol. II, p. 208, doc. A/CN.4/228 and Add.1, para. 52.

<sup>174</sup> Hackworth, op. cit., p. 279.

<sup>175</sup> Snyder, op. cit., p. 21.

<sup>176</sup> Guggenheim, op. cit., p. 207.

<sup>177</sup> See article 4 above, para. (6) of the commentary.

<sup>178</sup> United Nations, *Treaty Series*, vol. 374, p. 120.

most-favoured-nation grants, is stipulated in annex F, part II, of the Treaty concerning the establishment of the Republic of Cyprus, signed at Nicosia on 16 August 1960, quoted above.<sup>179</sup>

(29) Unilateral most-favoured-nation clauses, coupled with reciprocity, were included in the peace treaties which the Allied and Associated Powers concluded in 1947 with Bulgaria (article 29);<sup>180</sup> Hungary (article 33);<sup>181</sup> Romania (article 31);<sup>182</sup> Finland (article 30);<sup>183</sup> and Italy (article 82).<sup>184</sup> The same clause was included in the State Treaty for the re-establishment of an independent and democratic Austria (article 29).<sup>185</sup>

(30) By the mere stipulation of reciprocity a unilateral clause does not become bilateral.<sup>186</sup> This can be illustrated by the following quotation from article 33 of the Hungarian Peace Treaty:

... the Hungarian Government ... shall grant the following treatment to each of the United Nations which, in fact, reciprocally grants similar treatment in like matters to Hungary:

(a) In all that concerns duties and charges on ... the United Nations shall be granted unconditional most-favoured-nation treatment; ...<sup>187</sup>

The meaning of this clause is clear: although the right of the United Nations to claim most-favoured-nation treatment was subject to the offering to reciprocity, it was still a unilateral right; the provision did not entitle Hungary to demand most-favoured-nation treatment.

(31) While the American form of the conditional clause can now be deemed to have virtually disappeared, the most-favoured-nation clause coupled with the condition of reciprocal treatment still exists. It is to be noted, however, that the application of this category of clauses made subject to a condition of compensation is restricted to certain spheres, such as consular immunities and functions, matters of private international law and matters customarily dealt with by establishment treaties.

(32) It has been indicated that the shift in the policy of the United States from conditional to unconditional most-favoured-nation treatment with regard to commercial matters in the early 1920s was not accompanied by a shift in relation to consular rights and privileges, with respect to which the use of the conditional clause (or rather the clause conditional on reciprocal treatment) continued.<sup>188</sup>

(33) In a letter dated 20 January 1967, the Department of State reported to the Senate Foreign Relations Com-

mittee that most of the consular agreements concluded by the United States of America contained a criminal immunity provision which was applicable to the consular personnel if the sending State concerned agreed to give "reciprocal treatment" to American consular officers.<sup>189</sup>

(34) An example of this kind of clause based on reciprocal treatment is article 14 of the Italo-Turkish Consular Convention of 9 September 1929. It reads as follows:

The Consular officials of each of the High Contracting Parties shall further enjoy, subject to reciprocity, in the territory of the other Party, the same privileges and immunities as the Consular officials of any third Party of the same character and rank, so long as the latter enjoy such privileges.

The High Contracting Parties agree that neither of them shall be entitled to appeal to the advantages under a Convention with a third Party in order to claim for its Consular officials privileges or immunities other or more extended than those granted by the Party itself to the Consular officials of the other Party.<sup>190</sup>

(35) A more recent instance of such a provision is the first paragraph of article 3 of the Convention on conditions of residence and navigation between the Kingdom of Sweden and the French Republic, signed at Paris on 16 February 1954:

Subject to the effective application of reciprocity, the nationals of each of the High Contracting Parties residing in the territory of the other Contracting Party shall have the right, in the territory of the other Contracting Party, under the same conditions as nationals of the most-favoured-nation, to engage in any commerce or industry, as well as in any trade or profession, that is not reserved for nationals.<sup>191</sup>

(36) Another recent example can be found in the Consular Convention between Poland and Yugoslavia, signed at Belgrade on 17 November 1958, article 46 of which reads as follows:

Each Contracting Party undertakes to accord the other Contracting Party most-favoured-nation treatment in all matters relating to the privileges, immunities, rights and functions of consuls and consular staff. However, neither Contracting Party may invoke the most-favoured-nation clause for the purpose of requesting privileges, immunities and rights other or more extensive than those which it itself accords to the consuls and consular staff of the other Contracting Party.<sup>192</sup>

(37) The clause conditional upon reciprocity of treatment is a simplified form of the clause made subject to a condition of compensation.<sup>193</sup> According to one source:

This system seems clearer and more practical than the preceding one: it does not refer to the counterpart provided by the favoured State, but seeks to establish perfect symmetry between the benefits provided by the granting State and by the State benefiting by the clause. In other words, it seeks to establish material reciprocity. This implies a measure of symmetry between the two legislations. As Niboyet says, "this diplomatic reciprocity thus has an international head but two national feet. It is a triptych."

From the purely logical point of view, this is quite satisfying intellectually, but not very satisfactory in practice. Quite apart from the difficulties which the interpretation of reciprocity always

<sup>179</sup> See article 4 above, para. (14) of the commentary.

<sup>180</sup> United Nations, *Treaty Series*, vol. 41, p. 21.

<sup>181</sup> *Ibid.*, p. 135.

<sup>182</sup> *Ibid.*, vol. 42, p. 3.

<sup>183</sup> *Ibid.*, vol. 48, p. 203.

<sup>184</sup> *Ibid.*, vol. 49, p. 3.

<sup>185</sup> *Ibid.*, vol. 217, p. 223.

<sup>186</sup> For a different view on the matter, see that of the Rapporteur of the Institute of International Law, P. Pescatore, « La clause de la nation la plus favorisée dans les conventions multilatérales », *Annuaire de l'Institut de droit international*, 1969, Basle, vol. 53, t. I, p. 204, foot-note 3.

<sup>187</sup> United Nations, *Treaty Series*, vol. 41, p. 204.

<sup>188</sup> See *Yearbook ... 1968*, vol. I, p. 186, 976th meeting, para. 8.

<sup>189</sup> Whiteman, *op. cit.*, pp. 752 and 753.

<sup>190</sup> League of Nations, *Treaty Series*, vol. CXXIX, p. 195.

<sup>191</sup> United Nations, *Treaty Series*, vol. 228, p. 141.

<sup>192</sup> *Ibid.*, vol. 432, p. 323.

<sup>193</sup> See *Yearbook ... 1969*, vol. II, pp. 166 and 167, doc. A/CN.4/213, para. 58.

entails, this system has the disadvantage of reducing the benefits, if any, of the most-favoured-nation clause, without eliminating the resulting disadvantages for the granting State. Of course, the beneficiary State cannot bring the clause into operation without offering the very advantages which it claims, but the unilateral nature of that step will almost always mean that the reciprocal benefits, although theoretically equivalent, will be very different in practice...<sup>194</sup>

(38) Clearly the drafters of most-favoured-nation clauses combined with a condition of reciprocity of treatment do not aim at a treatment of their compatriots in foreign lands which is equal with that of the nationals of other countries, whereas equality with competitors is of paramount importance in matters of trade, and particularly as regards customs duties. What they are interested in is a different kind of equality: equal treatment granted by the contracting States to each other's nationals. Hence the view of an author:

The most-favoured-nation clause combined with the condition of reciprocity does not seem to be conducive to the unification and simplification of international relations, a fact which deprives the clause of the few merits formerly attributed to it.<sup>195</sup>

*Text of the articles adopted by the Commission on the ground of the preceding considerations*

(39) Article 11 describes the effect of an unconditional most-favoured-nation clause which, for the purposes of the present draft articles, is designated as a clause not made subject to a condition of compensation, a term defined in article 2. According to article 11, in the case of a most-favoured-nation clause not made subject to a condition of compensation the beneficiary State acquires the right to most-favoured-nation treatment (as defined in article 5) and the obligation to accord any compensation to the granting State does not arise for the beneficiary State. Article 12, on the other hand, describes the effect of a most-favoured-nation clause made subject to a condition of compensation. It states that, in the case of a most-favoured-nation clause made subject to a condition of compensation, the beneficiary State acquires the right to most-favoured-nation treatment only upon according the agreed compensation to the granting State. Article 13 describes the effect of a most-favoured-nation clause made subject to a condition of reciprocal treatment, a term which has also been defined in article 2. The Commission deemed it appropriate to provide separately for this type of condition in view of its being the most commonly found among the possible conditions of compensation. The rule of article 13 is an application of the general rule contained in article 12 to the specific case of most-favoured-nation clauses subject to the condition of reciprocal treatment.

(40) A most-favoured-nation clause can be made subject to the condition of reciprocal treatment by the wording of the clause itself, or by another provision of the treaty containing the clause or of any other treaty, or by any other kind of agreement between the granting and beneficiary States.

(41) The meaning of reciprocal treatment, as indicated in paragraph 1 (f) of article 2,<sup>196</sup> is "equivalent" treatment i.e. treatment of the same kind and of the same measure. For instance, if both the granting State and the beneficiary State permit each other's nationals access to their courts without depositing security for costs (*cautio judicatum solvi*), this constitutes reciprocal treatment, or similarly if they permit each other's nationals the free exercise of a certain kind of trade. This is called in French doctrine "réciprocité trait pour trait". As will be seen in connexion with article 20, a most-favoured-nation clause of such a kind does not possess the same automaticity as the unconditional form, because the beneficiary State can enjoy the treatment extended by the granting State to a third State only after assuring the granting State that it will accord to it or to persons or things in a determined relationship with it treatment of the same kind.

(42) The conditions of reciprocity in a most-favoured-nation clause can give rise to serious questions of interpretation, mainly if the relevant rules of the interested countries differ substantially from each other.<sup>197</sup> This inherent difficulty, however, does not alter the validity of the rule.

(43) The arising and the termination or suspension of rights under a most-favoured-nation clause combined with reciprocal treatment are dealt with later.<sup>198</sup>

**Article 14. Compliance with agreed terms and conditions**

**The exercise of rights arising under a most-favoured-nation clause for the beneficiary State or for persons or things in a determined relationship with that State is subject to compliance with the relevant terms and conditions laid down in the treaty containing the clause or otherwise agreed between the granting State and the beneficiary State.**

*Commentary*

(1) As a result of the Commission's consideration of the articles dealing with most-favoured-nation clauses made subject to conditions, it emerged that there might be a gap in the draft if provision were not to be made, not only for conditions of compensation and, more specifically, of reciprocal treatment, but also for the case of conditions concerning the exercise of rights arising under a most-favoured-nation clause. It is apparent that the word "conditions" is used in practice to cover not only those according to which the right of the beneficiary State under the clause is made subject to its giving concessions in exchange to the granting State, but also those on whose fulfilment the exercise of such a right is made dependent. The latter conditions are common in practice and may be imposed by the internal law of the granting State or may be agreed between the granting and beneficiary States in the treaty containing the clause or otherwise.

<sup>194</sup> Piot, *loc. cit.*, pp. 9 and 10.

<sup>195</sup> Level, *loc. cit.*, p. 338, para. 37.

<sup>196</sup> See article 2 above, paras. (7) to (11) of the commentary.

<sup>197</sup> Batifol, *op. cit.*, pp. 213 and 214, No. 188.

<sup>198</sup> See articles 20 and 21 below, and the commentaries thereto.

## (2) As an authoritative source has explained:

The conditions attaching to the grant of a specific type of more favourable treatment claimed under the most-favoured-nation clause are not to be confused with the conditional form of the most-favoured-nation clause. What is involved here is not reciprocal treatment within the meaning of the conditional form of the most-favoured-nation clause but requirements relating to the factual content of the more favourable treatment itself (e.g. a certificate of qualification as a requirement for the licensing of an alien to engage in a particular trade, certificates of origin or of analysis for purposes of proof of origin and customs classification of goods). Such factual requirements must, however, be objectively related to the advantage which is to be granted and must not be used for the purpose of engaging in concealed discrimination.<sup>199</sup>

The last sentence of the quotation draws attention to the requirement of good faith. This is of course not restricted to this particular situation.

(3) Article 22 (Compliance with the laws and regulations of the granting State) applies to the case of conditions that may be imposed by the internal law of the granting State. The present article is designed to cover the case of other conditions agreed upon between the granting and beneficiary States for the purpose of completeness of the draft. The wording of article 14 repeats that of the first sentence of article 22, with the necessary adjustments. In particular, the reference is to "terms and conditions", in order further to emphasize that what is involved is agreed stipulations regarding the exercise of rights under a most-favoured-nation clause.

**Article 15. Irrelevance of the fact that treatment is extended to a third State against compensation**

**The acquisition without compensation of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause not made subject to a condition of compensation is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended against compensation.**

*Commentary*

(1) It is not only most-favoured-nation promises that can be classified as unconditional or conditional on reciprocal treatment or on another kind of compensation; the favours extended by the granting State to third States can be classified in a similar manner; they can be granted unilaterally as a gift, in theory at least, or they can be accorded against some kind of compensation. For example, the granting State may reduce its tariffs on oranges imported from a third State unilaterally or it can bind this reduction to a tariff reduction by the third State on the textiles imported by the latter from the granting State. To give another example, the granting State can assure the third State that the consuls of the latter will have immunity from criminal jurisdiction uni-

laterally or it may agree with the third State that the grant of immunity from criminal jurisdiction will be reciprocal. If in such types of cases the granting State offers the most-favoured-nation treatment to a beneficiary State unconditionally, the question arises: are the rights of the beneficiary State affected by whether the promises of the granting State to the third State were made subject to certain conditions or not?

(2) There is a contradictory practice regarding the question just posed. In certain cases the courts reached conclusions different from the conclusion reflected in article 15. Thus in 1919 the highest Court of Argentina rejected an appeal against a decision of the High Court of Santa Fé and ruled that:

... neither the appellant's invocation of the powers conferred upon consuls under the treaties concluded with the United Kingdom in 1825 (article 13) and with the Kingdom of Prussia and the States of the German Customs Union in 1857 (article 9), which he claims extend to consuls of the Kingdom of Italy by virtue of the most-favoured-nation clause inserted in the agreements concluded with that Kingdom, nor precedent—if any—would affect the settlement of the point at issue under federal law. In the first place, since these were concessions granted subject to reciprocity, it would have been necessary to show that the Italian Government granted, or was prepared to grant, those same concessions to consuls of Argentina...<sup>200</sup>

(3) A German court in 1922 rejected an appeal by a French plaintiff against an order to deposit security for costs in an action brought by him against a German national. Section 110 of the German Code of Civil Procedure laid down that aliens appearing as plaintiffs before German courts must at the defendant's request deposit a security for costs. That provision did not apply to aliens whose own State did not demand security for costs from Germans appearing as plaintiffs. In article 291 (I) of the Treaty of Versailles, Germany undertook:

to secure to the Allied and Associated Powers, and to the officials and nationals of the said Powers, the enjoyment of all the rights and advantages of any kind which she may have granted to Austria, Hungary, Bulgaria or Turkey, or to the officials and nationals of these States by treaties, conventions or arrangements concluded before August 1, 1914, so long as those treaties, conventions or arrangements remain in force.

There existed between Germany and Bulgaria a treaty providing for the exemption, on the basis of reciprocity, from the duty to deposit security for costs. In a note communicated to Germany in April 1921, the French Government informed the German Government that it wished to avail itself of the relevant provisions of the treaty between Germany and Bulgaria. The plaintiff did not prove that in France German nationals were exempt from depositing security for costs in actions brought against French nationals. The Upper District Court held that the appeal must be dismissed. Article 291 of the Treaty of Versailles, according to the Court, did not oblige Germany to grant to French nationals wider privileges than those granted to the nationals of the former Central Powers. The Court said that the treaty with

<sup>199</sup> Jaenicke, *loc. cit.*, p. 499. See the "Swiss Cow" case, cited in para. (20) of the commentary to articles 9 and 10 above.

<sup>200</sup> See Secretariat Digest (*Yearbook ... 1973*, vol. II, p. 118, doc. A/CN.4/269, foot-note 2).

Bulgaria was based on reciprocity and that, as France did not grant such reciprocal treatment, its nationals were not entitled to an exemption from the duty to deposit security for costs.<sup>201</sup>

(4) The following instance, although coloured with references to French internal legislation, reveals the various trends in French thinking on the problem at issue. The brothers Betsou, Greek nationals, in 1917 leased certain premises in Paris for commercial use. The lease expired in 1926. The lessors refused to renew the lease, whereupon the plaintiffs claimed 200,000 francs as damages for eviction. Their claim was based on the provisions of the law of 30 June 1926, which granted certain privileges to those engaged in business activities. In support of their claim to the privileges of this law in spite of their foreign nationality, they cited the Franco-Greek Convention of 8 September 1926, and through the operation of the most-favoured-nation clause contained therein, the Franco-Danish Convention of 9 February 1910, Denmark being in this regard the most-favoured-nation. Article 19 of the law of 1926 provided that aliens should be entitled to its privileges only subject to reciprocity. The Civil Tribunal of the Seine held for the plaintiffs and said that, through the operation of the most-favoured-nation clause, Greek nationals in France enjoyed the same privileges in commerce and industry as Danish nationals. The Franco-Danish Convention stipulated that in the exercise of their commercial activities Danes enjoyed all the privileges granted to French nationals by subsequent legislation. The law of 30 June 1926 undoubtedly conferred privileges upon those who were engaged in commerce. Although the terms of article 19 of the French law required reciprocity in legislation as an absolute and imperative rule, and although there was no legislation on commercial property in Denmark, the French law should be interpreted in accordance with the Franco-Danish Convention. Danish subjects could not be deprived of their rights and privileges by subsequent French legislation. The Tribunal said:

A convention between nations, as a contract between private persons, is a reciprocal engagement which should be observed by both parties so long as the treaty is not denounced or replaced by a new treaty which restricts the effects of the original contract.

The Court of Appeal of Paris, reversing the decision of the Tribunal of the Seine, held that the brothers Betsou could not claim a right to the renewal of their lease. The law of 30 June 1926 clearly showed that it construed the right of commercial property as "*un droit civil stricto sensu*", that is to say, as a right subject to the provision of article 11 of the Civil Code, which made the enjoyment of rights by foreigners dependent upon the reciprocal treatment of French subjects abroad. In the Franco-Danish treaty it had been carefully stated that the nationals of the two States would enjoy the rights and privileges stipulated only in so far as those rights and privileges were compatible with the existing legislation of the two States, and Danish legislation did not recognize

the rights of foreigners to hold commercial property in Denmark.<sup>202</sup>

(5) An important French source finds the solution of the lower court, the Civil Tribunal of the Seine, justified. According to this source:

Reciprocity (whether that of article 11 [of the Civil Code] or that deriving from a reciprocity clause) is concrete reciprocity. On the other hand, the most-favoured-nation clause, when it is bilateral, establishes a kind of abstract reciprocity: States mutually undertake to accord to each other the treatment which they accord to some more-favoured third States. Here the clause appears like one of those treaties referred to in article 11 [of the Civil Code] which grant exemption from the requirement of material reciprocity.<sup>203</sup>

(6) A convincing motivation for the solution proposed in article 15 can be found in a Greek decision reported as follows. The Convention concerning Establishment and Judicial Protection concluded between Greece and Switzerland on 1 December 1927 provides in article 9 that:

In no case shall the nationals of either of the Contracting Parties be subjected on the territory of the other Contracting Party to charges, customs duties, taxes, dues or contributions of any nature different from or higher than those which are or will be imposed on subjects of the most-favoured-nation.

Article 11, which relates to commercial, industrial, agricultural and financial companies duly constituted according to the laws of one of the Contracting Parties and having their headquarters on its territory, provides that the said companies

shall enjoy, in every respect, the benefits accorded by the most-favoured-nation clause to similar companies, and, in particular they shall not be subject to any fiscal contribution or charge, of whatever kind and however called, different from or higher than those which are or will be levied on companies of the most-favoured-nation.

The appellant in this case, a Swiss company whose head office was situated in Geneva, claimed exemption from income tax, invoking in support of that claim the Anglo-Greek Convention of 1936 for the Reciprocal Exemption from Income Tax on Certain Profits or Gains Arising from an Agency. Under that Convention, the profits or gains accruing in Greece to a person resident or to a body corporate whose business was managed and controlled in the United Kingdom, were exempted from income tax on condition of reciprocity. It was held that the appellant was entitled to fiscal exemption. It was said, *inter alia*, that:

Whereas, in economic treaties in particular, the purpose of the most-favoured-nation clause is to avoid the danger that the subjects of Contracting States might possibly be placed in an unfavourable position compared with subjects of other States in the context of international economic competition. Through the operation of that clause, each of the two Contracting States grants to the other the favours which it has already granted to a third State and undertakes to grant it any favours which it may grant to a third State in future, for the duration of the treaty. Provided

<sup>201</sup> *Security for Costs (Treaty of Versailles) Case*, Germany, Upper District Court, Frankfurt-on-the-Main, 11 December 1922 (*ibid.*, p. 128, doc. A/CN.4/269, paras. 24 and 25).

<sup>202</sup> *Betsou v. Volzenlogel*, France, Civil Tribunal of the Seine, 23 December 1927; Court of Appeal of Paris (First Chamber), 24 December 1928 (*ibid.*, p. 129, doc. A/CN.4/269, paras. 28-30).

<sup>203</sup> Level, *loc. cit.*, p. 338, para. 36.

that there is no stipulation to the contrary in the agreement, such latter favours accrue *ipso jure* to the beneficiary of the clause, which does not have to furnish any additional compensation, even where the concessions granted to the third State are not unilateral but are subject to reciprocity. When interpreted in that sense, the clause achieves the purpose for which it was designed, namely, assimilation in each of the two States, in respect of the matters to which the clause relates, of the subjects or enterprises of the other State to the subjects or enterprises of a third and favoured country.

Whereas, in the current case, the most-favoured-nation clause embodied in the convention between Greece and Switzerland is simply stated without restriction or onerous conditions, and as such confers upon Swiss enterprises operating in Greece the right to fiscal exemption under the conditions under which the same exemption is granted to British enterprises, even if Greek enterprises do not enjoy in Switzerland the favour which they enjoy in Great Britain. Consequently, the impugned decision ... should for that reason be set aside...<sup>204</sup>

(7) The Commission believes that the rule stated in article 15 is in conformity with modern thinking on the operation of the most-favoured-nation clause. If the clause is not made subject to a condition of compensation, then the beneficiary State and the persons or things in a determined relationship with it acquire automatically the favours extended by the granting State to a third State or to persons or things in a determined relationship with it in the manner and under the conditions described in articles 9 and 10. If the most-favoured-nation clause in question is not explicitly made subject to a condition of compensation or if it is silent concerning such a condition, then, in the view of the Commission, the beneficiary State cannot be refused the treatment extended by the granting State to a third State on the ground that that treatment has been given against reciprocal treatment or against any other compensation. This is obvious if it is considered that the American form of conditional clause has virtually gone out of use. It seems to be evident also in spheres other than trade. In these spheres the parties to a most-favoured-nation clause can freely agree on granting each other most-favoured-nation treatment subject to reciprocal treatment or any other kind of compensation. In such cases the question does not arise. If they fail to do so, however, it follows from the nature of an unconditional most-favoured-nation clause that the granting State cannot withhold from the beneficiary State the treatment extended by it to a third State on the ground that that latter treatment was not extended gratuitously but against reciprocity of treatment or any other kind of compensation.

(8) On the basis of the foregoing, the Commission found it appropriate to adopt a rule stating the irrelevance of the fact that treatment is extended to a third State against compensation. The use of the phrase "is not affected by the mere fact", in this and the following four articles, is intended to underline the "irrelevance" aspect of their provisions, which alone justifies their inclusion in the draft. In short, that phrase is intended to emphasize that the right to most-favoured-nation treatment exists, not-

withstanding the modalities of the extension of treatment by the granting State to the third State. The rule embodied in this article is in accordance with the basic purposes of a most-favoured-nation clause and also with the presumption of the unconditionality of that clause.

**Article 16. Irrelevance of limitations agreed between the granting State and a third State**

**The acquisition of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended under an international agreement between the granting State and the third State limiting the application of that treatment to relations between them.**

*Commentary*

(1) This rule clearly follows from the general rule regarding third States of the Vienna Convention (articles 34 and 35) and also from the nature of the most-favoured-nation clause itself. The statement of the rule is warranted, however, by the fact that there exist a number of agreements aiming more or less clearly at a result of the kind referred to in the article, notwithstanding the doubts about the effect of such agreements upon the rights of third States, beneficiaries of a most-favoured-nation clause. Such agreements can take the form of treaty provisions ("clauses réservées"), or they may be implied in certain multilateral treaties.

(2) The rule proposed in the article applies to most-favoured-nation clauses irrespective of whether they belong to the unconditional type or take the form of a clause conditional upon any form of compensation, in particular reciprocal treatment. The rule was formulated in paragraph 2 of the resolution adopted by the Institute of International Law at its fortieth session, in 1936, as follows:

This régime of unconditional equality [established by the operation of an unconditional most-favoured-nation clause] cannot be affected by the contrary provisions of ... conventions establishing relations with third States.<sup>205</sup>

(3) In the League of Nations Economic Committee there was a discussion of the question, originally raised at the Diplomatic Conference held at Geneva to draw up an international convention on the abolition of import and export prohibitions and restrictions, whether States not parties to the proposed convention could, by virtue of bilateral agreements based on the most-favoured-nation clause, claim the benefit of any advantages mutually conceded by the signatories to the international convention. At the Conference it was soon realized, however, that that question could not be answered in the convention, which could not affect the contents of bilateral agreements based on the most-favoured-nation clause. In

<sup>204</sup> Fiscal Exemption Case in Greece; Greece, Conseil d'État, 1954. See Secretariat Digest, (*Yearbook* ... 1973, vol. II, p. 138, doc. A/CN.4/269, paras. 58 and 59).

<sup>205</sup> See *Yearbook* ... 1969, vol. II, p. 181, doc. A/CN.4/213, annex II.

the Economic Committee, a proposal was made to adopt a provision designed to restrict the stipulations of the convention to the contracting parties.<sup>206</sup>

(4) There are a number of conventions that contain clauses by which the parties intend to restrict certain benefits to the relations established between themselves. Thus the first paragraph of article 6 of the International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels, signed at Brussels on 10 April 1926,<sup>207</sup> reads as follows:

The provisions of this Convention shall be applied in each contracting State, with the reservation that its benefits may not be extended to non-contracting States and their nationals, and that its application may be conditioned on reciprocity.

The following remark has been made by an author concerning this provision:

Such a provision has the disadvantage of failing to release contracting States from their obligations under previous clauses, of having the status of *res inter alios acta* for the other States which are parties to those clauses and thus placing the States which subscribe to it in the position of being potential violators of the clause.<sup>208</sup>

The reference in the clause to reciprocity does not counteract its inherent weakness, because unconditional obligations cannot be transformed into conditional ones without the consent of the respective beneficiaries.

(5) A somewhat milder version of the clause was inserted in the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, also signed at Brussels on 10 April 1926.<sup>209</sup> Article 14 of the Convention reads as follows:

The provisions of this Convention shall be applied in each contracting State in cases in which the vessel to which the claim relates belongs to a contracting State, as well as in any other cases provided for by the national laws.

Nevertheless the principle formulated in the preceding paragraph does not affect the right of the contracting States not to apply the provisions of this Convention in favour of the nationals of a non-contracting State.

(6) Article 98, paragraph 4, of the Havana Charter of 24 March 1948, which was prepared with the intention of establishing an International Trade Organization (ITO), reads as follows:

Nothing in this Charter shall be interpreted to require a Member to accord to non-Member countries treatment as favourable as that which it accords to Member countries under the provisions of the Charter, and failure to accord such treatment shall not be regarded as inconsistent with the terms of the spirit of the Charter.<sup>210</sup>

<sup>206</sup> *Ibid.*, pp. 179 and 180, doc. A/CN.4/213, annex I, under the heading "Relations between bilateral agreements based on the most-favoured-nation clause and economic plurilateral conventions".

<sup>207</sup> League of Nations, *Treaty Series*, vol. CLXXVI, p. 209.

<sup>208</sup> Vignes, *loc. cit.*, p. 291.

<sup>209</sup> League of Nations, *Treaty Series*, vol. CXX, p. 209.

<sup>210</sup> United Nations Conference on Trade and Employment (Havana, November 1947-March 1948), *Final Act and Related Documents* (United Nations publication, Sales No. 1948.II.D.4), p. 51.

Although this provision is not a "clause réservée", it was severely criticized as long ago as 1948. The representative of the Soviet Union stated in the Economic and Social Council that:

Such a provision was equivalent to authorization of a departure from the most-favoured-nation principle in reciprocal relations with non-member countries, and was in patent contradiction to the purpose of expanding world trade...<sup>211</sup>

(7) From a strictly legal point of view, paragraph 4 of article 98 of the ITO Charter is an empty provision because it states only the obvious, namely, that the Charter does not impose obligations upon the members vis-à-vis non-members. The provision has, however, a certain propagational effect, even if it is not assumed that it indirectly encourages the parties to the Charter to break the obligations which may exist for them under bilateral most-favoured-nation clauses with non-members. However, the ITO provision is not, and never was, in force and can hardly be considered as having any effect at present, not even through article XXIX of the General Agreement on Tariffs and Trade, paragraph 1 of which states that:

The Contracting Parties undertake to observe to the fullest extent of their executive authority the general principles ... of the Havana Charter...<sup>212</sup>

(8) According to one source,<sup>213</sup> the idea of the provision contained in article 98 of the Havana Charter is reminiscent of the old conditional most-favoured-nation clause, in that countries that refuse to become parties to the General Agreement—and to make the tariff concessions that such participation would entail—may not be allowed to enjoy freely the benefits of that Agreement.

(9) No author expressly denies the rule proposed in article 16. As stated by one writer:

The validity of the "clause réservée" is difficult to assess. Since the "clause réservée" is *res inter alios acta* as far as the beneficiary State entitled to claim most-favoured-nation treatment is concerned, it is hard to see how that clause, to which the State in question has not acceded, can reduce the scope of the commitments assumed towards it by the granting State.<sup>214</sup>

The same writer tries to distinguish between two situations:

If the treaty granting the privileged advantages and making them the subject of a "clause réservée" predates the convention according most-favoured-nation treatment it could be argued, taking into account the publicity necessarily given to treaties, that the beneficiary State could not have been unaware of the commitments entered into by the granting State and the "clause réservée" relating to those commitments. In such circumstances, the beneficiary State may be regarded as implicitly acceding to the "clause réservée". However, in the case of a "clause réservée" laid down after the most-favoured-nation clauses, the granting State, which has not attached to the latter clauses any accompanying provision limiting their scope, cannot, *a posteriori*,

<sup>211</sup> See *Official Records of the Economic and Social Council, Seventh Session*, 195th meeting, p. 329.

<sup>212</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (*op. cit.*), p. 49. For a contrary view, see Jackson, *op. cit.*, p. 118.

<sup>213</sup> Hawkins, *op. cit.*, p. 85.

<sup>214</sup> Level, *loc. cit.*, p. 336, para. 20.



avoid their application by virtue of a commitment entered into with the favoured State to which the granting State has not been a party.<sup>215</sup>

This distinction, however, seems unwarranted and the argumentation in favour of the effect of the "clause réservée" stipulated previously to the most-favoured-nation clause is not sustained by any rule of the law of treaties. The author quoted abandons this idea himself when he concludes as follows:

We know the solution ... given by the International Court of Justice [in the *Anglo-Iranian Oil Co. case*]. The legal basis for most-favoured-nation treatment lies in the treaty which provides for such treatment, and the advantages accorded to the third State apply to the beneficiary State only by reference. Consequently, the "clause réservée" cannot be invoked against the State which is a beneficiary of the most-favoured-nation clause, since the rights of that State do not derive from the treaty containing the "clause réservée".<sup>216</sup>

**Article 17. Irrelevance of the fact that treatment is extended to a third State under a bilateral or a multilateral agreement**

The acquisition of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended under an international agreement, whether bilateral or multilateral.

*Commentary*

(1) The Commission has stated above that:

It is not necessary ... that the treatment actually extended to the third State, with respect to itself or the persons or things concerned, be based on a formal treaty or agreement. The mere fact of favourable treatment is enough to set in motion the operation of the clause. However, the fact of favourable treatment may consist also in the conclusion or existence of an agreement between the granting State and the third State by which the latter is entitled to certain benefits. The beneficiary State, on the strength of the clause, may also demand the same benefits as were extended by the agreement in question to the third State.<sup>217</sup>

It would seem obvious that, unless the clause otherwise provides or the parties to the treaty otherwise agree, the acquisition of rights by the beneficiary of the clause is not affected by the mere fact that the granting State extended the favoured treatment to a third State under an international agreement, whether bilateral or multilateral.

*The most-favoured-nation clause and multilateral agreements*

(2) However, the question whether a most-favoured-nation clause attracts benefits arising from a multilateral agreement is not without its own history. The relation

between bilateral agreements based on the most-favoured-nation clause and "economic plurilateral conventions" was already a matter of discussion in the period of the League of Nations. The following is an excerpt from the conclusions of the Economic Committee of the League of Nations:

During the Diplomatic Conference held at Geneva to draw up an International Convention on the Abolition of Import and Export Prohibitions and Restrictions, the question arose whether States not parties to that Convention could, by virtue of bilateral agreements based on the most-favoured-nation clause, claim the benefit of any advantages mutually conceded by the signatories of the International Convention. In deference to this consideration, it was even proposed to include a clause to that effect in the Convention. It was soon realized, however, that this question could not be answered in the Convention, which could not affect the contents of bilateral agreements based on the most-favoured-nation clause. The Conference realized the great importance of the problem, both for the general economic work of the League and for the conclusion of future economic agreements under the League's auspices, and the nature and field of application of such agreements. It was urged at the Conference that the conclusion of plurilateral conventions would be hindered if countries, while not acceding to such agreements, could still, without giving any counter-engagements, avail themselves of the engagements undertaken by the signatory States of such conventions.

The Economic Committee of the League was asked to make an exhaustive study of the most-favoured-nation clause in commercial treaties and to put forward proposals regulating it in as comprehensive and as uniform a manner as possible, and it has carefully considered the question, which is the subject of the present report. It took the view that the World Economic Conference of Geneva, when it recommended the conclusion of plurilateral economic conventions with the object of improving the world economic situation and the application of the most-favoured-nation clause in the widest and most unconditional form, probably did not quite realize that—up to a point—these two recommendations might clash. One argument—and a very sound one—brought up in the Economic Committee was that in certain cases countries would have little or no interest in acceding to a plurilateral economic convention or in undertaking the commitments it entailed if, by invoking the most-favoured-nation clause, as embodied in bilateral agreements, they could claim as of right and without incurring corresponding obligations, that the obligations contracted by the signatory States of the plurilateral convention should apply to themselves. It was strongly urged, indeed, that such possibility might seriously impair the whole future economic work of the League and that the only means of averting the danger would be to adopt a provision whereby the most-favoured-nation clause embodied in bilateral commercial treaties would not, as a rule, affect plurilateral economic conventions.

It was objected, however, that a clause of this kind, instead of leading, as the World Economic Conference recommended, to the unlimited application of the most-favoured-nation clause, would actually check it, and that, more especially in countries where the unlimited application of this clause is the basis of commercial relations with foreign countries, such a reservation would probably be misunderstood and might give rise to a hostile attitude towards the League's economic work. It was further argued that a State might quite conceivably, on wholly serious and genuine grounds, be unable to undertake the commitments involved by an international economic convention; that the final decision whether it could do so or not would lie with the State itself; and that it could hardly be asked, as a result of a most-favoured-nation clause drafted *ad hoc* in bilateral commercial treaties, to give up the right in cases of this kind to refuse to accept differential treatment on the part of one or more other States.

<sup>215</sup> *Ibid.*, para. 21.

<sup>216</sup> *Ibid.*

<sup>217</sup> See article 5 above, para. (6) of the commentary.

The arguments advanced on both sides are so cogent that the Economic Committee has not found it possible at this moment to find a general and final solution for this difficult problem.

It is unanimously of opinion, however, that, although this reservation in plurilateral conventions may appear in some cases legitimate, it can only be justified in the case of plurilateral conventions of a general character and aiming at the improvement of economic relations between peoples, and not in the case of conventions concluded by certain countries to attain particular ends the benefits of which those countries would, by such a procedure, be refusing to other States when the latter might, by invoking most-favoured-nation treatment, derive legitimate advantages.

The said reservation should also be expressly stipulated and should not deprive a State not a party to the plurilateral convention of advantages it enjoys either under the national laws of the participating State or under a bilateral agreement concluded by the latter with a third State itself not a party to the said plurilateral convention.

Finally, this reservation should not be admitted in cases in which the State claiming the advantages arising under the plurilateral convention, though not acceding to it, would be prepared to grant full reciprocity in the matter.

The Economic Committee expresses the view that countries which, with reference to the terms of plurilateral economic conventions, agreed to embody in their bilateral agreements based on the most-favoured-nation clause a reservation defined in accordance with the principles set forth above would not be acting contrary to the recommendations of the World Economic Conference of Geneva, and consequently will not be acting in a manner inconsistent with the objects which the League has set itself to attain.<sup>218</sup>

(3) Reservations of this kind were indeed embodied in several European treaties in the following years. One example is the following provision of a commercial treaty concluded between the Economic Union of Belgium and Luxembourg and Switzerland on 26 August 1929:

It is furthermore understood that the most-favoured-nation clause may not be invoked by the High Contracting Parties in order to obtain new rights or privileges which either of them may hereafter grant under collective conventions to which the other is not a party, provided that the said conventions are concluded under the auspices of the League of Nations or registered by it and open for the accession of the States. Nevertheless, the High Contracting Party concerned may claim the benefit of the rights or privileges in question if such rights or privileges are also stipulated in conventions other than collective conventions which fulfil the aforementioned conditions, or if the Party claiming such benefits is prepared to grant reciprocal treatment."<sup>219</sup>

(4) In the era preceding the World Monetary and Economic Conference held at London in 1933, proposals for reaching agreement as to preferred status for collective arrangements came from Europe and were intended in some form or another to cope with American competition in foreign trade on the European market.<sup>220</sup> Such proposals met with strong opposition from the United States.

The situation changed somewhat at the 1933 Conference, where the United States Secretary of State, Mr. Cordell Hull, outlined the conditions under which the United States would be willing to accept the exception of multilateral arrangements from most-favoured-nation commitments. The provision proposed by Mr. Hull for adoption by the Conference read as follows:

The participating Governments urge the general acceptance of the principle that the rule of equality shall not require the generalization to non-participants of the reduction of tariff rates or import restrictions made in conformity with plurilateral agreements that give reasonable promise of bringing about such general economic strengthening of the trade area involved as to prove of benefit to the nations generally; provided such agreements:

- (a) Include a trade area of substantial size;
- (b) Call for reductions that are made by uniform percentages of all tariff rates or by some other formula of equally broad applicability;
- (c) Are open to the accession of all countries;
- (d) Give the benefit of the reductions to all countries which in fact make the concessions stipulated; and
- (e) When the countries party to the plurilateral agreement do not, during the term of the plurilateral treaty, materially increase trade barriers against imports from countries outside of such agreement.<sup>221</sup>

The London Conference, however,

was not only fated to be an addition to the already long list of abortive international economic conferences but, as the result of President Roosevelt's famous message blasting the currency stabilization proposals before the Conference, it was destined to collapse without even the standard amount of pretence that it had succeeded in accomplishing anything of consequence.<sup>222</sup>

Later in 1933, at the Seventh International Conference of American States, held at Montevideo, Mr. Hull submitted and obtained the adoption in principle of a draft agreement having much in common with the proposal he had submitted to the London Conference.

(5) The United States proposal led to the opening for signature on 15 July 1934 of an Agreement concerning non-application of the most-favoured-nation clause to certain multilateral economic conventions.<sup>223</sup> The substantive provisions of the Agreement provide:

#### Article I

The High Contracting Parties, with respect to their relations with one another, will not, except as provided in Article II hereof, invoke the obligations of the most-favoured-nation clause for the purpose of obtaining from Parties to multilateral conventions of the type hereinafter stated, the advantages or benefits enjoyed by the Parties thereto.

<sup>221</sup> League of Nations, Monetary and Economic Conference, *Reports Approved by the Conference on 27 July 1933, and Resolutions Adopted by the Bureau and the Executive Committee* (C. 435.M.220.1933.II [Conf. M.E.22(1)]), p. 43.

<sup>222</sup> Viner, *op. cit.*, p. 36.

<sup>223</sup> Agreement between the United States of America, Economic Union of Belgium and Luxembourg, Colombia, Cuba, Greece, Guatemala, Nicaragua and Panama to refrain from invoking the Obligations of the Most-favoured-nation clause for the purpose of obtaining the Advantages or Benefits established by Certain Economic Multilateral Conventions (League of Nations, *Treaty Series*, vol. CLXV, p. 9).

<sup>218</sup> League of Nations, "Recommendations of the Economic Committee relating to Tariff Policy and the Most-Favoured-Nation Clause" (E.805.1933.II.B.1), pp. 102-104.

<sup>219</sup> League of Nations, *Treaty Series*, vol. CV, p. 13.

<sup>220</sup> See details in J. Viner, *The Customs Union Issue*, Studies in the administration of international law and organization, No. 10, New York, Carnegie Endowment for International Peace, 1950, pp. 22 *et seq.*

The multilateral economic conventions contemplated in this Article are those which are of general applicability, which include a trade area of substantial size, which have as their objective the liberalization and promotion of international trade or other international economic intercourse, and which are open to adoption by all countries.

#### Article II

Notwithstanding the stipulation of Article I, any High Contracting Party may demand, from a State with which it maintains a treaty containing the most-favoured-nation clause, the fulfilment of that clause insofar as such High Contracting Party accords in fact to such State the benefits which it claims.

(6) Notwithstanding the 1935 statement of Secretary of State Hull, quoted in the Commission,<sup>224</sup> this Agreement can hardly be interpreted otherwise than as an expression of the view that a most-favoured-nation pledge, unless otherwise provided, extends the benefits granted under a multilateral agreement. It would seem that the position taken by the United States at the time has been similarly interpreted by an American source.<sup>225</sup> The intention of the Agreement obviously was to create by common consent a conventional and if possible widely accepted exception to the general rule. The experiment failed because only three States became parties to the Agreement: Cuba, Greece and the United States. Little significance can be attributed to the fact that when signing the Agreement, *ad referendum*, the Belgian Ambassador took the attitude that it did not constitute a new rule but merely stated that which was already international law.<sup>226</sup> What the Belgian Ambassador considered settled law in 1935 was put forward by the Belgian Premier in 1938 as a proposal. Mr. van Zeeland, in his report submitted upon the request of the British and French Governments, recommended that:

Exceptions to MFN ... be admitted in order to allow the formation of group agreements aimed at lowering tariff barriers, provided these are open to the accession of other States.<sup>227</sup>

(7) The idea that the most-favoured-nation clause should not attract benefits resulting from provisions of multilateral trade conventions open for all States found its way into the resolution adopted by the Institute of International Law at its fortieth session (Brussels, 1936). Paragraph 7 of that resolution states *inter alia*:

The most-favoured-nation clause does not confer the right:

...

to the treatment resulting from the provisions of conventions open for signature by all States whose purpose is to facilitate and stimulate international trade and economic relations by a systematic reduction of customs duties.<sup>228</sup>

(8) With regard to theory, one writer proposed that a distinction be made in the sphere of international trade

and customs tariffs between "collective treaties of special interest" and "collective treaties of general interest".<sup>229</sup> Most-favoured-nation clauses embodied in bilateral treaties would attract the benefits stipulated in the former but would not give the right to advantages promised in treaties of the latter type because, the argument went, those treaties being open to all States, their advantages could be easily acquired by accession. In that way acceding States would assume also the obligations imposed by the treaty and put themselves in a position of equality with the other parties to it, whereas through the operation of a most-favoured-nation clause they would claim only the advantages of the multilateral treaty without submitting to its obligations.<sup>230</sup>

(9) This theory received strong criticism from another writer. Referring to the argument based on the openness of the multilateral treaties in question, he wrote:

Two answers may be made to this: the first is that, if the clause is unconditional, it will be turned into a conditional clause since the country acceding to the treaty will have to assume the obligations of that treaty in order to acquire its advantages. To maintain that any other solution would be immoral would be to question the very concept of the unconditional clause, since it invariably has the effect of conferring advantages without corresponding obligations.

Moreover, how can the criticism levelled at the unconditional clause in connexion with plurilateral treaties be reconciled with the Economic Committee's recommendation that the unconditional formula should always be used? Furthermore, the fact that the commitment entered into becomes burdensome at a particular point in time is insufficient grounds for *arrogating the right to modify it*.\*

In any even, what is an open treaty? Mr. Ito himself mentions the case of a treaty to which all States wishing to do so could theoretically become parties but whose terms are such that, in practice, they could only be fulfilled by the original signatories.

Furthermore, even if those terms can be fulfilled, they are far from being unimportant. A State acceding to the treaty at a subsequent stage would have to accept them without having been able to discuss them. Such a State may find the obligations imposed on it in return for advantages to which it would in fact be entitled without counterpart if the clause was unconditional, more burdensome than do other countries. It may also have special reasons for not acceding to the treaty. Affiliation to a group, even one of a purely economic character, invariably has political repercussions which may preclude such affiliation.

To call upon the country to which the clause has been accorded to accede to an agreement which it may find unacceptable is rather like someone telling his creditor: "I have promised to pay you a million, but I am absolved from having to do so because you are free to marry Mis X, whose dowry will provide you with that amount."

The fact that, in such a case, all the benefits of the clause would be withdrawn from the country to which an undertaking has been made also emerges clearly from the fact that it would be placed on exactly the same footing as countries which had not obtained the promise of most-favoured-nation treatment and which are in just as good a position as that country to accede to the open treaty.

<sup>224</sup> Secretary of State Cordell Hull to President Roosevelt, 10 May 1935, MS. Department of State, File 710G, Commercial Agreement/108 (see *Yearbook ... 1968*, vol. I, p. 186, 976th meeting, para. 11 and foot-note 4).

<sup>225</sup> Whiteman, *op. cit.*, p. 765.

<sup>226</sup> Hackworth, *op. cit.*, p. 293.

<sup>227</sup> League of Nations, *Commercial Policy in the Interwar Period: International Proposals and National Policies* (Ser. L.O. N.P.1942.II.A.6), p. 84.

<sup>228</sup> *Yearbook ... 1969*, vol. II, p. 181, doc. A/CN.4/213, annex II.

<sup>229</sup> N. Ito, *La clause de la nation la plus favorisée*, Paris, les Editions internationales, 1930.

<sup>230</sup> Similarly, G. Scelle, *Précis de droit des gens - Principes et systématique*, Paris, Sirey, 1934, vol. II, p. 390.

We are thus led to conclude that the most-favoured-nation clause is indeed an obstacle to the negotiation of plurilateral treaties and that that obstacle can be removed only by an express reservation in the instrument embodying the clause or by the amicable agreement of the States beneficiaries of the clause.<sup>231</sup>

(10) The preceding views have received support from another authority, who writes:

... whatever the arguments in favour of the opportuneness of excluding [from the advantages of a collective treaty] the State party to the bilateral treaty, such exclusion is difficult to reconcile with the most-favoured-nation clause and clearly contradicts the guarantees of equality previously given to the State which is the beneficiary of that clause. While the ostensible purpose of such action would be to thwart the selfish designs of a State wishing to obtain tariff advantages cheaply, would it not be even more immoral to deny a co-contractor the application of a clause whose benefits it had previously been promised?

...

It must be recognized that, from the point of view of legal technique, the latter solution [an express reservation or the amicable agreement of the States beneficiaries of the clause] was more correct, since it shows greater concern to respect the concordance of the will of States, which is the only sound basis for positive law.<sup>232</sup>

#### *GATT and non-member States*

(11) The General Agreement on Tariffs and Trade does not include a provision on the lines of articles 98, paragraph 4, of the Havana Charter.<sup>233</sup> The cornerstone of the General Agreement is an unconditional most-favoured-nation clause. The Agreement is open to accession by all States, or at least that is how certain authors<sup>234</sup> interpret the text of article XXXIII, which reads as follows:

A government not party to this Agreement ... may accede to this Agreement ... on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority.<sup>235</sup>

(12) What is the position of third States, not members of GATT? Can they claim GATT advantages through the operation of a most-favoured-nation clause concluded with a GATT member State? That question has been answered in the affirmative by a recognized authority on GATT matters, who has written:

Any advantage granted by a GATT contracting party to any other country must be granted to all contracting parties. Thus advantages granted by a contracting party to a non-GATT member must also be granted to all contracting parties. Consequently, if A and B are GATT members but X is not and A concludes a bilateral trade agreement with X, all advantages given to X in that agreement must also be extended to B. And *vice versa*, if the A-X treaty has a MFN clause, X derives all the

advantages that A owes GATT members by virtue of the entire GATT agreement. Thus the impact of GATT goes well beyond its membership. Some suggestion was made at the 1947 Geneva meetings that GATT benefits should apply only to GATT members, but this idea was rejected.<sup>9</sup> In some instances the net result is greatly to reduce the incentive for a nation to enter GATT since, if it has a most-favoured-nation bilateral treaty with its principal trading partners and these partners are GATT members, it obtains most of the advantages of GATT without granting anything to those GATT members with which it has no trade agreements.<sup>10</sup>

<sup>9</sup> United Nations document E/PC/T/C.II/3 (1946), p. 14.

<sup>10</sup> ... This may explain why relatively few Latin American countries have become members of GATT. Among those which are not members are Costa Rica, Ecuador, El Salvador, Paraguay and Venezuela.<sup>11</sup>

(13) The Working Group on organizational and functional questions of GATT considered in 1955 the question of the extension by contracting parties to non-contracting parties of the benefits of the Agreement by means of bilateral agreements. It was pointed out in the discussion that non-contracting parties frequently received all the benefits of the Agreement without having to undertake its corresponding obligations. Despite some dissatisfaction with that situation, the majority consensus was that the attitude which the contracting party wished to adopt in that respect was a matter for each contracting party to decide.<sup>237</sup>

(14) According to the Soviet textbook of international law, Austria after its accession to the General Agreement did not immediately extend GATT rates of customs duties to the Soviet Union, notwithstanding the most-favoured-nation treatment provided for by treaty between the two countries. The extension of such rates took place only upon the express demand of the USSR. Other Western European countries having concluded treaties of the same type with the Soviet Union extended GATT benefits to Soviet products automatically.<sup>238</sup>

#### *Other open multilateral agreements and States not parties*

(15) Before the United States became a party to the Agreement on the importation of educational, scientific and cultural materials of 22 November 1950 (Florence Agreement),<sup>239</sup> it claimed, under most-favoured-nation clauses, the same treatment for United States products as was accorded by a party to the Agreement to the products of another party. Thus, on 12 June 1963, the Department of State instructed the United States Embassy at Rome:

In view of the disadvantageous competitive position in which United States exports of scientific equipment have been put by the Italian Government's action, it is suggested that the Embassy take the matter up informally with the proper Italian authorities. The objective of such discussions should be to obtain duty-free treatment of such equipment if imported from the United States

<sup>231</sup> E. Allix, "Les aspects juridiques de la clause de la nation la plus favorisée", *Revue politique et parlementaire*, Paris, vol. 148 (July-September 1931), pp. 231 and 232.

<sup>232</sup> Ch. Rousseau, *Principes généraux du droit international public*, Paris, Pédone, 1944, vol. I, pp. 777 and 778.

<sup>233</sup> See article 16 above, para. (6) of the commentary.

<sup>234</sup> Sauvignon, *op. cit.*, p. 267.

<sup>235</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (*op. cit.*), p. 51.

<sup>236</sup> Jackson, *op. cit.*, pp. 257 and 258.

<sup>237</sup> GATT document L/327, quoted in K. Hasan, *op. cit.*, p. 78, foot-note 2. See also *Yearbook ... 1970*, vol. II, p. 230, doc. A/CN.4/228 and Add.1, para. 187.

<sup>238</sup> State Institute of Law of the Academy of Sciences of the Soviet Union, (*op. cit.*), p. 270.

<sup>239</sup> United Nations, *Treaty Series*, vol. 131, p. 25.

for sale to approved institutions. In its approach to the Italian Government, the embassy might point out that article XIV-1 of our FCN Treaty with Italy [<sup>240</sup>] and article I:1 of GATT [<sup>241</sup>] provide for unconditional most-favored-nation treatment of United States products. Although such treatment is subject to specified exceptions, the Florence Agreement does not appear to fall within any of these exceptions. If Italy accords duty-free treatment under certain circumstances to scientific equipment of any other country, then it must accord the same treatment to imports of United States scientific equipment.<sup>242</sup>

In connexion with its presentation to Congress of proposed implementing legislation of the United States for this Agreement, the Executive prepared an affirmative reply to the question whether a country not a party to the Agreement would "be entitled under the most-favoured-nation clause to the duty-free treatment accorded by a party to the Agreement to another such party", and it was explained that "the United States considers that legally a country not a party to the agreement would be entitled to such treatment pursuant to an unconditional most-favoured-nation clause with a party thereto", although it was recognized that some parties to the agreement might give a negative answer to the question.<sup>243</sup>

(16) In a discussion on 21 October 1957, at a Meeting of Governmental Experts on the Agreement on the Importation of Educational, Scientific and Cultural Materials, held at Geneva from 21 to 29 October 1957, it was reported that the French representative;

... recalled that the provisions of paragraph 1 of article 1 were applicable only to materials mentioned in annexes A, B, C, D and E of the Agreement which were the products of another Contracting State. France, however, granted duty-free entry for such materials, irrespective of the country of origin or exportation, for it considered that, by virtue of the unconditional "most-favoured-nation" clause included in the trade agreements which it had concluded with most countries, and having regard to the obligations mentioned in article IV, subparagraph (a), of the Agreement, no distinction as to country of origin or exportation should be made with regard to the materials concerned. The French Government wished to know whether such an interpretation was accepted by the other Contracting States.<sup>244</sup>

(17) Article IV (a) of the Florence Agreement, referred to above, states that the parties "undertake that they will as far as possible ... continue their common efforts to promote by every means the free circulation" of the materials to which the Agreement relates, "and abolish or reduce any restrictions to that free circulation which are not referred to in this Agreement".<sup>245</sup>

(18) The following three cases further illustrate the point. In the first case, the Asia Trading Company of Djakarta brought an action in the District Court of Amsterdam against the firm of Biltimex of Amsterdam. The defendant applied for an order that the plaintiff,

being a foreign company, should deposit security for costs (*cautio judicatum solvi*). The plaintiffs opposed the application. The Court held that the order for the security (*cautio*) must be refused. This followed from article 24 of the Netherlands-Indonesian Union Statute agreed upon on 2 November 1949, which promised the nationals of each partner to the Union treatment on a footing of substantial equality with the other's own nationals, and in any case most-favoured-nation treatment. The latter provision guaranteed to Indonesians exemption from the security for costs (*cautio judicatum solvi*), because the Netherlands had previously exempted other foreigners and foreign countries from the security (*cautio*) under the Hague Convention on Procedure in Civil Cases of 17 July 1905.<sup>246</sup>

(19) The second case serves as negative proof to the above proposition. Although the claim based upon the most-favoured-nation clause is rejected, this is done on the ground that the subject-matter of the multilateral treaty in question (the Hague Convention on Procedure in Civil Cases of 17 July 1905) is not *ejusdem generis* as that of the clause upon which the appellant relied. Thus the judgement implicitly acknowledges that, in the case where the clause and the multilateral treaty covered the same ground, appellant could not have been denied the benefits of the latter. The appellant, a United States citizen domiciled in Belgium, owed an acknowledged debt to the respondent. When in the Netherlands, he was imprisoned for his debt under an order given by the President of the District Court of Zutphen. The appellant sought to be released by the President of the District Court of The Hague, but his appeal failed. He appealed further to the Court of Appeal of The Hague, relying, *inter alia*, on two treaty provisions by virtue of which, he argued, he should be set free. The first of these was article 24 of the Convention relating to Civil Procedure of 17 July 1905.<sup>247</sup> The appellant further relied on article III, section I, of the Netherlands-United States Treaty of Friendship, Commerce and Navigation of 27 March 1956.<sup>248</sup> The appellant submitted that he was entitled to benefit from article 24 of the Hague Convention on Procedure in Civil Cases through the operation of the

<sup>246</sup> *Asia Trading Co. Ltd., v. Biltimex, Netherlands, District Court of Amsterdam, 17 October 1951*. See Secretariat Digest, Yearbook ... 1973, vol. II, p. 137, doc. A/CN.4/269, para. 55.

<sup>247</sup> The article reads [translation from the official French text]:

"Civil imprisonment, whether as a means of enforcement or as a simple preventive measure, may not, in civil or commercial proceedings, be imposed on aliens who are nationals of one of the contracting States in cases where it would not be imposed on nationals of the country. A circumstance which may be invoked by a national domiciled within the country to secure the ending of civil imprisonment must produce the same effect for the benefit of a national of a contracting State, even if that circumstance arises outside the country."

<sup>248</sup> This provision reads:

"Nationals of either Party within the territories of the other Party shall be free from molestations of every kind, and shall receive the most constant protection and security. They shall be accorded in like circumstances treatment no less favorable than that accorded nationals of such other Party for the protection and security of their persons and their rights. The treatment accorded in this respect shall in no case be less favorable than that accorded nationals of any third country or that required by international law."

<sup>240</sup> Treaty of Friendship, Commerce and Navigation, signed at Rome on 2 February 1948 (*ibid.*, vol. 79, pp. 190 and 192).

<sup>241</sup> Quoted above, article 4, para. 10 of the commentary.

<sup>242</sup> Whiteman, *op. cit.*, pp. 776 and 777.

<sup>243</sup> *Ibid.*, p. 767.

<sup>244</sup> Document UNESCO/MC/34/SR.I-II, p. 9, quoted by Whiteman, *op. cit.*, p. 768.

<sup>245</sup> United Nations, *Treaty Series*, vol. 131, p. 30.

most-favoured-nation clause. The Court, which held that the appeal must be dismissed, stated:

The appellant deems his imprisonment to be illegal on account of its being contrary to Article III, section I, of the Netherlands-United States Treaty of Friendship, Commerce and Navigation, which was ratified by the (Netherlands) Act of 5 December 1957... This provision, assuming it is binding upon everyone, does not prevent a citizen of the United States from being imprisoned in this country under article 768 of the Code of Civil Procedure. Civil imprisonment, indeed, does not run counter to the protection of rights which the Kingdom of the Netherlands under the Treaty owes to citizens of the United States. Moreover, from Article V of the Treaty, as from Article 5 of the annexed protocol of signature, it becomes clear that the Treaty is of limited purport only as far as civil procedure is concerned: civil imprisonment is not referred to, still less precluded. A more liberal interpretation of Article III, section I, as sought by the appellant and under which in this country a citizen of the United States would enjoy the protection of Article 24 of the Convention on Civil Procedure without the United States having acceded to it, is therefore unacceptable to the Court.<sup>249</sup>

(20) In the third case, it was expressly recognized that privileges provided pursuant to a "multiple or bipartite international treaty" could be claimed on the basis of a most-favoured-nation clause.<sup>250</sup>

(21) As regards the so-called open multilateral treaties, it has been found that there is no such constant and uniform usage, accepted as law, which would warrant a proposal for a rule excepting open-ended multilateral treaties, i.e. the favours resulting from such treaties, from the operation of most-favoured-nation clauses. A recent thorough study has come to the same conclusion:

At present there seems to be no justification in law for saying that a customary usage may exempt open multilateral conventions from the scope of the clause. Neither the material element—the usual practice of States—nor the *opinio juris* affect the issue. At least, the prevailing feeling allows that the question may be approached from various angles, and it is concerned to give due weight to the elements which might lead to an opposing conclusion.

... as international law stands at present, the only legal solution is to insert a specific exception in the clause.<sup>251</sup>

(22) As regards the so-called closed multilateral treaties, it has also been found that the advantages accorded under such treaties do not escape the operation of a most-favoured-nation clause. The argument has been put forward that the main reason<sup>252</sup> for exempting the favours of an open multilateral treaty from the operation of a most-favoured-nation clause is that States can easily acquire the advantages of such treaties by acceding to them. In this way acceding States also assume the obligations arising from the treaty and put themselves in a position of equality with the other parties to the treaty, whereas through the operation of a most-favoured-

nation clause they would claim only the advantages of the open multilateral treaty without submitting to its obligations. It follows from this reasoning that, in the case of a closed multilateral treaty, the possibility of an easy accession falls and —*cessante causa cessat effectus*— there remains no reason why the advantages of a closed multilateral treaty should not fall under the operation of a most-favoured-nation clause.

(23) On the basis of the foregoing considerations the Commission adopted article 17, which provides that the acquisition of rights by the beneficiary State is not affected by the mere fact that the treatment by the granting State of a third State has been extended under an international agreement, whether bilateral or multilateral. This, of course, cannot be understood to mean that a bilateral or multilateral agreement is always needed for the operation of the clause. In this respect reference is made to paragraph (1) of this commentary.

#### **Article 18. Irrelevance of the fact that treatment is extended to a third State as national treatment**

**The acquisition of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended as national treatment.**

#### *Commentary*

(1) This rule seems to be at first sight self-evident. When two States promise each other national treatment (inland parity) and then promise other States most-favoured-nation treatment, the latter group may legitimately claim that they are also entitled to be treated on a "national basis", for otherwise they are not being treated as favourably as the most-favoured-nation (assuming that there is a material difference in treatment as a result of different promises made).<sup>253</sup>

(2) This is also the British practice regarding the relation between national treatment and treatment accorded under a most-favoured-nation clause. According to a writer:

... the m.f.n. standard fulfils the function of generalizing the privileges granted under the national standard to any third State among the beneficiaries of m.f.n. treatment in the same field.<sup>254</sup>

(3) The same view is held by an author from the German Democratic Republic:

Since national treatment generally embraces a maximum of rights and the rights accorded are clearly defined, States often seek to have their nationals placed on an equal footing with those of other countries. If national treatment is thus granted to the most-favoured-nation, all other entitled States can also claim it for their nationals by invoking the most-favoured-nation clause.<sup>255</sup>

<sup>249</sup> *McLane v. N.V. Koninklijke Vleeswarenfabriek B. Linthorst en Zonen*, Netherlands, Court of Appeal of The Hague, 4 February 1959. See Secretariat Digest, *Yearbook* ... 1973, vol. II, p. 142, document A/CN.4/269, para. 68.

<sup>250</sup> *Taxation Office v. Fulgor (Greek Electricity Company)*, Greece, Council of State, 28 May 1969, (*ibid.*, p. 148, para. 87).

<sup>251</sup> Sauvignon, *op. cit.*, pp. 267 and 268.

<sup>252</sup> Although a false one (see in this regard E. Allix, quoted in para. (9) above).

<sup>253</sup> Snyder, *op. cit.*, pp. 11 and 12.

<sup>254</sup> Schwarzenberger, "The most-favoured-nation standard in British State practice", *loc. cit.*, p. 119.

<sup>255</sup> K. Becher, "Das Prinzip der Meistbegünstigung und die Völkerrechtskommission der Vereinten Nationen", *Deutschen Ausenpolitik* (East Berlin), 17th year, No. 4 (July-August 1972), p. 774.



(4) This effect of the most-favoured-nation clause has been explicitly recognized in France. The French Foreign Minister, in a letter of 22 July 1929,<sup>256</sup> published a list of countries enjoying national treatment in France. The Minister added:

A greater number of conventions were entered into on the basis of the treatment reserved for the nationals of the most-favoured-nation. Aliens capable of availing themselves of a convention of that nature are entitled to be treated in France as the nationals of the above-listed countries.<sup>257</sup>

The official French view on this point has not changed since.

(5) This position is also manifested in the practice of French courts:

... [French] legal thinking has, on the whole, taken the view that national treatment is to be applied to those who invoke it on the strength of a most-favoured-nation clause.<sup>258</sup>

Thus a French court, the Tribunal correctionnel de la Seine, in one case among many others, stated:

Whereas Sciama, being of Italian nationality, may legitimately claim the benefit of article 2 of the treaty of establishment of 23 August 1951 between France and Italy, which provides: "The nationals of each of the High Contracting Parties shall enjoy in the territory of the other party most-favoured-nation treatment with regard to ... the practice of trade..."; and whereas, consequently, he is entitled to rely on the provisions of article 1 of the convention concluded on 7 January 1862 between France and Spain, which provides that: "The subjects of both countries may travel and reside in the respective territories on the same footing as nationals ... practise both wholesale and retail trade operation..."<sup>259</sup>

(6) The Supreme Court of the United States also had occasion to discuss the effect of a most-favoured-nation clause when combined with a national treatment clause of another treaty. The most-favoured-nation clause in question was one included in an 1881 treaty between the United States and Serbia. The relevant portion of that clause ran as follows:

In all that concerns the right of acquiring, possessing or disposing of every kind of property, real or personal, citizens of the United States in Serbia and Serbian subjects in the United States shall enjoy the rights which the respective laws grant or shall grant in each of these States to the subjects of the most-favoured-nation.

Within these limits, and under the same conditions as the subjects of the most-favoured-nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament, inheritance, or in any other manner whatever, without being subject to any taxes, imposts or charges whatever, other or higher than those which are or shall be levied on natives or on the subjects of the most favoured State...<sup>260</sup>

<sup>256</sup> *Journal officiel de la République française, Lois et décrets*, Paris, 12-13 August 1929, 61st year, No. 189.

<sup>257</sup> A. Piot, "Of realism in conventions of establishment", *Journal du droit international*, 88th year, No. 1 (January-March 1961), p. 45.

<sup>258</sup> Level, *loc. cit.*, p. 338.

<sup>259</sup> *In re : Sciama and Soussan*, France, Tribunal correctionnel de la Seine, 27 November 1962. See Secretariat Digest (*Yearbook* ... 1973, vol. II, p. 145, doc. A/CN.4/269, para. 77).

<sup>260</sup> *British and Foreign State Papers, 1880-1881*, London, Ridgway, 1888, vol. 72, p. 1131.

The Supreme Court stated:

The 1881 Treaty clearly declares its basic purpose to bring about "reciprocally full and entire liberty of commerce and navigation" between the two signatory nations so that their citizens "shall be at liberty to establish themselves freely in each other's territory". Their citizens are also to be free to receive, hold and dispose of property by trading, donation, marriage, inheritance or any other manner "under the same conditions as the subjects of the most favored nation". Thus, both paragraphs of Art. II of the treaty which have pertinence here contain a "most favored nation" clause with regard to "acquiring, possessing or disposing of every kind of property". This clause means that each signatory grants to the other the broadest rights and privileges which it accords to any other nation in other treaties it has made or will make. In this connexion we are pointed to a treaty of this country made with Argentina [<sup>261</sup>] before the 1881 Treaty with Serbia, and treaties of Yugoslavia with Poland and Czechoslovakia, all of which unambiguously provide for the broadest kind of reciprocal rights of inheritance for nationals of the signatories which would precisely protect the right of these Yugoslavian claimants to inherit property of their American relatives...

We hold that under the 1881 Treaty, with its "most favored nation" clause, these Yugoslavian claimants have the same right to inherit their relatives' personal property as they would if they were American citizens living in Oregon...<sup>262</sup>

(7) The solution sustained in practice and proposed in article 18 has been questioned in the writings of several authors. According to one source:

It may be argued against the affirmative solution that, among the concessions mutually granted by the High Contracting Parties, the most-favoured-nation clause is of a lower order than the national treatment clause and that it is paradoxical for the former to produce the same effects as the latter. It may also be asked whether the special nature of the two clauses does not bar their cumulative application. As clauses which grant equal treatment, in one case, with the most-favoured foreigner and, in the other case, with nationals, they have no effect by virtue of their content but by mere reference. Is the intent of the contracting States truly reflected by thus linking one clause to the other to the point of producing an effect which is not in keeping with the meaning of the first of the two clauses? ... Although this argument has its relevance, [French] legal thinking has, on the whole, taken the view that national treatment is to be applied to those who invoke it on the strength of a most-favoured-nation clause.<sup>263</sup>

(8) Basing its views on the practice of States, the Commission has no reason to depart from the conclusion which follows from the ordinary meaning of the clause which assimilates its beneficiary to the nation most

<sup>261</sup> The national treatment clause (article IX) of the Treaty of Friendship, Commerce and Navigation between the United States and the Argentina Confederation of 1853 provided:

"In whatever relates to ... acquiring and disposing of property of every sort and denomination, either by sale, donation, exchange, testament, or in any other manner whatsoever, ... the citizens of the two contracting parties shall reciprocally enjoy the same privileges, liberties and rights as native citizens ..."<sup>a</sup>

<sup>a</sup> "United States of America, *The Statutes at Large and Treaties of the United States of America from December 1925 to March 1927* (Washington, D.C., United States Government Printing Office, 1927), vol. X, p. 1009. Text also in *British and Foreign State Papers, 1852-1853* (London, Ridgway, 1864), vol. 42, p. 772."

<sup>262</sup> *Kolovrat et al. v. Oregon*, United States Supreme Court, 1 May 1961. See Secretariat Digest (*Yearbook* ... 1973, vol. II, p. 144, doc. A/CN.4/269, para. 73).

<sup>263</sup> Level, *loc. cit.*, p. 338.



favoured: if the best, the highest, favour extended to a third State consists in national treatment, then it is this treatment that is in conformity with the promise due to the beneficiary. If a State wishes to exclude previous or future national treatment grants from its most-favoured-nation pledge, it is free to do so. If such exception is not written in the treaty, then the consequences are that the national treatment promise follows the treaty containing the most-favoured-nation clause. This situation requires nothing but a certain circumspection from those involved in treaty-making.

**Article 19. Most-favoured-nation treatment and national or other treatment with respect to the same subject-matter**

1. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause is not affected by the mere fact that the granting State has agreed to accord as well to that beneficiary State national treatment or other treatment with respect to the same subject-matter as that of the most-favoured-nation clause.

2. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause is without prejudice to national treatment or other treatment which the granting State has accorded to that beneficiary State with respect to the same subject-matter as that of the most-favoured-nation clause.

*Commentary*

(1) It is not uncommon that both national treatment and most-favoured-nation treatment are stipulated in respect of the same subject-matter. An author refers to the Portuguese-English treaty of 1642, in article 4 of which Portugal promised:

that the subjects of the Most Renowned King of Great Britain ... shall [not] be more burdened with customs, impositions, or other taxes other than the inhabitants and subjects of the said lands [kingdoms, provinces, territories and islands of the King of Portugal, in Europe], or other subjects of any nation whatsoever in league with the Portugals..."<sup>264</sup>

A more recent example is the provision of article 6, paragraph 1, of the Multilateral Convention on Cooperation in Maritime Commercial Navigation signed at Budapest on 3 December 1971 by Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR, reading as follows:

Vessels flying the flags of the Contracting Parties shall enjoy in ports of the respective countries, on the basis of reciprocity, the most favourable treatment accorded to national vessels engaged in international traffic or, also on the basis of reciprocity, the most favourable treatment accorded to vessels of other countries in all matters relating to their entry into, stay in and departure from a port, the use of ports for loading and unloading

operations, the taking-on and setting-down of passengers, and the use of navigation services.<sup>265</sup>

(2) In some clauses it is specified that the basis of the treatment in question shall be that of the granting State's nationals or the nationals of the most-favoured-nation, "whichever is more favourable".<sup>266</sup>

(3) The Secretariat of the Economic Commission for Europe, in a paper analysing the compatibility of these two kinds of grant, whether embodied in one or more instruments, came to the following conclusion:

... The problem of the compatibility of general most-favoured-nation treatment and the grant of "national treatment" to commercial shipping does not, in fact, appear to arise. Where both these systems exist side by side, the provision for "national treatment" has overriding force—always provided that no more favourable concession has been made to a third country. In such a case, it is this more favourable treatment which must be granted to shipping of the country eligible for both "national treatment" and most-favoured-nation treatment. Such a solution, undoubtedly prevailing in treaties of commerce which, like that between Norway and the USSR, contain the "national treatment" clause for commercial shipping side by side with a general most-favoured-nation clause, seems equally applicable both in the case of a multilateral convention containing both clauses and in the case of a multilateral convention containing only the general most-favoured-nation clause faced with bilateral conventions containing the "national treatment" clause for particular questions relating to commerce or navigation.<sup>267</sup>

(4) It may be presumed that national treatment is at least equal or superior to the treatment of the most-favoured foreign country and that the former therefore implies the latter. This has been explicitly stated in a protocol forming part of the Treaty of Commerce and Navigation between the United Kingdom and Turkey, signed on 1 March 1930. The protocol reads:

It is understood that, wherever the present treaty stipulates national treatment, this implies the treatment of the most-favoured foreign country, the intention of the high contracting parties clearly being that national treatment in their respective territories is at least equal or superior to treatment of the "most-favoured foreign country".<sup>268</sup>

The presumption is, however, open to rebuttal. There may be cases where foreigners enjoy advantages not granted to nationals. Should such a case occur, most-favoured-nation treatment surpasses national treatment. A specific stipulation to this effect may be found in the United Kingdom-Switzerland Treaty on Friendship, Commerce and Reciprocal Establishment of 6 September 1855, article VIII of which reads as follows:

In all that relates to the importation into, the warehousing in,

<sup>265</sup> *Sbornik deistvuyshchikh dogovorov, soglasheniy i konventsiy, zaklyuchennykh SSSR s inostrannymi gosudarstvami*, vol. XXIX, *Deistvushchie dogovory, soglasheniya i konventsii, vstupivshie v silu mezhdru 1 yanvaraya i 31 dekabrya 1973 goda* (Treaties, agreements and conventions in force between the USSR and foreign countries, vol. XXIX, Treaties, agreements and conventions which came into force between 1 January and 31 December 1973), Moscow, Mezhdunarodnye otnosheniya, 1975, pp. 364 and 365.

<sup>266</sup> See e.g. article 38 of the Treaty on Friendship, Commerce and Navigation between the Federal Republic of Germany and Italy of 21 November 1957 (Strupp, *op. cit.*, p. 500).

<sup>267</sup> E/ECE/270, part II, para. 42(h).

<sup>268</sup> League of Nations, *Treaty Series*, vol. CVIII, p. 432.

<sup>264</sup> B. Nolde, "La clause de la nation la plus favorisée et les tarifs préférentiels", *Recueil des cours...*, 1932-I, Paris, Sirey, 1932, vol. 39, p. 27.

the transit through, and the exportation from, their respective territories, of any article of lawful commerce, the two contracting parties engage that their respective subjects and citizens shall be placed upon the same footing as subjects and citizens of the country, or as the subjects and citizens of the most favoured nation in any case where the latter may enjoy an exceptional advantage not granted to natives.<sup>269</sup>

(5) According to one source:

[National treatment] is sometimes granted concurrently with the most-favoured-nation clause. In such cases, it is the more favourable of the two types of treatment—normally national treatment—that applies. In exceptional cases, however, most-favoured-nation treatment may be more advantageous than national treatment. This is the case when a State which wishes to expand its industrial production grants foreign enterprises tax exemptions and other advantages greater than those accorded to national enterprises. It would therefore be quite false to suppose that the granting of national treatment automatically encompasses most-favoured-nation treatment.<sup>270</sup>

(6) According to another writer:

Two or more of the standards may also be employed in the same treaty for the better attainment of the same or different objectives. Thus, the coupling of m.f.n. and national-treatment clauses may lead to treatment more advantageous to nationals of the other contracting party than could be achieved by the employment of one or the other standard in relation to, for instance, exemption from civil defence duties. In such cases, the typical intention of contracting parties is that the application of several standards should be cumulative. Therefore a presumption exists in favour of their cumulative interpretation.<sup>271</sup>

(7) It must be clearly seen that most-favoured-nation treatment and national treatment are of a different character. The first operates only on condition that a certain favoured treatment has been extended to a third State (and if this is not the case the grant remains empty). The other is a direct grant which confers an advantage upon the beneficiary independently of the fact that treatment has been extended to a third State or not. It may happen, however, that a most-favoured-nation pledge is coupled with another direct grant which is not national treatment. The granting State, for example, may undertake to accord certain determined treatment to the beneficiary State, to its nationals, to its ships, etc., which may not be the same as the treatment of its own nationals. Article 19 envisages this situation also by means of the expression "or other treatment".

(8) The Commission is aware that a situation in which the beneficiary State on the basis of one or more treaties or other commitments is entitled to different types of treatment concerning the same subject-matter can involve great difficulties of implementation. Can the beneficiary State freely change its preference from one to another type of treatment? Can different types of treatment be demanded for one or another subject to the beneficiary State? For example, can different shipping companies of the beneficiary State demand different types of treatment for their vessels?

Can the advantages be demanded cumulatively? Because of the difficulties involved, the Commission found it preferable to formulate the rule as a saving clause.

(9) The Commission agreed that, at any rate, in the presence of most-favoured-nation treatment, national treatment and any other treatment accorded by the granting State with respect to the same subject-matter, the beneficiary State not only had an "either/or" choice, but might also be in a position to opt for the cumulative enjoyment of all, some, or parts of the various treatments concerned. The article has therefore been drafted in such a manner so as not to prejudge that second possibility, which may be open in practice to the beneficiary State. To this effect an appropriate reference has been made to the lack of effect on the beneficiary State's actual enjoyment of its right to most-favoured-nation treatment by the mere fact that national or other treatment had been accorded to it as well by the granting State. As now drafted, *paragraph 1* states the general rule, placing the emphasis on the right to most-favoured-nation treatment. As that rule is similar in character to those embodied in the four previous articles, that is to say that it amounts to an "irrelevancy" type of rule, the Commission deemed it appropriate to use for that paragraph the expression "is not affected by the mere fact". *Paragraph 2* relates to the converse aspect of the provision of paragraph 1, emphasizing that the right of the beneficiary State to most-favoured-nation treatment is without prejudice to national or other treatment accorded by the granting State to that beneficiary State with respect to the same subject-matter. The two paragraphs read together should make it clear that, whenever the beneficiary State is accorded different types of treatment with respect to the same subject-matter, it shall be entitled to whichever treatment or combination of treatments it prefers in any particular case.

#### *Article 20. Arising of rights under a most-favoured-nation clause*

1. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause not made subject to a condition of compensation arises at the moment when the relevant treatment is extended by the granting State to a third State or to persons or things in the same relationship with that third State.

2. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of compensation arises at the moment when the relevant treatment is extended by the granting State to a third State or to persons or things in the same relationship with that third State and the agreed compensation is accorded by the beneficiary State to the granting State.

3. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of reciprocal treatment arises at the moment when the relevant

<sup>269</sup> United Kingdom, Foreign Office, *Handbook of Commercial Treaties etc. with Foreign Powers*, 4th ed., London, H.M. Stationery Office, 1931, p. 669.

<sup>270</sup> Sauvignon, *op. cit.*, p. 6.

<sup>271</sup> Schwarzenberger, "The principles and standards ...", *loc. cit.*, p. 69.

treatment is extended by the granting State to a third State or to persons or things in the same relationship with that third State and the agreed reciprocal treatment is accorded by the beneficiary State to the granting State.

#### Commentary

(1) Article 20 deals with the moment when the right of the beneficiary State to most-favoured-nation treatment arises. The presence of two elements is necessary to put into action an unconditional most-favoured-nation clause: (a) a valid clause contained in a treaty in force, and (b) an extension of treatment by the granting State to a third State. A third element is needed in the case of a clause subject to a condition of compensation or reciprocal treatment: (c) the according of that compensation or reciprocal treatment. If one of the necessary elements is lacking, there is no such thing as an operating or a functioning clause.<sup>272</sup> In the case of a clause not made subject to a condition of compensation, the moment of the arising of the beneficiary State's right is the one when the relevant treatment is extended by the granting State to a third State. In the case of a clause made subject to a condition of compensation or reciprocal treatment, the moment of the beginning of a functioning clause is the one when the last two elements coexist, that is, when the relevant treatment is extended and the agreed compensation or reciprocal treatment is accorded. As to the first element, the validity and the being in force of the treaty are taken for granted and they are therefore not mentioned in article 20.

(2) A most-favoured-nation clause, unless otherwise agreed, obviously attracts benefits extended to a third State both before and after the entry into force of the treaty containing the clause. The reason for this rule has been explained as follows:

... since the purpose of the clause is to place the beneficiary State on an equal footing with third States, it would be an act of bad faith to confine that equality to future legal situations. A *pro futuro* clause or a clause directed towards the past cannot be deemed to exist unless it is worded in unequivocal fashion. Otherwise, the clause must extend to the beneficiary all advantages granted both in the past and in the future.<sup>273</sup>

(3) This view is sustained in practice, as evidenced by the following case. The special legislation of Belgium regulating the duration of tenancies rendered nationals of countries that were either neutral or allied to Belgium during the First World War eligible to share in its benefits, on condition of reciprocal treatment. The claimant complained that the privilege of the legal extension of her tenancy had been denied her because of her French nationality and because of the lack of reciprocal treatment of Belgian nationals in France. The Court held for the claimant. Pursuant to the Franco-Belgian convention of 6 October 1927, the nationals of each of the High Contracting Parties "shall enjoy in the territory

of each other most-favoured-nation treatment in all questions of residence and establishment, as also in the carrying on of trade, industry and the professions" (article 1). This privilege was extended to cover the possession, acquisition and leasing of real or personal property (article 2). The treaty concluded between Belgium and Italy on 11 December 1882 provided (article 3) that the nationals of each of the High Contracting Parties should enjoy within each other's territory full civil rights on an equal footing. The Court stated:

It follows, then, that by virtue of the most-favoured-nation clause, French nationals in Belgium are completely assimilated to Belgian nationals for the purposes of their civil rights, and consequently share in the legislation regulating rents. It is immaterial whether these treaties precede or succeed the legislation in question...

The Franco-Belgian treaty of 6 October 1927 was concluded by the Belgian Government in the hope of securing for its nationals in France the benefit of all legislation affecting tenancies and commercial property, in order that the nationals of each country should be treated on an equal footing...

The claimant, as a French national, is therefore entitled to claim a legal extension of her tenancy of the premises by virtue of the treaty of 6 October 1927.<sup>274</sup>

(4) The question has also been raised and discussed whether the beginning of the functioning of a most-favoured-nation clause cannot retroactively influence the position of the beneficiary State, i.e. the position of the persons who derive their rights from that State. According to one author:

What is at issue here is whether the clause follows the time-of-application provisions of the treaty from which it derives its content or those of the treaty which provides for most-favoured-nation treatment. In the latter case, nationals of the beneficiary State can also claim the advantages previously granted to the favoured State, but this treatment takes effect only on the date of the entry into force of the treaty containing the most-favoured-nation clause... If the first assumption is correct and the clause is also subject to the time-of-application provisions of the treaty concluded with the favoured State, nationals of the beneficiary State are in exactly the same position as those of the favoured State, and are thus entitled to claim that the advantages in question were applicable to them prior to the publication of the treaty containing the clause, i.e. as from the entry into force of the treaty concluded between the favoured State and the granting State. Thus, in the second of the two posited cases, nationals of the beneficiary State would be entitled to retroactive application—in relation to the date of publication of the treaty containing the clause—of most-favoured-nation treatment.

French legal thinking has rejected the idea of giving the clause this kind of retroactive effect. Nationals of the beneficiary State can claim the advantages granted to the favoured State only on the date of the entry into force of the treaty containing the clause. "The actual formulation of the clause does not warrant retroactive assimilation to foreigners who already enjoy favoured status." ... "If existing advantages are automatically made applicable, this applies only to the future." ... Of course, under the rule governing time of application, the High Contracting Parties may, by expressly so stipulating, provide for retroactive application of the clause. The view upheld by French legal thinking is

<sup>272</sup> As Schwarzenberger puts it, "In the absence of undertakings to third States, the m.f.n. standard is but an empty shell" (*International Law and Order* (*op. cit.*), p. 130).

<sup>273</sup> Sauvignon, *op. cit.*, p. 21, note 1. See, in the same sense, Basdevant, "Clause de la nation la plus favorisée" (*loc. cit.*), p. 488.

<sup>274</sup> *Trossy v. Dumortier*, Belgium, Brussels Civil Court (Chamber of Rent Restriction Appeals), 31 May 1928. See Secretariat Digest, (*Yearbook* ... 1973, vol. II, pp. 129 and 130, doc. A/CN.4/269, para. 31).

in keeping with the analysis of the nature of the clause contained in the judgement rendered by the International Court of Justice in the Anglo-Iranian cases. The enjoyment of advantages under the clause derives from the clause itself and not from the treaty containing the substantive provisions whose application is sought. Although the clause permits enjoyment of the advantages granted to nationals of the favoured State, it does not retroactively make the beneficiary State a party to the treaty concluded between the granting State and the favoured State.<sup>275</sup>

(5) In the same sense, another author writes:

The clause does not do away with past differences between the various national legal systems. The "standard" rule, which calls for an "inopportune" international legal situation to cease to exist at the earliest possible time ... does not prevail against the international legal principle of non-retroactivity... Most-favoured-nation treatment is, as Scelle puts it, automatically communicated, but this applies only to the future. It should be noted that the same reasoning can be employed in determining the application in time of a treaty containing a reciprocity clause. The advantages granted on this basis to nationals of a given State also do not extend back to the time when our nationals first enjoyed this right (*de facto, de jure* or by treaty) in the country concerned.<sup>276</sup>

This reasoning seems to be correct and it is in conformity with the rule set out in the article.

(6) The question whether the operation of a most-favoured-nation clause is contingent upon a third State merely becoming entitled to claim certain treatment, or whether it operates only when the third State actually claims and begins to enjoy the treatment, has been examined by an authority in the following manner:

Supposing that Great Britain is entitled to most-favoured-nation treatment under a treaty with State A, and by reason of a treaty between State A and State B the latter is or becomes entitled to claim for itself or its nationals certain treatment from A, e.g. exemption from income tax or from some legislation affecting the occupation of houses, when is Great Britain entitled to claim from A the treatment due to B? At once or only when B has succeeded in asserting its treaty right to this treatment? In answer to this question two views are possible. The first is that Great Britain has no *locus standi* to claim the treatment until she can point to its actual exercise and enjoyment by B or B's nationals. This view places Great Britain at the mercy of the degree of vigilance exerted by B or the degree of importance of the matter to B; for instance, B might have no nationals residing in the territory of A and earning a taxable income. The second view is that the most-favoured-nation clause in the treaty with Great Britain, automatically and absolutely, invests her and her nationals with all rights in *pari materia* which may be possessed at any time when the treaty is in force by B and its nationals, irrespective of the question whether those rights are in fact being exercised and enjoyed or not, that is, irrespective of the question whether B has claimed them or neglected to claim them or had no occasion to claim them. The United Kingdom Government has been advised by its law officers that the second view is the right one, that is to say, that while the question "must depend upon the true construction of the most-favoured-nation clause upon which it may arise, ... speaking generally ... the right extends to the treatment which the most-favoured-nation is entitled to, whether actually claimed or exercised or not". The United Kingdom has asserted, and succeeded in maintaining, this second view.<sup>277</sup>

According to the same source, a similar position was taken by the United Kingdom in cases where it was not the beneficiary but the granting State:

On 11 April 1906, on a question relating to the right of aliens to receive British pilotage certificates, the law officers, when asked whether the right claimable by subjects of the nations indicated was an absolute right by reason of the operation of the most-favoured-nation clause, or whether the right was one which was claimable only if and when the subjects of States who had been granted national treatment had claimed and received the particular privilege then under consideration, said that the answer to this question "must depend upon the true construction of the particular most-favoured-nation clause upon which it may arise; but speaking generally, we are of the opinion that the right extends to the treatment which the most-favoured-nation is entitled to, whether actually claimed or not. On the other hand, the treatment accorded in actual practice would be very material upon the construction of the treaty upon which it depends."<sup>278</sup>

A further source shows that this view is not restricted to British practice:

In 1943 the American Embassy in Santiago took the position that the unconditional most-favoured-nation clause in the United States-Chilean commercial agreement gave the right to duty-free importation of United States lumber "of those species of woods specified in the memoranda exchanged between the Peruvian and Chilean Governments [providing duty-free treatment for such species of Peruvian lumber imported into Chile] and [that] this position holds regardless of whether there have been any imports into Chile from Peru or any other country of the particular species of wood specified in the memoranda." Thus, the most-favoured-nation clause was interpreted to accord those rights legally accorded to products of another country, whether or not there was in fact any enjoyment of such right with reference to such products.<sup>279</sup>

(7) As provided for in article 20, it is the extension of benefits to the third State that brings the clause into action. This "extension" can also take place by the conclusion of a treaty or by any other kind of agreement reached between the granting State and the third State. Is the effect the same if the grant is not based on a treaty but on the internal law of the granting State? According to one writer:

This question is frequently settled without any doubt by the wording of the relevant clause, for instance, the following clause is common:

The subjects of each of the High Contracting Parties in the territories of the other shall be at full liberty to acquire and possess every description of property ... which the laws of the other High Contracting Party permit the subjects of any foreign country to acquire and possess.

On the other hand, where the treaty merely provides that the nationals of A are entitled to whatever rights and privileges B may "grant" to the nationals of C, the question may arise whether the clause refers to grant by treaty or to grant by any means whatever. The British answer to this question is that the clause includes grant by any means whatever."<sup>280</sup>

(8) For another author, "it is quite immaterial whether the advantages granted to 'any third contry' derive from the domestic law of the other Contracting Party or from

<sup>275</sup> Level, *op. cit.*, pp. 336 and 337.

<sup>276</sup> Ch. Gavalda, note on a decision of the Court of Cassation of 12 October 1960, *Revue critique de droit international privé*, Paris, No. 3 (July-Sept. 1969), p. 538.

<sup>277</sup> McNair, *op. cit.*, pp. 278 and 279.

<sup>278</sup> *Ibid.*, pp. 279 and 280.

<sup>279</sup> Whiteman, *op. cit.*, p. 750.

<sup>280</sup> McNair, *op. cit.*, p. 280.

agreements concluded by the latter with 'any third country'".<sup>281</sup> Further, he calls this rule "a rule which has long been established and is absolutely unchallengeable".<sup>282</sup>

(9) The 1936 resolution of the Institute of International Law is also explicit:

The most-favoured-nation clause confers upon the beneficiary the regime granted by the other contracting party to the nationals, goods and ships of any third country by virtue of its municipal law and its treaty law.<sup>283</sup>

(10) It is obvious that the answer to the question dealt with in the previous paragraphs depends on the interpretation of a given clause. The purpose of the proposed rule is precisely to give guidance in cases where the working of the clause is such that it refers purely and simply to most-favoured-nation treatment without containing details as to its functioning. It is believed that in such cases it can be presumed that the intention of the parties consists in bringing the beneficiary into the same legal position as the third State. This idea and the theory adopted by the Commission in article 8, according to which the source of the beneficiary's right ultimately lies in the treaty or international agreement containing the clause, sufficiently warranted the adoption of the rule as proposed in article 20.

(11) *Paragraph 1* of article 20 accordingly provides that the right of the beneficiary State under a most-favoured-nation clause not made subject to a condition of compensation to the treatment enjoyed by the third State arises at the moment when that treatment is extended by the granting State to a third State. It is to be understood that, if the third State enjoys that treatment already at the moment of the entry into force of the clause, i.e. the treaty or international agreement containing it, then the beneficiary State becomes immediately entitled to the same treatment. If, however, the relevant treatment is extended to the third State later, it is at that later time that the right of the beneficiary State arises.

(12) In the case of a most-favoured-nation clause made subject to a condition of compensation or of reciprocal treatment, the presence of a third element is needed for the right of the beneficiary State to the treatment in question to arise: the beneficiary State's right will arise at the moment when the relevant treatment is extended by the granting State to a third State and the agreed compensation or reciprocal treatment is accorded by the beneficiary State to the granting State. *Paragraphs 2 and 3* of article 20 deal respectively with cases involving one or other conditional clause.

#### **Article 21. Termination or suspension of rights under a most-favoured-nation clause**

**1. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-**

**favoured-nation clause is terminated or suspended at the moment when the extension of the relevant treatment by the granting State to a third State or to persons or things in the same relationship with that third State is terminated or suspended.**

**2. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of compensation is equally terminated or suspended at the moment of termination or suspension by the beneficiary State of the agreed compensation.**

**3. The right of the beneficiary State for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of reciprocal treatment is equally terminated or suspended at the moment of termination or suspension by the beneficiary State of the agreed reciprocal treatment.**

#### *Commentary*

(1) It follows from the very nature of the most-favoured-nation clause that the right of the beneficiary State—and hence the functioning of the clause—ceases when the third State loses its privileged position. The privilege having disappeared, the fact which put the clause into operation no longer exists, and therefore the clause ceases to have effect.<sup>284</sup>

(2) Thus the Supreme Court of Administration of Finland, in the case of the application of the trade agreement between Finland and the United Kingdom, passed a judgement on 12 March 1943 in the following sense:

The duties imposed on certain goods in the trade agreement between Finland and the United Kingdom were to be applied also to goods imported from Germany in accordance with the most-favoured-nation clause between Finland and Germany. The court decided that after the United Kingdom had declared war on Finland, the most-favoured-nation clause was no longer applicable to Germany, and consequently the duties imposed on goods imported from Germany should be treated autonomously and not according to the trade agreement between Finland and England.<sup>285</sup>

(3) This characteristic of the most-favoured-nation clause has been expressed by the Institute of International Law in its 1936 resolution in the following manner:

The duration of the effects of the most-favoured-nation clause is limited by that of the conventions with third States which led to the application of that clause.<sup>286</sup>

In the course of the Commission's discussion on the codification of the law of treaties, the following draft provision was submitted by a member:

When treaty provisions granting rights or privileges have been abrogated or renounced by the parties, such provisions can no

<sup>281</sup> Nolde, "La clause de la nation la plus favorisée ..." (*loc. cit.*), p. 48.

<sup>282</sup> *Ibid.* Similarly, Sauvignon, *op. cit.*, p. 22.

<sup>283</sup> See *Yearbook ... 1969*, vol. II, p. 181, doc. A/CN.4/213, annex II.

<sup>284</sup> Snyder, *op. cit.*, p. 37; Sibert, *op. cit.*, pp. 255 *et seq.*

<sup>285</sup> Application of the trade agreement between Finland and the United Kingdom of Great Britain and Northern Ireland, Finland: Supreme Court of Administration, 12 March 1943. See Secretariat Digest (*Yearbook ... 1973*, vol. II, p. 124, doc. A/CN.4/269, para. 13).

<sup>286</sup> *Yearbook ... 1969*, vol. II, p. 181, doc. A/CN.4/213, annex II.

longer be relied upon by a third State by virtue of a most-favoured-nation clause.<sup>287</sup>

Both texts are limited to the case where the favour granted by the granting State to a third State was embodied in a treaty.

(4) The will of the parties can of course under special circumstances change the operation of the clause. That such special circumstances existed was contended by the American party before the International Court of Justice in the *Case concerning rights of nationals of the United States of America in Morocco*.<sup>288</sup> The Court interpreted the most-favoured-nation clauses in the treaties between the United States and Morocco in accordance with the general nature and purpose of the most-favoured-nation clauses. In the words of the Court:

The second consideration [of the United States] was based on the view that the most-favoured-nation clauses in treaties made with countries like Morocco should be regarded as a form of drafting by reference rather than as a method for the establishment and maintenance of equality of treatment without discrimination amongst the various countries concerned. According to this view rights or privileges which a country was entitled to invoke by virtue of a most-favoured-nation clause, and which were in existence at the date of its coming into force, would be incorporated permanently by reference and enjoyed and exercised even after the abrogation of the treaty provisions from which they had been derived.

From either point of view, this contention is inconsistent with the intentions of the parties now in question. This is shown both by the wording of the particular treaties, and by the general treaty pattern which emerges from the examination of the treaties... These treaties show that the intention of the most-favoured-nation clauses was to establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned.<sup>289</sup>

In the same judgment, the Court held also:

It is not established that most-favoured-nation clauses in treaties with Morocco have a meaning and effect other than such clauses in other treaties or governed by different rules of law. When provisions granting fiscal immunity in treaties between Morocco and third States have been abrogated or renounced, these provisions can no longer be relied upon by virtue of a most-favoured-nation clause.<sup>290</sup>

(5) A notable instance of changing the general pattern of the operation of the clause is that of the general Agreement on Tariffs and Trade. The key provision of the General Agreement is a general most-favoured-nation clause in respect of customs duties and other charges in article I, paragraph 1.<sup>291</sup> Article II, paragraph 1 (a) of the General Agreement, however, provides:

Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate part of the appropriate schedule annexed to this Agreement.<sup>292</sup>

According to one writer:

It can even be maintained that article II (1)—safeguarding of schedules—is of greater significance than the most-favoured-nation clause itself... This paragraph of article II is a completely new phenomenon in international commercial legislation and an addition to the most-favoured-nation clause of no mean import. The “Schedules” are the consolidated list of all concessions made by all contracting parties in their negotiations with their trading partners and maximum rates. The difference this addition makes to the most-favoured-nation clause is the protection it offers against the raising of the tariff on scheduled items. The traditional clause, while ensuring unconditional most-favoured-nation treatment, only provides equality of treatment against tariff changes.<sup>293</sup>

According to another author, the General Agreement.

goes beyond the most-favored-nation principle in this respect. Each member giving a concession is directly obligated to grant the same concession to all other members in their own right; this is different from making the latter rely on continued agreement between the Party granting the concession and the Party that negotiated it.<sup>294</sup>

(6) One authority gives the following picture of the operation of the clause:

... The clause can be pictured as a float, which enables its possessor to maintain itself at the highest level of the obligations accepted towards foreign States by the grantor State; if that level falls, the float cannot turn into a balloon so as to maintain the beneficiary of the clause artificially above the general level of the rights exercised by other States.<sup>295</sup>

In the system of GATT, as has been shown, the provision of article II, paragraph 1 (a), has indeed transformed the float of the clause into a balloon (the concessions once given cannot be withdrawn except through a complicated procedure of consultations with the contracting parties in accordance with article XXVIII of the General Agreement). It is submitted, however, that the special system of the General Agreement constitutes an exception to the general rule of the functioning of the clause and that this rule is by no means affected by the different functioning of the most-favoured-nation clause in the General Agreement which owes its existence to a specific agreement of the contracting parties.

(7) From the point of view of the termination or suspension of the functioning of the clause, it is irrelevant what caused the termination of the benefits granted to third States. The proposed rule being dispositive, the parties to a treaty containing the clause are free to agree to the continuation of their respective favoured treatment even after the expiry of the grant of benefits to the third State. They may maintain their respective favoured position also on the basis of special arrangements. A historic example of such a case is given as follows:

The Italo-Abyssinian war provides a final example of the preservation of an advantage for a State benefiting from the clause beyond the duration of the treatment of the favoured third

<sup>287</sup> Mr. Jiménez de Aréchaga. See *Yearbook ... 1964*, vol. I, p. 184, 752nd meeting, para. 1.

<sup>288</sup> *I.C.J. Reports 1952*, p. 176.

<sup>289</sup> *Ibid.*, pp. 191 and 192.

<sup>290</sup> *Ibid.*, pp. 204 and 205.

<sup>291</sup> See article 4 above, para. (10) of the commentary.

<sup>292</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (op. cit.), p. 3.

<sup>293</sup> G. Curzon, *Multilateral Commercial Diplomacy: The General Agreement on Tariffs and Trade and its Impact on National Commercial Policies and Techniques*, New York, Praeger, 1966, p. 64.

<sup>294</sup> Hawkins, *op. cit.*, p. 226, note 4 on chapter VIII.

<sup>295</sup> C. Rossillion, “La clause de la nation la plus favorisée dans la jurisprudence de la Cour internationale de Justice”, *Journal du droit international*, Paris, 82nd year, No. 1 (January-March, 1955), p. 106.



country. The sanctions against Italy resulted in the denunciation by States Members of the League of Nations of their trade treaties with Rome. The advantages conferred by those treaties should normally have ceased at the same time to accrue to third countries benefiting from the clause. They were, however, preserved for the countries in question on the basis of Article 16, paragraph 3, of the Covenant, under which the Members of the League agreed that they would mutually support one another in the financial and economic measures taken as sanctions "in order to minimize the loss and inconvenience resulting from the above measures."<sup>296</sup>

The author quoting the case adds the following remark:

Article 49 of the United Nations Charter [mutual assistance in carrying out measures decided upon by the Security Council] can also justify a request along these lines by a beneficiary State, perhaps after the latter has undertaken the consultation envisaged by Article 50.<sup>297</sup>

(8) *Paragraph 1* of article 21 applies to all kinds of most-favoured-nation clauses, whether or not made subject to a condition of compensation. The right of the beneficiary State to the favoured treatment obviously expires or is suspended at the moment when the relevant treatment by the granting State of the third State terminates or is suspended, as the case may be. In cases where treatment that is within the limits of the subject-matter of the clause is extended by the granting State to more than one third State, it is to be understood that the right of the beneficiary State to the favoured treatment terminates or is suspended upon the termination or suspension of the extension of the relevant treatment to all the third States concerned.

(9) *Paragraphs 2 and 3* of article 21 envisage the cases of most-favoured-nation clauses made subject to the conditions of compensation and of reciprocal treatment. In such cases, the right of the beneficiary State to the benefits enjoyed by the third State will also be terminated or suspended at the time when the beneficiary State withdraws permanently or temporarily its consent to accord the agreed compensation or reciprocal treatment, notwithstanding the fact that the third State continues to enjoy the favoured treatment in question.

(10) The provisions of article 21 are not of an exhaustive character. Other events can also terminate the enjoyment of the rights of the beneficiary State: expiration of the time-limit inserted in the clause; agreement of the granting State and the beneficiary State as to termination; uniting of the granting State and the third State.

#### **Article 22. Compliance with the laws and regulations of the granting State**

**The exercise of rights arising under a most-favoured-nation clause for the beneficiary State or for persons or things in a determined relationship with that State is subject to compliance with the relevant laws and regulations of the granting State. Those laws and regulations, however, shall not be applied in such a manner that the treatment of the beneficiary State or of persons or things in a determined**

**relationship with that State is less favourable than that of the third State or of persons or things in the same relationship with that third State.**

#### *Commentary*

(1) An unconditional most-favoured-nation clause entitles the beneficiary State to the exercise of the enjoyment of the rights indicated in the clause without compensation. These rights are exercised or enjoyed in ordinary cases by the nationals, ships, products, etc. of the beneficiary State. The right of the beneficiary State (and the right of its nationals, ships, products, etc. derived therefrom) cannot be made dependent on the right exercised or enjoyed by the granting State (its nationals, ships, products, etc.) in the beneficiary State. The element of unconditionality, however, cannot be stretched so wide as to absolve the beneficiary State, i.e. its nationals, ships, products, etc., from the duty of respecting the internal laws and regulations of the granting State and to comply with them, inasmuch as such compliance is expected from and exerted by any other State, i.e. its nationals, products, etc.

(2) The following case, decided by the French Court of Cassation, explains fully the underlying idea of article 22. The appellant, an Italian citizen, was convicted under article 1 of the Decree of 12 November 1938 for having failed, as an alien, to obtain a trader's permit. He maintained that he was not required to be in possession of a trader's permit because, by virtue of the most-favoured-nation clause contained in the Franco-Italian agreement of 17 May 1946, he was entitled to rely on the Franco-Spanish treaty of 7 January 1862, which gave Spanish citizens the right to carry on trade in France. The public Prosecutor contended that the Franco-Spanish treaty did not exempt Spanish citizens from the requirements of obtaining a trader's permit, and that a letter of the French Minister for Foreign Affairs dated 15 April 1957, which stated that foreign nationals entitled to rely on treaties conferring the right to trade in France were not exempt from the requirements of obtaining traders' permits, was binding on the courts. The appeal was dismissed. The Court said:

The judgement under appeal, in view of the letter of the Minister for Foreign Affairs dated 15 April 1957, finds that the exercise of the right to trade in France which is granted to foreign nationals by international agreements does not exempt foreign nationals from the need to satisfy the necessary—as well as sufficient—requirement, namely, to be in possession of a trader's permit, and that this applies in particular to Italian nationals by virtue of the Franco-Italian agreement of 17 May 1946.

The judgement under appeal thus arrived at a correct decision, without violating any of the provisions referred to in the notice of appeal.

Notwithstanding that international agreements can only be interpreted by the Contracting Parties, the interpretation thereof, as far as France is concerned, is within the competence of the French Government, which alone is entitled to lay down the meaning and scope of a diplomatic document. The Franco-Italian agreement of 17 May 1946 provides that Italian nationals are entitled to the benefit of the most-favoured-nation clause, and the treaty of 7 January 1862, between France and Spain, on which the appellant relies and which applies to Italian nationals with regard to the exercise of trading activities must, according

<sup>296</sup> Sauvignon, *op. cit.*, pp. 96 and 97.

<sup>297</sup> *Ibid.* For details of the Ethiopian-Italian case, see League of Nations, *Official Journal, Special Supplement No. 145*, p. 26, and *Special Supplement No. 150*, pp. 11 and 12.



to the interpretation given by the Minister for Foreign Affairs, be understood as follows: although the provisions which are applicable to foreign nationals must not, if they are not to violate the provisions of the international agreements, result in restricting the enjoyment of the rights which the treaty confers on Spanish nationals, the duty imposed upon a Spanish trader to be in possession of a special trader's permit does not affect the enjoyment of those rights but only the conditions of their exercise. To be in possession of a trader's permit is therefore a necessary as well as sufficient condition, which must be satisfied where a foreign national is to be entitled to rights which are granted to French nationals.<sup>298</sup>

(3) In some cases the clause itself contains a reference to the laws of the granting State and expressly stipulates that the rights in question must be exercised "in conformity with the laws" of that State. Such a case was dealt with in the following instance. The decedent was at the time of this death a resident of New York state. He died intestate. He was a citizen and subject of the Kingdom of Italy, and all his next of kin were residents of Italy. He left no next of kin residing in the state of New York, and it was alleged in the petition that there were no creditors. The consul-general of the Kingdom of Italy filed a petition to administer the decedent's estate. The public administrator, although duly served, did not appear. The petitioner asserted a right to administration without giving any security and in preference to the public administrator, and based his claim on treaty provisions in the consular treaty of 1878 between the United States and Italy. The letters of administrations were granted. The court said:

Conceding that, under the "most-favored-nation" clause in the provision of the treaty with Italy relating to the rights, prerogatives, immunities, and privileges of consuls general, the stipulation contained in the treaty of 27 July 1853 with the Argentine Republic [299] becomes a part of the treaty with Italy, I do not find in that stipulation any justification for the conclusion sought. A right to intervene "conformably with the laws" of the state of New York is something different from a right to set aside the laws of the state, and take from a person who, by those laws, is the officer entrusted with the administration of estates of persons domiciled here, and who leave no next of kin within the jurisdiction, the right and duty of administering their assets. And, when the laws of the state required an administrator to give a bond to be measured by the value of assets, nothing in the treaty provisions grants to the consul an immunity from this requirement to be obtained merely by asserting, in substance, that he has no knowledge of the existence of any debts... Therefore, the petitioner may have letters on giving the usual security, but that this is done pursuant to our local law, and because the public administrator has refused to act.<sup>300</sup>

<sup>298</sup> Corneli Case, France, Court of Cassation, 2 July 1958. See Secretariat Digest (*Yearbook* ... 1973, vol. II, p. 139, doc. A/CN.4/269, para. 63).

<sup>299</sup> Article IX of the Treaty between the United States of America and Argentina reads:

If any citizen of either of the two contracting parties shall die without will or testament in any of the territories of the other, the consul-general or consul of the nation to which the deceased belonged, or the representative of such consul-general or consul in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs.

<sup>300</sup> *In re*: Logiorato's Estate, United States of America, State of New York, New York County Surrogate's Court, February 1901. See Secretariat Digest, *Yearbook* ... 1973, vol. II, p. 149, doc. A/CN.4/269, para. 89.

(4) In other cases the duty of respecting the internal laws of the granting State is laid down in a separate provision of the treaty containing the most-favoured-nation clause. Thus, for example, the Long-Term Trade Agreement of 23 June 1962 between the Union of Soviet Socialist Republics and the United Arab Republic contains the following provisions (article 6):

The circulation of goods between the USSR and the United Arab Republic shall take place in accordance with the provisions of this Agreement and with the import and export laws and regulations in force in the two countries provided that these laws and regulations are applied to all countries.<sup>301</sup>

(5) Although the commentaries and precedents refer to cases of unconditional most-favoured-nation clauses, it seems to be self-evident that the rule proposed applies also to cases where the most-favoured-nation clause is coupled with the requirement of compensation. The rule proposed, therefore, is in general language and does not differentiate between the two types of clauses.

(6) The rule proposed in article 22 is in a certain relationship with article 41 of the Vienna Convention on Diplomatic Relations,<sup>302</sup> article 55 of the Vienna Convention on Consular Relations,<sup>303</sup> article 47 of the Convention on Special Missions<sup>304</sup> and article 77 of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.<sup>305</sup> In the first two conventions, paragraph 1 of the relevant articles reads as follows:

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

Paragraph 1 of the relevant article of the Convention on Special Missions and of the Convention on the Representation of States in Their Relations with International Organizations of a Universal Character reproduces the foregoing text, with some drafting changes. The roots of the rule contained in article 22, however, can be traced further, and ultimately to the principle of sovereignty and equality of States. Obviously, beyond the limits of the privileges granted by the State, its laws and regulations must be generally observed on its territory.

(7) The purpose of a most-favoured-nation clause, namely, to create a situation of non-discrimination between the beneficiary State and the granting State, can be defeated by a discriminatory application of the laws of the granting State. Therefore the Commission has found that the rule embodied in article 22 which states the obligation of compliance with the relevant laws of the granting State should also contain a proviso as to the application of those laws. Consequently, article 22 states that the laws and regulations of the granting State shall

<sup>301</sup> United Nations, *Treaty Series*, vol. 472, p. 74.

<sup>302</sup> *Ibid.*, vol. 500, p. 120.

<sup>303</sup> *Ibid.*, vol. 596, pp. 308-310.

<sup>304</sup> General Assembly resolution 2530 (XXIV), annex.

<sup>305</sup> *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations*, vol. II, *Documents of The Conference* (United Nations publication, Sales No. E.75.V.12), p. 221.

not be applied in such a manner that the treatment of the beneficiary State, or of persons or things in a determined relationship with that State, is less favourable than that of the third State or of persons or things in the same relationship with that third State.

**Article 23. The most-favoured-nation clause in relation to treatment under a generalized system of preferences**

A beneficiary State is not entitled, under a most-favoured-nation clause, to treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a scheme of generalized preferences, established by that granting State, which conforms with a generalized system of preferences recognized by the international community of States as a whole or, for the States members of a competent international organization, adopted in accordance with its relevant rules and procedures.

*Commentary*

(1) As stated in the introduction to this chapter of the Commission's report,<sup>306</sup> the Commission from the early stages of its work has taken cognizance of the problem which the application of the most-favoured-nation clause creates in the sphere of economic relations when the world consists of States whose economic development is strikingly unequal. Part of General Principle Eight of annex A.I.1 of the recommendations adopted by UNCTAD at its first session was also quoted.<sup>307</sup> This principle was adopted in 1964 by a roll-call vote of 78 to 11, with 23 abstentions.

(2) The secretariat of UNCTAD had explained the meaning of General Principle Eight as follows:

From General Principle Eight it is clear that the basic philosophy of UNCTAD starts from the assumption that the trade needs of a developing economy are substantially different from those of a developed one. As a consequence, the two types of economies should not be subject to the same rules in their international trade relations. To apply the most-favoured-nation clause to all countries regardless of their level of development would satisfy the conditions of formal equality, but would in fact involve implicit discrimination against the weaker members of the international community. This is not to reject on a permanent basis the most-favoured-nation clause. The opening sentence of General Principle Eight lays down that "international trade should be conducted to mutual advantage on the basis of the most-favoured-nation treatment...". The recognition of the trade and development needs of developing countries requires that, for a certain period of time, the most-favoured-nation clause will not apply to certain types of international trade relations.\*\*

\*\* In the words of a report entitled "The developing countries in GATT", submitted to the first session of the Conference:

"There is no dispute about the need for a rule of law in world trade. The question is: What should be the character of that law? Should it be a law based on the presumption that the world is essentially homogeneous, being composed of countries of equal strength and comparable levels of economic development, a law founded, therefore, on the principles of reciprocity and non-discrimination? Or should it be a law that recognizes diversity of levels of economic development and differences in economic and social systems?"<sup>308</sup>

<sup>306</sup> See paras. 51-55 above.

<sup>307</sup> See para. 52 above.

<sup>308</sup> See *Yearbook ... 1970*, vol. II, p. 231, doc. A/CN.4/228 and Add.1, para. 188.

(3) Of primary interest to developing countries are the preferences granted to them by developed countries. The main aim of UNCTAD from the very beginning has been to achieve a system of generalized non-reciprocal and non-discriminatory preferences for the benefit of developing countries. The main ideas of UNCTAD in this area are explained as follows in an UNCTAD research memorandum:

In the relationship between developed and developing countries the most-favoured-nation clause is subject to important qualifications. These qualifications follow from the principle of a generalized, non-reciprocal and non-discriminatory system of preferences. Developed market-economy countries are to accord preferential treatment in their markets to exports of manufactures and semi-manufactures from developing countries. This preferential treatment should be enjoyed only by the developing suppliers of these products. At the same time developing countries will not be required to grant developed countries reciprocal concessions.

The need for a preferential system in favour of all developing countries is referred to in a number of recommendations adopted by the first session of the United Nations Conference on Trade and Development. General Principle Eight states that "developed countries should grant concessions to all developing countries ... and should not, in granting these or other concessions, require any concessions in return from developing countries".<sup>[309]</sup> In its recommendation A.III.5, the Conference recommended

"that the Secretary-General of the United Nations make appropriate arrangements for the establishment as soon as possible of a committee of governmental representatives ... with a view to working out the best method of implementing such preferences on the basis of non-reciprocity from the developing countries".<sup>[310]</sup>

At the second session of the Conference, the principle of preferential treatment of exports of manufactures and semi-manufactures from developing countries was unanimously accepted. According to resolution 21 (II), the Conference:

"1. *Agrees* that the objectives of the generalized non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least advanced among the developing countries, should be:

- "(a) To increase their export earnings;
- "(b) To promote their industrialization;
- "(c) To accelerate their rates of economic growth;

"2. *Establishes*, to this end, a Special Committee on Preferences, as a subsidiary organ of the Trade and Development Board, to enable all the countries concerned to participate in the necessary consultations...

"...

"4. *Requests* that ... the aim should be to settle the details of the arrangements in the course of 1969 with a view to seeking legislative authority and the required waiver in the General Agreement on Tariffs and Trade as soon as possible thereafter;

"5. *Notes* the hope expressed by many countries that the arrangements should enter into effect in early 1970".<sup>[311]</sup>

<sup>309</sup> See *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No. 64.II.B.11), p. 20.

<sup>310</sup> *Ibid.*, p. 39.

<sup>311</sup> *Ibid.*, *Second Session*, vol. 1, *Report and Annexes* (United Nations publication, Sales No. E.68.II.D.14), p. 38.

This is not the occasion to go at length into the reasons and considerations underlying the position of UNCTAD on the issue of preferences. Given the sluggish expansion of exports of primary products, and the limitations of inward-looking industrialization, the economic growth of developing countries depends in no small measure upon the development of export-oriented industries. It is clear, however, that to gain a foothold in the highly competitive markets of the developed countries, the developing countries need to enjoy, for a certain period, preferential conditions of access. The case for such a preferential treatment is not unlike that of the infant industry argument. It has long been accepted that, in the early stages of industrialization, domestic producers should enjoy a sheltered home market vis-à-vis foreign competitors. Such a shelter is achieved through the protection of the nascent industries in the home market. By the same token it could be argued that the promotion of export-oriented industries requires a sheltered export market. This is achieved through the establishment of preferential conditions of access in favour of developing suppliers. Preferential treatment for exports of manufactures and semi-manufactures is supposed to last until developing suppliers are adjudged to have become competitive in the world market. Upon reaching this stage, conditions of access to the markets of developed countries are to be governed again by the most-favoured-nation clause.

While UNCTAD is in favour of a general non-reciprocal system of preferences from which *all* developing countries would benefit, it does not favour the so-called special or vertical preferences. Those refer to the preferential arrangements actually in force between *some* developing countries and *some* developed countries. A typical example of vertical preferences is that between the European Economic Community (EEC) and eighteen African countries, most of which are former French colonies. The same is true of the preferential arrangement between the United Kingdom and developing Commonwealth countries. Such preferential arrangements differ from the general system of preferences in two important respects:

- (a) they involve discrimination in favour of some developing countries against all other developing countries. Accordingly third party developing countries stand to be adversely affected;
- (b) they are reciprocal. Thus, the associated African countries enjoy preferential conditions of access in the Common Market. In return the Common Market countries enjoy preferential access to the markets of the associated countries. Although there are some exceptions, reciprocity is also characteristic of the relationship between the United Kingdom and the Commonwealth countries.

As has been mentioned before, these special preferential arrangements were countenanced by Article I of GATT as a derogation from the most-favoured-nation clause. According to UNCTAD recommendations, these preferential arrangements are to be gradually phased out against the provision of equivalent advantages to the beneficiary developing countries. General Principle Eight states that:

"Special preferences at present enjoyed by certain developing countries in certain developed countries should be regarded as transitional and subject to progressive reduction. They should be eliminated as and when effective international measures guaranteeing at least equivalent advantages to the countries concerned come into operation." [312]

The question is taken up again in recommendation A.II.1.:

"Preferential arrangements between developed countries and developing countries which involve discrimination against

other developing countries, and which are essential for the maintenance and growth of the export earnings and for the economic advancement of the less developed countries at present benefiting therefrom, should be abolished *pari passu* with the effective application of international measures providing at least equivalent advantages for the said countries. These international measures should be introduced gradually in such a way that they become operative before the end of the United Nations Development Decade." [313]

The position of UNCTAD on the issue of special preferences is motivated by various considerations. It is believed that the existence of such preferential arrangements may act as a hindrance to the eventual establishment of a fully integrated world economy. The privileged position of some developing countries in the markets of some developed countries is likely to create pressure on third party developing countries to seek similar exclusive privileges in the same or in other developed countries. The experience of the last decade goes a long way to vindicate this belief. The Yaoundé Convention of 1963, providing for preferential arrangements between EEC and the eighteen African countries, has induced many other African countries (e.g. Nigeria, Kenya, Uganda, Tanzania) to seek similar association with EEC. Moreover, in Latin America there appears to be a growing feeling that, to counteract discrimination against them in the Common Market, it may be necessary to secure preferential treatment in the United States market from which the associated African countries would be excluded. Such a proliferation of special preferential arrangements between groups of countries may eventually lead to the division of the world economy into competing economic blocks.

Apart from the danger of proliferation, special preferences involve, as mentioned before, reciprocal treatment. Accordingly, some developed countries enjoy preferential access to the markets of some developing countries. Here again, the existence of the so-called reverse preferences may provide an additional inducement for proliferation of vertical trading arrangements.

For these considerations UNCTAD has recommended the gradual phasing-out of special preferences. It is recognized, however, that, in the case of certain countries, the enjoyment of preferential access is essential for the maintenance and growth of their export earnings. For this reason the phasing-out of special preferences was made conditional upon the application of international measures providing at least equivalent advantages for developing countries benefiting therefrom.<sup>314</sup>

(4) In the sphere of preferences, a compromise agreement was reached unanimously at the second session of UNCTAD, in 1968, and embodied in resolution 21 (II). That resolution favoured the introduction of a generalized non-reciprocal, non-discriminatory system of preferences and envisaged the necessity of a gradual phasing-out of the special preferences.

(5) The Special Committee on Preferences, established by resolution 21 (II) as a subsidiary organ of the Trade and Development Board, succeeded in reaching "agreed conclusions" on a generalized system of preferences which were annexed to decision 75 (S-IV) adopted by the Trade and Development Board at its fourth special session held at Geneva on 12 and 13 October 1970.<sup>315</sup>

<sup>313</sup> *Ibid.*, p. 30.

<sup>314</sup> UNCTAD, Research memorandum No. 33/Rev.1, paras. 19-27.

<sup>315</sup> UNCTAD, *Official Records of the Trade and Development Board, Fourth Special Session, Supplement No. 1* (TD/B/322), p. 1.

<sup>312</sup> *Ibid.*, [First Session], vol. I, *Final Act and Report* (United Nations publication, Sales No. 64.II.B.11), p. 20.

Excerpts from that very important document are reproduced below.

## I.

### *The Special Committee on Preferences*

1. *Recalls* that in its resolution 21 (II) of 26 March 1968 the United Nations Conference on Trade and Development recognized the unanimous agreement in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal, non-discriminatory preferences which would be beneficial to the developing countries;

2. *Further recalls* the agreement that the objectives of the generalized, non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least developed among the developing countries, should be: (a) to increase their export earnings; (b) to promote their industrialization; and (c) to accelerate their rates of economic growth;

...

9. *Recognizes* that these preferential arrangements are mutually acceptable and represent a co-operative effort which has resulted from the detailed and extensive consultations between the developed and developing countries which have taken place in UNCTAD. This co-operation will continue to be reflected in the consultations which will take place in the future in connexion with the periodic reviews of the system and its operation;

10. *Notes* the determination of the prospective preference-giving countries to seek as rapidly as possible the necessary legislative or other sanction with the aim of implementing the preferential arrangements as early as possible in 1971;

...

## II. REVERSE PREFERENCES AND SPECIAL PREFERENCES

1. The special Committee notes that, consistent with Conference resolution 21 (II), there is agreement with the objective that in principle all developing countries should participate as beneficiaries from the outset and that the attainment of this objective, in relation to the question of reverse preferences, which remains to be resolved, will require further consultations between the parties directly concerned. These consultations should be pursued as a matter of urgency with a view to finding solutions before the implementation of the schemes. The Secretary-General of UNCTAD will assist in these consultations with the agreement of the Governments concerned.

...

## III. SAFEGUARD MECHANISMS

1. All proposed individual schemes of preferences provide for certain safeguard mechanisms (for example, *a priori* limitation or escape-clause type measures) so as to retain some degree of control by preference-giving countries over the trade which might be generated by the new tariff advantages. The preference-giving countries reserve the right to make changes in the detailed application as in the scope of their measures, and in particular, if deemed necessary, to limit or withdraw entirely or partly some of the tariff advantages granted. The preference-giving countries, however, declare that such measures would remain exceptional and would be decided on only after taking due account, in so far as their legal provisions permit, of the aims of the generalized system of preferences and the general interests of the developing countries, and in particular the interests of the least developed among the developing countries.

...

## IV. BENEFICIARIES

1. The Special Committee noted the individual submissions of the preference-giving countries on this subject and the joint position of the countries members of the Organization for Economic Co-operation and Development as contained in paragraph 13 of the introduction to the substantive documentation containing the preliminary submissions of the developed countries; ... namely:

"As for beneficiaries, donor countries would in general base themselves on the principle of self-election. With regard to this principle, reference should be made to the relevant paragraphs in document TD/56, ... i.e. Section A in Part I."

...

## V. SPECIAL MEASURES IN FAVOUR OF THE LEAST DEVELOPED AMONG THE DEVELOPING COUNTRIES

1. In implementing Conference resolution 21 (II), and as provided therein, the special need for improving the economic situation of the least developed among the developing countries is recognized. It is important that these countries should benefit to the fullest extent possible from the generalized system of preferences. In this context, the provisions of Conference resolution 24 (II) of 26 March 1968 should be borne in mind.

2. The preference-giving countries will consider, as far as possible, on a case-by-case basis, the inclusion in the generalized system of preferences of products of export interest mainly to the least developed among the developing countries, and as appropriate, greater tariff reductions on such products.

...

## VI. DURATION

The initial duration of the generalized system of preferences will be ten years. A comprehensive review will be held some time before the end of the ten-year period to determine, in the light of the objectives of Conference resolution 21 (II), whether the preferential system should be continued beyond that period.

## VII. RULES OF ORIGIN

...

## VIII. INSTITUTIONAL ARRANGEMENTS

1. The Special Committee on Preferences agrees that there should be appropriate machinery within UNCTAD to deal with the questions relating to the implementation of Conference resolution 21 (II) bearing in mind Conference resolution 24 (II). The [appropriate UNCTAD body] should have the following terms of reference:

(a) It will review:

- (i) The effects of the generalized system of preferences on exports and export earnings, industrialization and the rates of economic growth of the beneficiary countries, including the least developed among the developing countries, and in so doing will consider, *inter alia*, questions related to product coverage, exception lists, depths of cut, working of safeguard mechanisms (including ceilings and escape clauses) and rules of origin;

...

## IX. LEGAL STATUS

1. The Special Committee recognizes that no country intends to invoke its rights to most-favoured-nation treatment with a view to obtaining, in whole or in part, the preferential treatment granted to developing countries in accordance with Conference resolution 21 (II), and that the Contracting Parties to the General Agreement on Tariffs and Trade intend to seek the required waiver or waivers as soon as possible.

2. The Special Committee takes note of the statement made by the preference-giving countries that the legal status of the tariff preferences to be accorded to the beneficiary countries by each preference-giving country individually will be governed by the following considerations:

- (a) The tariff preferences are temporary in nature;
- (b) Their grant does not constitute a binding commitment and, in particular, it does not in any way prevent:
  - (i) Their subsequent withdrawal in whole or in part; or
  - (ii) The subsequent reduction of tariffs on a most-favoured-nation basis, whether unilaterally or following international tariff accommodations;
- (c) Their grant is conditional upon the necessary waiver or waivers in respect of existing international obligations, in particular in the General Agreement on Tariffs and Trade.

(6) The General Assembly took note of the unanimous agreement reached in the Special Committee on Preferences by including the following passage in the International Development Strategy for the Second United Nations Development Decade adopted in its resolution 2626 (XXV) of 24 October 1970:

(32) Arrangements concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential treatment to exports of developing countries in the markets of developed countries have been drawn up in the United Nations Conference on Trade and Development and considered mutually acceptable to developed and developing countries. Preference-giving countries are determined to seek as rapidly as possible the necessary legislative or other sanction with the aim of implementing the preferential arrangements as early as possible in 1971. Efforts for further improvements of these preferential arrangements will be pursued in a dynamic context in the light of the objectives of resolution 21 (II) of 26 March 1968, adopted by the Conference at its second session.

### *Developments in GATT*

(7) Part IV of the General Agreement was added to the original text in 1966 with the intention of satisfying the trade needs of developing countries.<sup>316</sup> It did not take too long to detect that the provisions of part IV were insufficient. On the basis of the agreement reached at the second session of UNCTAD and in the Special Committee on Preferences, the Governments members of GATT voted to authorize the introduction by developed member countries of generalized, non-discriminatory preferential tariff treatment for products originating in developing countries. The authorization takes the form of a waiver under the terms of article XXV of the General Agreement. The full text of the waiver reads as follows:

*The CONTRACTING PARTIES to the General Agreement on Tariffs and Trade,*

*Recognizing* that a principal aim of the CONTRACTING PARTIES is promotion of the trade and export earnings of developing countries for the furtherance of their economic development;

*Recognizing* further that individual and joint action is essential to further the development of the economies of developing countries;

*Recalling* that at the Second UNCTAD, unanimous agreement was reached in favour of the early establishment of a mutually acceptable system of generalized, non-discriminatory preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries;

*Considering* that mutually acceptable arrangements have been drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries;

*Noting* the statement of developed contracting parties that the grant of tariff preferences does not constitute a binding commitment and that they are temporary in nature;

*Recognizing* fully that the proposed preferential arrangements do not constitute an impediment to the reduction of tariffs on a most-favoured-nation basis,

Decide:

(a) That without prejudice to any other Article of the General Agreement, the provisions of Article I shall be waived for a period of ten years to the extent necessary to permit developed contracting parties, subject to the procedures set out hereunder, to accord preferential tariff treatment to products originating in developing countries and territories with a view to extending to such countries and territories generally the preferential tariff treatment referred to in the Preamble to this Decision, without according such treatment to like products of other contracting parties

*Provided that* any such preferential tariff arrangements shall be designed to facilitate trade from developing countries and territories and not to raise barriers to the trade of other contracting parties;

(b) That they will, without duplicating the work of other international organizations, keep under review the operation of this Decision and decide, before its expiry and in the light of the considerations outlined in the Preamble, whether the Decision would be renewed and if so, what its terms should be;

(c) That any contracting party which introduces a preferential tariff arrangement under the terms of the present Decision or later modifies such arrangement, shall notify the CONTRACTING PARTIES and furnish them with all useful information relating to the actions taken pursuant to the present Decision;

(d) That such contracting party shall afford adequate opportunity for consultations at the request of any other contracting party which considers that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the preferential arrangement;

(e) That any contracting party which considers that the arrangement or its later extension is not consistent with the present Decision or that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the arrangement or its subsequent extension and that consultations have proved unsatisfactory, may bring the matter before the CONTRACTING PARTIES which will examine it promptly and will formulate any recommendations that they judge appropriate.<sup>317</sup>

### *Functioning of the generalized system of preferences*

(8) The Soviet Union was the first country to introduce, as early as 1965, a unilateral system of duty-free imports from developing countries. Such duty-free treatment

<sup>316</sup> See *Yearbook ... 1970*, vol. II, p. 232, doc. A/CN.4/228 and Add.1, para. 192.

<sup>317</sup> Decision of 25 June 1971. GATT, *Basic Instruments and Selected Documents, Eighteenth Supplement* (Sales No.: GATT/1972-1), pp. 24-26.

applies to all products. No conditions in respect of duration or the reimposition of duties are attached. As the Soviet representative in the Special Committee on Preferences explained, the USSR, in addition to according tariff preferences, would continue with a number of other measures designed to increase its imports from developing countries on the lines outlined in the Joint Declaration of the socialist countries of Eastern Europe.<sup>318</sup>

(9) Australia followed suit in 1966 with a more restricted unilateral system, and Hungary announced its own system in 1968. Some detailed description of the latter may serve to illustrate the operation of a scheme of generalized preferences established by a State. As amplified and approved in 1971 and 1974, the Hungarian preferential list to products covers a wide range of products, both agricultural and industrial. It is based on requests of developing countries and includes items of special export interest for the least developed among the developing countries; the extent of tariff reductions is set forth by government decree. The preferential tariff rates are 50 to 90 per cent below the most-favoured-nation tariff rates and more than 100 products are accorded full duty exemption. 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, and which maintain normal trade relations with Hungary and can give reliable evidence of the origin of products eligible for preferential tariff treatment. A product shall be deemed to originate in a beneficiary country if it has been produced in that country or 50 per cent of its value has been added to it in that country. A safeguard mechanism consists in the possibility that the Ministers of Foreign Trade and of Finance, in collaboration with the President of the National Board for Materials and Prices, can increase, reduce or suspend the application of the tariff rates established in columns I, II and III (columns I and II of the customs tariff indicate "preferential" and "most-favoured-nation" tariff rates, respectively; the tariff rates in column III are applied to goods originating from those countries to which neither preferential nor most-favoured-nation treatment is applied). This detailed regulation entered into force on 1 January 1971. In 1974, the number of beneficiary countries was enlarged, the product coverage of the system was also broadened and some tariff rates were reduced.<sup>319</sup> The Hungarian system allows preferences only provisionally for those countries which on 1 January 1972 extended special (reverse) preferences to certain developed countries.

(10) EEC also announced a scheme of generalized preferences in 1971, allowing the duty-free entry of manufactured and semi-manufactured products from a number of developing States. Firm limits are set for the quantities that may be imported in this way and certain sensitive

items such as textiles and shoes are given less generous treatment. The generalized system of preferences of the United States of America is contained in title V of its Trade Act of 1974.<sup>320</sup> Its section 501 authorizes the President to extend preferences. Section 502 defines the notion of a "beneficiary developing country", excluding from that notion certain countries. Section 503 determines the articles eligible for preferential treatment, excluding some import-sensitive articles. Section 504 contains limitations on preferential treatment. Section 505 sets a 10-year time-limit for duty-free treatment under the title and provides for a comprehensive review of the operation of the whole preferential system after five years.

(11) It is perhaps too early to assess the results—the success or failure—of the GSP. Some voices of complaint have already been heard. According to the report of the Trade and Development Board on its fifth special session (April-May 1973):

The representatives of developing countries stated that, while some progress might have been achieved in the implementation of the generalized system of preferences, the system itself was far from adequate in terms of its objectives and its performance thus far was disappointing... They observed that the actual benefits of the scheme were still meagre because of the limited coverage of the schemes in operation, ... the limitations imposed on preferential imports by ceilings and the application of non-tariff barriers on products covered by the system.

The representatives of several developing countries including the least developed among them felt that the generalized system of preferences was of little or no benefit, since their countries did not produce manufactures or semi-manufactures, but only supplied primary materials and semi-processed agricultural commodities which were not covered by the generalized system of preferences. In addition, they pointed out that the safeguard clauses presently embodied in the schemes allowed much leeway for limiting the scope of preferences and made such preferences disparate, while creating considerable uncertainty.<sup>321</sup>

(12) The Charter of Economic Rights and Duties of (XXIX) of 12 December 1974 also contains provisions pertinent to the problems under consideration. Thus, with regard to the GSP, articles 18 and 19 read as follows:

#### Article 18

Developed countries should extend, improve and enlarge the system of generalized non-reciprocal and non-discriminatory tariff preferences to the developing countries consistent with the relevant agreed conclusions and relevant decisions as adopted on this subject, in the framework of the competent international organizations. Developed countries should also give serious consideration to the adoption of other differential measures, in areas where this is feasible and appropriate and in ways which will provide special and more favourable treatment, in order to meet the trade and development needs of the developing countries. In the conduct of international economic relations the developed countries should endeavour to avoid measures having a negative effect on the development of the national economies of the developing countries, as promoted by generalized tariff pref-

<sup>318</sup> *Official Records of the Trade and Development Board, Tenth Session, Supplement No. 6A (TD/B/329/Rev.1)*, part two, para. 192. See R. Krishnamurti, "The agreement on preferences, a generalized system in favour of developing countries", *Journal of World Trade Law*, Twickenham, vol. 5, No. 3 (January-February 1971), pp. 56 and 57.

<sup>319</sup> See GATT documents L/3301 and L/4106.

<sup>320</sup> Public Law 93-618; came into force on 3 January 1975. For text, see *U.S. Code Congressional and Administrative News*, Washington, D. C., No. 13 (30 January 1975), p. 6956.

<sup>321</sup> *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 15 (A/9015/Rev.1)*, part one, chap. I, paras. 89 and 90.

erences and other generally agreed differential measures in their favour.

#### Article 26

All States have the duty to co-exist in tolerance and live together in peace, irrespective of differences in political, economic, social and cultural systems, and to facilitate trade between States having different economic and social systems. International trade should be conducted without prejudice to generalized non-discriminatory and non-reciprocal preferences in favour of developing countries, on the basis of mutual advantage, equitable benefits and the exchange of most-favoured-nation treatment.

(13) At its last (fourth) session, held at Nairobi in May 1976, the United Nations Conference on Trade and Development adopted resolution 96 (IV), of 31 May 1976, entitled "A set of interrelated and mutually supporting measures for expansion and diversification of exports of manufactures and semi-manufactures of developing countries". Section I of that resolution ("Improving access to markets in developed countries for manufactures and semi-manufactures of developing countries") includes the following:

Access to markets of developed countries for manufactures and semi-manufactures should be improved, in particular in the following areas:

#### A. Generalized system of preferences

(a) The generalized system of non-reciprocal, non-discriminatory preferences should be improved in favour of the developing countries, taking into account the relevant interests of those developing countries enjoying special advantages as well as the need to find ways and means of protecting their interests. Preference-giving countries should achieve this in their respective schemes through the adoption, *inter alia*, of the following measures:

- (i) Extension of the coverage of the system to as many products of export interest to developing countries as possible, taking into account the export needs of developing countries and their desire to have all such products included in the schemes;
- (ii) As far as possible, application of duty-free entry for manufactured and semi-manufactured products and, where applicable, the substantial increase of ceilings and tariff quotas for these products;
- (iii) As flexible and liberal an application as possible of the rules for the operation of the schemes;
- (iv) Simplification, harmonization and improvement of the rules of origin of the generalized system of preferences in order to facilitate the maximum utilization of the schemes and exports thereunder. Preference-giving countries which have not yet done so should give serious consideration to adopting appropriate forms of "cumulative origin" treatment in their respective schemes;
- (v) Adaptation of the generalized system of preferences to respond better to the evolving needs of the developing countries, taking account in particular of the interests of the least developed countries.

(b) Preference-giving countries should implement the provisions of Conference resolution 21 (II) regarding the generalized, non-reciprocal and non-discriminatory system of preferences.

(c) The generalized system of preferences should continue beyond the initial period of ten years originally envisaged, bearing in mind, in particular, the need for long-term export planning in the developing countries. The relevant provisions of section III

of the agreed conclusions adopted by the Special Committee on Preferences at the second part of its fourth session [<sup>322</sup>] should be taken into account.

(d) The generalized system of preferences has been instituted to help meet the development needs of the developing countries and should only be used as such and not as an instrument of political or economic coercion or of retaliation against developing countries, including those that have adopted or may adopt, singly or jointly, policies aimed at safeguarding their national resources.

#### Additional measures to increase the utilization of preferences

(e) Efforts should be made by all preference-giving countries and beneficiary countries to increase, as much as possible, the degree of utilization of the different schemes of generalized preferences by all appropriate means. In this connexion, developed countries should make efforts to give technical assistance to countries benefiting from generalized preferences, particularly to the least advanced countries, to enable them to draw maximum advantage from preferences. Among other measures, this assistance could focus on better information to beneficiary countries concerning the advantages granted and on technical training for the personnel of developing countries dealing with the generalized system of preferences. Moreover, it is recommended that UNCTAD, with the assistance of other appropriate international institutions, pursue work in the field of dissemination of information, trade promotion and industrial promotion for products covered by the generalized system of preferences.

(f) Application of the above provisions by the socialist countries of Eastern Europe in their schemes of preferences, taking into account the joint declaration made by socialist countries of Eastern Europe at the second part of the fourth session of the Special Committee on Preferences, [<sup>323</sup>] and with due observance of the relevant provisions of the Charter of Economic Rights and Duties of States,<sup>324</sup>

(14) By its resolution 31/159 of 21 December 1976 the General Assembly decided, *inter alia*, as follows:

#### The General Assembly,

...

6. Endorses further resolution 96 (IV) of 31 May 1976 of the United Nations Conference on Trade and Development relating to a set of interrelated and mutually supporting measures for expansion and diversification of exports of manufactures and semi-manufactures of developing countries, in particular the decisions on the extension of the coverage of the generalized system of preferences to as many products of export interest to developing countries as possible and on the continuation of the system beyond the initial period of ten years as originally envisaged, and requests developed countries to consider, as appropriate, making it a continuing feature of their trade policies.

(15) There appears to be general agreement in principle, expressed within United Nations organs, that States should adopt a generalized system of preferences the characteristics of which are outlined above. There seems to be general agreement also that States will refrain from

<sup>322</sup> Trade and Development Board decision 75 (S-IV) of 13 October 1970, annex. See also para. (5) above.

<sup>323</sup> *Official Records of the Trade and Development Board, Tenth Session, Supplement No. 6A* (TD/B/329/Rev.1), part two, para. 192.

<sup>324</sup> *Proceedings of the United Nations Conference on Trade and Development, Fourth Session*, vol. I and Corr. 1, *Report and Annexes* (United Nations publication, Sales No.: E.76.II.D.10), p. 10.



invoking their rights to most-favoured-nation treatment with a view to obtaining in whole or in part the preferential treatment granted to developing countries by developed countries.<sup>325</sup> Accordingly, contracting parties to GATT have, under the conditions described above,<sup>326</sup> waived their rights to most-favoured-nation treatment under article I of the General Agreement.

(16) The Commission is aware that the usefulness of article 23 depends upon the permanence and the development of the GSP. It noted, however, that the General Assembly, in its resolutions 3362 (S-VII) of 16 September 1975, and 31/159 of 21 December 1976, expressed the wish that the GSP should not terminate at the end of the period of 10 years originally envisaged.

(17) It also took account of the fact that the countries establishing their own preferential scheme were free to withdraw their grants in whole or in part and that those grants were conditional upon the necessary waiver or waivers in cases where, as in the framework of the General Agreement on Tariffs and Trade, it was so prescribed.

(18) It is also evident that the advantages which the GSP may yield to developing countries may be diminished by a reduction of tariffs following international arrangements or unilateral action. In this respect, it is not yet possible to foresee to what extent the results of the current round of multilateral trade negotiations (the "Tokyo round") may affect the generalized system of preferences

(19) The system is based upon the principle of self-selection, i.e. that the donor countries have the right to select the beneficiaries of their system and withhold preferences from certain developing countries. As may be seen from the examples given above,<sup>327</sup> selections can be based on various considerations. It could be argued that the individual, national schemes of generalized preferences were in fact discriminatory and that the original idea of non-discriminatory preferences had not been reached. The principle of self-selection is, however, part of the system, from which it cannot be severed; but there is also the expectation that the right of self-selection will be exercised with reasonable restraint.

(20) The above-mentioned features are part and parcel of the GSP, which was adopted as a matter of compromise between developed and developing States.

(21) The Commission also took cognizance of the fact that there was currently no general agreement among States concerning the concepts of developed and developing States. The rule contained in article 23 applies to any State beneficiary of a most-favoured-nation clause irrespective of whether it belongs to the developed or to the developing category. The provision must apply also to developing beneficiary States, because if it did not the basic principle of the GSP—the principle of self-selection—could be circumvented.

(22) On the basis of the foregoing considerations, the Commission adopted article 23, whose first phrase states

that a beneficiary State is not entitled, under a most-favoured-nation clause, to treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a scheme of generalized preferences established by that granting State which conforms with a generalized system of preferences. The last phrase of the article, "recognized by the international community of States as a whole or, for the States members of a competent international organization, adopted in accordance with its relevant rules and procedures", is intended to make the article more accurately reflect the current situation as regards the general acceptability and implementation of the GSP, having due regard to the actual participation of States in international organizations or arrangements concerned with this question.

**Article 24. 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.**

*Commentary*

(1) Trade expansion, economic co-operation and economic integration among developing countries—whether within organized economic groupings or otherwise—have been accepted as important elements of an "international development strategy" and as essential factors in the economic development of those countries in a number of important international instruments adopted with the participation of both developed and developing countries. In these instruments, the establishment of preferences among developing countries has been acknowledged to be one of the arrangements best suited to contribute to trade among themselves. Some of these instruments testify to the willingness of developed countries to promote this tendency, *inter alia* by granting exceptions from their most-favoured-nation rights.

(2) General Principle Eight of recommendation A.I.1. adopted at the first session of the United Nations Conference on Trade and Development (Geneva, 1964), states, *inter alia*:

Developing countries need not extend to developed countries preferential treatment in operation amongst them.<sup>328</sup>

General Principle Ten states, *inter alia*:

Regional economic groupings, integration or other forms of economic co-operation should be promoted among developing countries as a means of expanding their intra-regional and extra-regional trade...<sup>329</sup>

<sup>325</sup> See para. (5) above, excerpts from the agreed conclusions of the Special Committee on Preferences, sect. IX: "Legal status".

<sup>326</sup> See para. (7) above.

<sup>327</sup> See paras. (9) and (10) above.

<sup>328</sup> For full text, see *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report (op. cit.)*, p. 20. (The text cited above is reproduced in *Yearbook ... 1970*, vol. II, p. 231, doc. A/CN.4/228 and Add.1, para. 188.)

<sup>329</sup> *Ibid.*

Recommendation A.III.8 states, *inter alia*:

... rules governing world trade should ... permit developing countries to grant each other concessions not extended to developed countries...<sup>330</sup>

(3) At its second session, (New Delhi 1968), UNCTAD adopted without dissent, on 26 March 1968, a "Concerted declaration on trade expansion, economic co-operation and regional integration among developing countries" (declaration 23 (II)), containing "declarations of support" by the developed market-economy countries and by the socialist countries of Eastern Europe. According to the first of these declarations:

The developed market-economy countries are ready, after examination and consultation within the appropriate international framework, to support particular trading arrangements among developing countries which are consistent with the objectives set out above. This support could include their acceptance of derogations from existing international trading obligations, including appropriate waivers of their rights to most-favoured-nation treatment.<sup>331</sup>

According to the second:

The socialist countries view with understanding and sympathy the efforts of the developing countries with regard to the expansion of trade and economic co-operation among themselves and, following the appropriate principles by which the socialist countries are guided in that respect, they are ready to extend their support to the developing countries.<sup>332</sup>

(4) At its last (fourth) session (Nairobi 1976), UNCTAD adopted without dissent, on 30 May 1976, resolution 92 (IV), entitled "Measures of support by developed countries and international organizations for the programme of economic co-operation among developing countries", the operative part of which reads, *inter alia*, as follows:

*The United Nations Conference on Trade and Development,*

...

*Urges* the developed countries and the United Nations system to provide, as and when requested, support and assistance to developing countries in strengthening and enlarging their mutual co-operation. To this end:

(a) The developed countries, both the developed market-economy countries and the socialist countries of Eastern Europe, commit themselves to abstain as appropriate from adopting any kind of measures or action which could adversely affect the decisions of developing countries in favour of the strengthening of their economic co-operation and the diversification of their production structures;

...

(c) The developed market-economy countries should, in particular:

(i) Support preferential trade arrangements among developing countries, including those of limited scope, through tech-

nical assistance and through appropriate policy measures in international trade organizations.<sup>333</sup>

(5) A Protocol relating to trade negotiations among developing countries was established at Geneva on 8 December 1971 under the auspices of GATT.<sup>334</sup> The objective of trade negotiations among developing countries being to expand their access on more favourable terms in one another's markets through exchanges of tariff and trade concessions, the Protocol includes rules to govern the necessary arrangements to achieve that objective, as well as a first list of concessions. The concessions exchanged pursuant to the Protocol are applicable to all developing States which become parties to it. The Protocol is open for acceptance by the countries which made offers of concessions in the negotiations and for accession by all developing countries. The Protocol entered into effect on 11 February 1973 for eight participating countries and, subsequently, for additional participating countries. The contracting parties to GATT, desirous of encouraging trade negotiations among developing countries through their participation in the Protocol, adopted a decision<sup>335</sup> authorizing the waiver of the provisions of paragraph 1 of article I of the General Agreement to the extent necessary to permit participating contracting parties to accord preferential treatment as provided in the Protocol to products originating in other parties to the Protocol, without being required to extend the same treatment to like goods when imported from other contracting parties. That decision was taken without prejudice to the reduction of tariffs on a most-favoured-nation basis.

(6) Economic co-operation among developing countries, based on the concept of individual and collective self-reliance, has been identified by them, in a number of declarations, as a major strategy to promote their development and as an important means of consolidating their unity and solidarity. Through such decisions, economic co-operation among developing countries has assumed increasing importance as a major area where this concept could materialize into policy action. Those declarations include, in particular, the Programme of Action adopted by the Third Ministerial Meeting of the Group of 77, held at Manila from 26 January to 7 February 1976,<sup>336</sup> the Action Programme for Economic Co-operation adopted by the Fifth Conference of Heads of State or Government of Non-Aligned Countries, held at Colombo from 16 to 19 August 1976,<sup>337</sup> and the report of the Conference on Economic Co-operation among Developing Countries, held at Mexico City from 13 to 22 September 1976.<sup>338</sup>

<sup>330</sup> *Ibid.*, p. 42. For a fuller treatment of the problems involved, see *Yearbook ... 1970*, vol. II, pp. 238 and 239, doc. A/CN.4/228 and Add.1, annex I, where the views of the UNCTAD secretariat on "Trade among developing countries" are set out.

<sup>331</sup> *Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. I, *Report and Annexes (op. cit.)*, p. 53.

<sup>332</sup> *Ibid.*

<sup>333</sup> *Proceedings of the United Nations Conference on Trade and Development, Fourth Session*, vol. I, *Report and Annexes (op. cit.)*, pp. 32 and 33.

<sup>334</sup> See GATT, *Basic Instruments and Selected Documents, Eighteenth Supplement (op. cit.)*, p. 11.

<sup>335</sup> *Ibid.*, p. 26.

<sup>336</sup> See *Proceedings of the United Nations Conference on Trade and Development, Fourth Session*, vol. I, *Report and Annexes (op. cit.)*, p. 118.

<sup>337</sup> See A/31/197, annex III.

<sup>338</sup> See A/C.2/31/7 and Add.1.

(7) As has been explained in a report by the Secretary-General of the United Nations on economic co-operation among developing countries,

... The three conferences held at Manila, Colombo and Mexico City were precisely directed towards the identification of a comprehensive set of objectives and related policy measures which could constitute a basic framework within which action by developing countries could be strengthened, initiated or further investigated. These three conferences should therefore be considered successive stages of the same process aimed at the elaboration of an action programme which would enable developing countries to exploit fully the potential complementarity of their economies while strengthening their collective countervailing power in their negotiations on economic relations with the developed countries.

The Third Ministerial Meeting of the Group of 77 at Manila drew up broad guidelines in the area of economic co-operation among developing countries and decided to convene the Conference on Economic Co-operation among Developing Countries at Mexico City further to elaborate on them. In the mean time, the non-aligned countries, all of which are members of the Group of 77, at the Fifth Conference of Heads of State or Government of Non-Aligned Countries at Colombo, adopted a programme in the same area. At Mexico City an effort was made by the Group of 77 to absorb within one single document all the major elements elaborated at the two previous conferences. As a result, the report of the conference at Mexico City may be considered to be the consolidated position of the Group of 77 on the subject of economic co-operation among developing countries.<sup>339</sup>

(8) Among the "Measures for economic co-operation among developing countries" adopted by the Mexico City Conference is the following:

## II. TRADE AND RELATED MEASURES

### A. Establishment of a global system of trade preferences among developing countries

3. A global system of trade preferences exclusively among developing countries should be established, with the objective of promoting the development of national production and mutual trade.<sup>340</sup>

(9) The General Assembly, in resolutions 3177 (XXVIII) of 17 December 1973, 3241 (XXIX) of 29 November 1974, 3442 (XXX) of 9 December 1975, 31/119 of 16 December 1976 and 32/180 of 19 December 1977, urged developed countries and international organizations to support measures of economic co-operation among developing countries.

(10) Reference must be made, in particular, to articles 21 and 23 of the Charter of Economic Rights and Duties of States,<sup>341</sup> which read as follows:

#### Article 21

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

<sup>339</sup> A/32/312, paras. 5 and 6.

<sup>340</sup> A/C.2/31/7, p. 15.

<sup>341</sup> General Assembly resolution 3281 (XXIX).

#### Article 23

To enhance the effective mobilization of their own resources, the developing countries should strengthen their economic co-operation and expand their mutual trade so as to accelerate their economic and social development. All countries, especially developed countries, individually as well as through the competent international organizations of which they are members, should provide appropriate and effective support and co-operation.

(11) Preferences granted by developing countries among themselves have been excluded from the operation of the most-favoured-nation clause in multilateral treaties concluded between developed and developing States or between developing States among themselves. Recent examples of these are, respectively, the Lomé-Convention between, the African, Caribbean and Pacific States (ACP) and EEC,<sup>342</sup> and the First Agreement on Trade Negotiations among Developing Member Countries of the Economic and Social Commission for Asia and the Pacific (Bangkok Agreement), signed at Bangkok on 31 July 1975.<sup>343</sup>

(12) The relevant provisions of those two treaties read as follows:

#### (a) ACP-EEC Convention of Lomé:

##### TITLE I

##### TRADE CO-OPERATION

...

##### Chapter 1

##### TRADE ARRANGEMENTS

...

##### Article 7

1. In view of their present development needs, the ACP States shall not be required, for the duration of this Convention, to assume, in respect of imports of products originating in the Community, obligations corresponding to the commitments entered into by the Community in respect of imports of the products originating in the ACP States, under this Chapter.

2. (a) In their trade with the Community, the ACP States shall not discriminate among the Member States, and shall grant to the Community treatment no less favourable than the most-favoured-nation treatment.

(b) The most-favoured-nation treatment referred to in subparagraph (a) shall not apply in respect of trade or economic relations between ACP States or between one or more ACP States and other developing countries.

#### (b) Bangkok Agreement:

##### Article 10

In matters of trade, any advantage, benefit, franchise, immunity or privilege applied by a Participating State in respect of a product originating in, or intended for consignment to, any other Participating State or any other country shall be immediately and unconditionally extended to the like product originating in, or intended for consignment to, the territories of the other Participating States.

##### Article 11

The provisions of article 10 shall not apply in relation to preferences granted by Participating States:

...

<sup>342</sup> See *Official Journal of the European Communities*, Luxembourg, 30 January 1976, vol. 19, No. L25, p. 2.

<sup>343</sup> See TD/B/609/Add.1 (vol. V), p. 177.

(b) Exclusively to other developing countries prior to the entry into force of this Agreement;

...

(d) To any other Participating State(s) and/or other ESCAP developing countries with which the Participating State engages in the formation of an economic integration grouping;

(e) To any other Participating State(s) and/or other developing countries with which the Participating State enters into an industrial co-operation agreement or joint venture in other productive sectors, within the purview of article 12.

...

#### Article 12

The Participating States agree to consider extending special tariff and non-tariff preferences in favour of products included in industrial co-operation agreements and joint ventures in other productive sectors reached among some or all of them, and/or with the participation of other developing countries that are members of the ESCAP Trade Negotiations Group, which will apply exclusively in favour of the countries participating in the said agreements or ventures...

(13) In the light of the developments indicated in the preceding paragraphs of this commentary, the Commission decided to include in its draft article 24, on the most-favoured-nation clause in relation to arrangements between developing States. In conformity with current trends, as exemplified in the international instruments referred to above, the article excepts from the operation of the most-favoured-nation clause as regards a developed beneficiary State any preferential treatment extended by a developing granting State to a developing third State. The rule is qualified, however, in two important respects. First, it is restricted to preferential treatment between developing countries in the sphere of trade. Secondly, it refers to preferential treatment by a developing granting State of a developing third State, extended "in conformity with the relevant rules and procedures of a competent international organization of which the States concerned are members". The last phrase is intended to make the provision of article 24 conform with the relevant provisions of the Charter of Economic Rights and Duties of States.

(14) The Commission reiterates, in the context of the present article, the fact that, at present, there is no general agreement among States concerning the concepts of developed and developing States.<sup>344</sup>

<sup>344</sup> At its thirty-second session, the General Assembly had before it the 1977 report of the Committee on Contributions, in which "the absence of a single and universally accepted definition of countries to be designated as developing" was noted (*Official Records of the General Assembly, Thirty-second Session, Supplement No. 11 (A/32/11)* para. 44). The Committee on Contributions also included in its report passages from a paper entitled "Developing countries and levels of development" prepared by the Secretariat for the Committee for Development Planning at its twelfth session, in 1976, in which it is stated, *inter alia* :

"While it has become an established practice to refer to countries as either developed or developing, or, in different circumstances, as developed market economies, developing market economies or centrally planned economies, the designations used do not in all cases apply to exactly the same groups of countries... (E/AC.54/L.81, p. 3)." (*Ibid.*, para. 43.)

(15) Some members of the Commission believed that the absence of such agreed concepts, in particular for purposes of international trade, might give rise to enormous difficulties in the application of the provisions of article 24.

#### Article 25. The most-favoured-nation clause in relation to treatment extended to facilitate frontier traffic

1. A beneficiary State other than a contiguous State is not entitled under a most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State in order to facilitate frontier traffic.

2. A contiguous beneficiary State is entitled under a most-favoured-nation clause to treatment not less favourable than the treatment extended by the granting State to a contiguous third State in order to facilitate frontier traffic only if the subject-matter of the clause is the facilitation of frontier traffic.

#### Commentary

(1) One of the exceptions that is often included in commercial treaties containing a most-favoured-nation clause relates to frontier traffic. Thus the General Agreement on Tariffs and Trade contains a cursory statement (article XXIV, para. 3) providing that:

The provisions of this Agreement shall not be construed to prevent:

(a) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic...<sup>345</sup>

The text of this provision is similar to that included in paragraph 7 of the 1936 resolution of the Institute of International Law:

The most-favoured-nation clause does not confer the right:

to the treatment which is or may thereafter be granted by either contracting country to an adjacent third State to facilitate the frontier traffic...<sup>346</sup>

(2) The frontier traffic exception was already discussed in the League of Nations Economic Committee. The Committee stated in its conclusion, *inter alia*, that:

... in most commercial treaties, allowance is made for the special situation in these [frontier] districts by excepting the customs facilities granted to frontier traffic from the most-favoured-nation régime... In any case, it must be admitted that the exception concerning frontier traffic is rendered necessary, not merely by long-standing tradition but by the very nature of things, and that it would be impossible, owing to differences in the circumstances, to lay down precisely the width of frontier zone which should enjoy a special régime.<sup>347</sup>

(3) Indeed, it seems to be quite general practice for commercial treaties concluded between States with no common frontier to except from the operation of the most-favoured-nation clause advantages granted to neigh-

<sup>345</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (*op. cit.*), p. 41.

<sup>346</sup> *Yearbook ... 1969*, vol. II, p. 181, doc. A/CN.4/213, annex II.

<sup>347</sup> *Ibid.*, pp. 178 and 179, annex I.

bouring countries in order to facilitate frontier traffic.<sup>348</sup> Commercial treaties concluded between neighbouring countries constitute a different category, inasmuch as the countries may or may not have a uniform regulation of the frontier traffic with their different neighbours.

(4) According to an authoritative source, there is almost universal agreement that free trade or freer trade must be allowed within a restricted (frontier) zone and that the generalization of this concession does not fall within the requirements of equality of treatment.<sup>349</sup> The same source quotes from a 1923 treaty between France and Czechoslovakia which exempts concessions granted within a 15-kilometre frontier zone, "such regime being confined exclusively to the needs of the populations of that zone or dictated by the special economic situations resulting from the establishment of new frontiers".<sup>350</sup>

(5) The expression "frontier traffic" is not quite unequivocal. It may mean the movement of goods or of persons or of both. It relates usually to persons residing in a certain frontier zone and to their movements to, and labour relations in, the opposite frontier zone, and also to the movement of goods between the two neighbouring zones, sometimes restricted to goods produced in those zones. The national regulations of frontier traffic are quite diverse, not only as to the width of the zone in question but also as to the conditions of the traffic between the two zones lying on both sides of the common frontier.

(6) The frontier traffic exception is frequently found in conventional stipulations. It seems that the rule is in conformity with the constant practice of States, which has not, to the best of the Commission's knowledge, produced any instance where a dispute has arisen over the essence of the rule. The rule seems to be founded on the basic philosophy of the most-favoured-nation clause and notably on the *ejusdem generis* rule, reflected in articles 9 and 10. It seems evident that a beneficiary State which has no common frontier with the granting State is not in a position to claim the same treatment for its nationals as that which the granting State extends in respect of those nationals of the contiguous third State who are residents of the frontier zone. It is equally evident that a non-contiguous beneficiary State cannot, on the basis of a general most-favoured-nation clause embodied in a commercial treaty, expect the same treatment for the movement of its goods as that extended by the granting State to a contiguous third State in respect of the movement of goods restricted to those produced in the frontier zone or to those serving the needs of the population of that zone.

(7) Although it may be said that the exception would apply on the basis of articles 9 and 10, the Commission was of the view that the spelling out of this undisputed rule, which is based on the fundamental limitations of the

clause, could be useful, and accordingly *paragraph 1* of article 25 states that a beneficiary State which is not contiguous to the granting State is not entitled, under the most-favoured-nation clause, to the treatment extended by the granting State to a contiguous third State for the purpose of facilitating frontier traffic.

(8) The situation is different if the beneficiary of a most-favoured-nation clause is a State which is itself also contiguous to the granting State. In such a case it is quite possible that the most-favoured-nation clause in favour of that State covers the benefits extended by the granting State to another (third) contiguous State. Accordingly, *paragraph 2* of article 25 states that a contiguous beneficiary State is entitled under a most-favoured-nation clause to treatment not less favourable than the treatment extended by the granting State to a contiguous third State, but again, in such a case, the most-favoured-nation clause attracts the relevant benefits only if the treatment conforms to the requirements of articles 9 and 10, i.e. if it is *ejusdem generis*. The Commission considered, however, that that requirement should be stated restrictively, and accordingly *paragraph 2* of article 25 explicitly states that the subject-matter of the clause must be the facilitation of frontier traffic. In the view of the Commission, the expression "contiguous beneficiary State", in *paragraph 2*, should not be understood to mean only a State having a common land frontier with the granting State but also a State separated from the granting State by a stretch of water, if the States concerned have agreed to consider traffic through it as "frontier" traffic.

#### *Article 26. The most-favoured-nation clause in relation to rights and facilities extended to a land-locked third State*

1. A beneficiary State other than a land-locked State is not entitled under a most-favoured-nation clause to rights and facilities extended by the granting State to a land-locked third State in order to facilitate its access to and from the sea.

2. A land-locked beneficiary State is entitled under a most-favoured-nation clause to the rights and facilities extended by the granting State to a land-locked third State in order to facilitate its access to and from the sea only if the subject-matter of the clause is the facilitation of access to and from the sea.

#### *Commentary*

(1) The case of the land-locked States, that is, the exception which the special position of those States requires in regard to the operation of the most-favoured-nation clause,<sup>351</sup> was stated in a proposal submitted by Czechoslovakia to the Preliminary Conference of Land-Locked States in February 1958. The proposal was explained as follows:

The fundamental right of a land-locked State to free access to the sea, derived from the principle of the freedom of the high seas,

<sup>348</sup> Basdevant, "Clause de la nation la plus favorisée" (*loc. cit.*), p. 476.

<sup>349</sup> Snyder (*op. cit.*), p. 157, quoting from R. Riedl and H. P. Whidden with the remark that the practice of States in this respect has changed little in 100 years.

<sup>350</sup> Article 13 (League of Nations, *Treaty Series*, vol. XLIV, p. 21).

<sup>351</sup> See *Yearbook ... 1975*, vol. II, p. 137, doc. A/10010/Rev.1, chap. IV, sect. B, article 14, paras. (9) and (10) of the commentary.

constitutes a special right of such a State, based on its natural geographical position. It is natural that this fundamental right belonging only to a land-locked State cannot be claimed, in view of its nature, by any third State by virtue of the most-favoured-nation clause. The exclusion from the effects of the most-favoured-nation clause of agreements concluded between land-locked States and countries of transit on the conditions of transit is fully warranted by the fact that such agreements are derived precisely from the said fundamental right.<sup>352</sup>

That proposal did not lead to the adoption of any rule on the matter by the 1958 United Nations Conference on the Law of the Sea.

(2) In 1964, the United Nations Conference on Trade and Development adopted a series of principles relating to transit trade of land-locked countries, principle VII of which reads:

The facilities and special rights accorded to land-locked countries in view of their special geographical position are excluded from the operation of the most-favoured-nation clause.<sup>353</sup>

(3) The preamble of the Convention on Transit Trade of Land-Locked States of 8 July 1965 reaffirms principle VII adopted by UNCTAD in 1964, and article 10 of the same Convention contains the following provision:

1. The Contracting States agree that the facilities and special rights accorded by this Convention to land-locked States in view of their special geographical position are excluded from the operation of the most-favoured-nation clause. A land-locked State which is not a party to this Convention may claim the facilities and special rights accorded to land-locked States under this Convention only on the basis of the most-favoured-nation clause of a treaty between that land-locked State and the Contracting State granting such facilities and special rights.

2. If a Contracting State grants to a land-locked State facilities or special rights greater than those provided for in this Convention, such facilities or special rights may be limited to that land-locked State, except in so far as the withholding of such greater facilities or special rights from any other land-locked State contravenes the most-favoured-nation provision of a treaty between such other land-locked State and the Contracting State granting such facilities or special rights.<sup>354</sup>

(4) The Third United Nations Conference on the Law of the Sea, in progress, has considered the matter in question, and has included in its "informal composite negotiating text" article 126, reading as follows:

*Exclusion of application of the most-favoured-nation clause*

Provisions of the present Convention, as well as special agreements relating to the exercise of the right of access to and from the sea, establishing rights and facilities on account of the special geographical position of land-locked States, are excluded from the application of the most-favoured-nation clause.<sup>355</sup>

<sup>352</sup> *Official Records of the United Nations Conference on the Law of the Sea*, vol. VII, Fifth Committee (Question of Free Access to the Sea of Land-Locked Countries) (United Nations publication, Sales No. 58.V.4, vol. VII, p. 77, doc. A/CONF.13/C.5/L.1, annex VI, commentary to article 8. See also report of the Working Party to the Fifth Committee (*ibid.*, p. 84, doc. A/CONF.13/C.5/L.16, para. 13).

<sup>353</sup> *Proceedings of the United Nations Conference on Trade and Development*, vol. I, Final Act and Report (*op. cit.*), p. 25.

<sup>354</sup> United Nations, *Treaty Series*, vol. 597, p. 42.

<sup>355</sup> *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. VIII (United Nations publication, Sales No. E.78.V.4), p. 22, doc. A/CONF.62/WP.10.

(5) On the basis of the foregoing, the Commission found it advisable to adopt a provision on most-favoured-nation clauses in relation to treatment granted to land-locked States. The Commission did not propose to enter into the study of the rights and facilities that were needed by land-locked States<sup>356</sup> or that were due to them under general international law. It took into account that currently sovereign States constituting approximately one fifth of the members of the international community were land-locked, and that most of those were developing States, some of which belonged to the least-developed countries.

(6) The Commission is of the view that the rights and facilities extended to a land-locked State by a coastal State for the purpose of facilitating the access of the former to and from the sea cannot be attracted by a most-favoured-nation clause in favour of another coastal State. This seems to be now generally recognized, as seen from the developments enumerated above. Such an exception serves the legitimate interests of land-locked States, which are in a disadvantageous position in respect of their access to the sea. The adoption of the rule will facilitate the extension of free access rights to those countries and relieve the coastal States in question from their obligations under most-favoured-nation clauses granted to other coastal States.

(7) The Commission found, however, that the exception thus constituted should not necessarily operate in respect of a clause the beneficiary of which is itself a land-locked State. If such State has a most-favoured-nation right *vis-à-vis* the coastal State, then it can avail itself of that right provided that the treatment is *ejusdem generis*, i.e. that it conforms to the requirements of articles 9 and 10 of the draft.

(8) Accordingly, *paragraph 1* of article 26 states that a beneficiary State other than a land-locked State is not entitled under a most-favoured-nation clause to rights and facilities extended by the granting State to a land-locked third State in order to facilitate its access to and from the sea. *Paragraph 2*, on the other hand, states that a land-locked beneficiary State is entitled to such favours under a most-favoured nation clause. That paragraph however, restricting somewhat the rules embodied in articles 9 and 10 of the present articles, allows for entitlement to such favours only if the subject-matter of the most-favoured-nation clause is the facilitation of access to and from the sea. Having made that restriction, the Commission did not find it necessary to provide expressly in paragraph 2 that the land-locked beneficiary State must be in the same region or subregion as the granting State.

(9) The Commission noted that the Convention on the High Seas (Geneva, 29 April 1958)<sup>357</sup> did not use, in English, the expression "land-locked States", but spoke of "non-coastal States" in article 2 and of "States having no sea-coast" in article 3. It believed, however, that the

<sup>356</sup> On this point, see L. C. Caflisch, "The access of land-locked States to the sea" in *Iranian Review of International Relations*, Teheran, Nos. 5-6 (winter 1975-76), p. 53.

<sup>357</sup> United Nations, *Treaty Series*, vol. 450, p. 82.

use of the term "land-locked States" had become quite common since 1958, as shown by the Convention on Transit Trade of Land-Locked States of 8 July 1965, mentioned above.<sup>358</sup> The expression is also used in the documents of the Third United Nations Conference on the Law of the Sea, and is defined in article 124, paragraph 1 (a), of the informal composite negotiating text of that Conference, as a "State which has no seacoast".<sup>359</sup> The Commission therefore believes that it can safely use this term without any risk of misunderstanding.

**Article 27. Cases of State succession, State responsibility and outbreak of hostilities**

**The provisions of the present articles shall not prejudice any question that may arise in regard to a most-favoured-nation clause from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.**

*Commentary*

(1) Article 27 reproduces, in substance, the text of article 73 of the Vienna Convention. It is intended to express the idea that cases of State succession, State responsibility, and outbreak of hostilities are not covered by the present articles. It may be questioned whether an article of this type is really necessary among the articles on the most-favoured-nation clause. Owing to the fact that the present articles were conceived as an autonomous set and that the States bound by these articles will not necessarily be parties to the Vienna Convention, the Commission concluded that the inclusion of an article based on article 73 of the Convention was warranted.

(2) Questions may also be raised concerning the use of the verb "prejudge" in relation to the international responsibility of a State. In the context of the Commission's work on State responsibility,<sup>360</sup> the rules on the most-favoured-nation clause contained in the present articles would constitute the "primary rules" to be observed by States. These primary rules would entail certain consequences, namely, the application of the "secondary rules" of international responsibility; therefore the violation of the rules could be said, in a certain sense, to prejudge the consequences. These possible objections ultimately relate to the language of the Vienna Convention, and the Commission found that a divergence from the language of that Convention would not be desirable. Similar language was used by the Commission in respect of State responsibility in article 38 of the draft which it prepared in 1974 on succession of States in respect of treaties.<sup>361</sup>

(3) As to the case of State succession, the Commission assumes that, in respect of a treaty embodying a most-favoured-nation clause, the general rules of State succession would apply. These rules apply obviously to any treaty that exists between the granting State and the beneficiary State. They apply also to treaties between the granting State and a third State serving as a basis for the beneficiary State's most-favoured-nation rights. If the rules of State succession result in the extinction of this latter type of treaty, this may of course lead to the termination of the right of the beneficiary State to the relevant treatment under article 21 of the present articles. An obvious example of such a case is the uniting of the granting State and the third State.

(4) As to State responsibility, any violation of an obligation under a most-favoured-nation clause, whether such violation has been committed directly or indirectly, by circumvention of the obligations concerned,<sup>362</sup> will entail the international responsibility of the granting State—the rules of such responsibility not being covered by the present articles. Similarly, the articles do not deal with the question of when and under what circumstances the granting State may suspend the application of most-favoured-nation treatment as a retortion or sanction for international wrongs committed against it.

(5) The articles, lastly, do not contain any provisions concerning the effect on the operation of the clause of an outbreak of hostilities between any of the States involved. It was thought that, because consideration of such situations was specifically omitted by the Commission in its study of the general law of treaties, it would be out of place to deal with them in the restricted sphere of the most-favoured-nation clause. A similar stand was adopted by the Commission in the context of its work on succession of States in respect of treaties (article 38).<sup>363</sup>

**Article 28. Non-retroactivity of the present articles**

**1. Without prejudice to the application of any rule set forth in the present articles to which most-favoured-nation clauses would be subject under international law independently of these articles, they apply only to a most-favoured-nation clause in a treaty which is concluded by States after the entry into force of the present articles with regard to such States.**

**2. Without prejudice to the application of any rule set forth in the present articles to which clauses on most-favoured-nation treatment would be subject under international law independently of these articles, they apply to the relations of States as between themselves only under a clause on most-favoured-nation treatment contained in an international agreement which is concluded by States and other subjects of international law after the entry into force of the present articles with regard to such States.**

<sup>358</sup> See para. (3) above.

<sup>359</sup> *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. VIII (op. cit.), p. 22, doc. A/CONF.62/WP.10.

<sup>360</sup> See chapter III below.

<sup>361</sup> See *Yearbook ... 1974*, vol. II (Part One), p. 268, doc. A/9610/Rev.1, chap. II, sect. D.

<sup>362</sup> See *Yearbook ... 1969*, vol. II, pp. 171 and 172, doc. A/CN.4/213, paras. 85-89.

<sup>363</sup> See foot-note 361 above.



*Commentary*

(1) This article is based on article 4 of the Vienna Convention. Its purpose is the same as that of the said provision of the Convention, which is essentially to simplify and facilitate the acceptance of the articles by governments.

(2) Although the necessity for article 28 may be questioned in view of the general rule of international law—codified in article 28 of the Vienna Convention—concerning the non-retroactivity of treaties, the Commission concluded that the inclusion of article 28 in the draft had the merit of placing the articles—as concerns their applicability—on the same footing as the Vienna Convention. It was agreed in that respect that the provision of article 28 operated *ex abundanti cautela*.

(3) The question may also be raised whether the articles contain anything which, under the introductory words of article 28 of the Vienna Convention (“Unless a different intention appears from the treaty or is otherwise established”), would counteract the principle of the non-retroactivity of treaties contained in that article. Because the view prevailed that the answer to that question was in the negative, the Commission decided to include article 28 in the draft.

(4) In view of the provisions of article 6, the present article is cast in two parallel paragraphs which relate, respectively, to most-favoured-nation clauses contained in treaties concluded by States and to clauses on most-favoured-nation treatment contained in international agreements concluded by States and other subjects of international law.

**Article 29. Provisions otherwise agreed**

**The present articles are without prejudice to any provision on which the granting State and the beneficiary State may otherwise agree.**

*Commentary*

(1) The purpose of this article is to express the residual character of the provisions contained in the present draft. The draft articles are in general without prejudice to the provisions to which the parties may agree in the treaty containing the clause or otherwise. The Commission was unanimous in the view that the granting and beneficiary States might agree on most-favoured-nation treatment in all matters that lent themselves to such treatment: they might specify the sphere of relations in which they undertook most-favoured-nation obligations and they might restrict *ratione materiae* their respective promises. The Commission also agreed that States might, in the clause itself or in the treaty containing the clause or otherwise, reserve their right to grant preferences, i.e. to except from the application of the most-favoured-nation clause favours that they granted to one or more States. It is understood, however, in this connexion, that the present article should not be used as a pretext for discrimination.

(2) It might be argued that a reservation as to preferential treatment of one or more States, while always

possible by agreement between States, changes the very nature of the clause as defined in articles 4 and 5, and in article 2, paragraph 1 (*d*). Were that to be the case, clauses of this type would not properly fall under the present articles; the provisions of the present articles would apply only *mutatis mutandis* to such “restricted most-favoured-nation clauses”. The Commission considered, however, that the practice of reserving the right to grant preferences, which was quite general, did not affect the nature of the most-favoured-nation clause.

**Article 30. New rules of international law in favour of developing countries**

**The present articles are without prejudice to the establishment of new rules of international law in favour of developing countries.**

*Commentary*

(1) The Commission considered whether further rules in favour of developing countries than those embodied in articles 23 and 24 should be developed for inclusion in the present draft. The Commission is conscious that the promotion of the trade of developing countries with a view to their economic development is being pursued at present in areas other than those to which articles 23 and 24 refer, namely, the generalized system of preferences and preferences granted by developing countries among themselves.

(2) One example of such other areas is that concerning multilateral trade negotiations. The relationship between multilateral trade negotiations and preferences granted to developing countries under the GSP is evident; to the extent that most-favoured-nation tariffs may be cut for export products from developing countries covered by the GSP, the margin of preference will be reduced even to zero depending upon the depth of cut, thus negating the privileged position which the developing countries concerned would be expected to enjoy under the GSP.

(3) This, among other reasons, has led to the formulation, in the context of multilateral trade negotiations, of the concept of “differential measures” as distinct from that of “preferences”. The reference to “differential measures” appears in the Tokyo Declaration. A declaration of intent to undertake a new round of multilateral trade negotiations in GATT was made in 1972 by EEC, the United States and Japan. The negotiations were declared officially open by a declaration of ministers of the contracting parties to GATT adopted at Tokyo in 14 September 1973 (the Tokyo Declaration).<sup>364</sup> Prior to that Declaration, at the third session (1972) of UNCTAD, and subsequently at the fourth session (1976) and in the General Assembly and other organs of the United Nations, as well as in intergovernmental meetings held outside the United Nations, declarations, resolutions and other decisions have addressed themselves to the question of “differential treatment” in the context of multilateral trade negotiations.

<sup>364</sup> See GATT, *Basic Instruments and Selected Documents*, *Twentieth Supplement* (Sales No. GATT/1974-1), pp. 19 *et seq.*

(4) For the purposes of the commentary to the present article, it suffices to refer to the relevant provisions of the Tokyo Declaration and of recent resolutions adopted by UNCTAD and the General Assembly. The Tokyo Declaration provides, *inter alia*:

2. The negotiations shall aim to:

- achieve the expansion and ever greater liberalization of world trade ... through ... the improvement of the international framework for the conduct of world trade.

...

5. The negotiations shall be conducted on the basis of the principles of mutual advantage, mutual commitment and overall reciprocity, while observing the most-favoured-nation clause... The developed countries do not expect reciprocity for commitments made by them in the negotiations to reduce or remove tariff and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of the trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. The Ministers recognize the need for special measures to be taken in the negotiations to assist the developing countries in their efforts to increase their export earnings and promote their economic development and, where appropriate, for priority attention to be given to products or areas of interest to developing countries. They also recognize the importance of maintaining and improving the Generalized System of Preferences. They further recognize the importance of the application of differential measures to developing countries in ways which will provide special and more favourable treatment for them in areas of the negotiation where this is feasible and appropriate.

...

9. ... Consideration shall be given to improvements in the international framework for the conduct of world trade which might be desirable in the light of progress in the negotiations...<sup>365</sup>

(5) At its fourth session (Nairobi 1976), UNCTAD adopted without dissent resolution 91 (IV) of 30 May 1976, which provides *inter alia* as follows:

*The United Nations Conference on Trade and Development.*

...

*Reaffirming* the need to secure additional benefits for the international trade of developing countries, as one of the major objectives of the multilateral trade negotiations, so as to improve the possibilities for these countries to participate in the expansion of world trade,

...

14. *Recalls* the provisions of the Tokyo Declaration ... according to which consideration shall be given to improvements in the international framework for the conduct of world trade which might be desirable in the light of progress in the negotiations and in this connexion draws attention to the proposal for establishing a group with the following mandate: "to improve the international framework for the conduct of world trade, particularly with respect to trade between developed and developing countries and

differentiated and more favourable measures to be adopted in such trade"<sup>366</sup>

(6) The Charter of Economic Rights and Duties of States<sup>367</sup> provides, *inter alia*, in article 18, as follows:

... Developed countries should also give serious consideration to the adoption of other differential measures, in areas where this is feasible and appropriate and in ways which will provide special and more favourable treatment, in order to meet the trade and development needs of the developing countries. In the conduct of international economic relations the developed countries should endeavour to avoid measures having a negative effect on the development of the national economies of the developing countries, as promoted by generalized tariff preferences and other generally agreed differential measures in their favour.

(7) While all these developments may show that there might be a tendency among States to promote the trade of developing countries through "differential treatment", the conclusion of the Commission is that this tendency has not yet crystallized sufficiently to permit it to be embodied in a clear legal rule that could find its place among the general rules on the functioning and application of the most-favoured-nation clause. All the texts partially quoted above are substantially expressions of intent rather than obligatory rules. Moreover, the multilateral trade negotiations are conducted within the framework of GATT, and the GATT system is subject to a procedure of consultations and the ultimate judgement of the contracting parties; it is not a universal system but is restricted to the membership of GATT, however broad that may be.

(8) What has been said of "differential treatment" can also be said of other concepts evolving with the aim of promoting the trade of developing countries. Under these circumstances it seemed to the Commission that, at least at the current stage of development, there was no agreement discernible that would warrant the inclusion in the draft articles of rules in favour of developing countries other than those contained in articles 23 and 24. Nor did UNCTAD, at its fourth session (Nairobi, May 1976), provide the Commission with a definitive text upon which it could have based the adoption of a new rule. However, with a view to the possibility of the development of such new rules, the Commission decided to include in the draft articles a general reservation concerning the possible establishment of new rules of international law in favour of developing countries. Article 30 leaves the matter open for future development within the international community and accordingly states that the present articles are without prejudice to the establishment of new rules of international law in favour of developing countries.

<sup>366</sup> *Proceedings of the United Nations Conference on Trade and Development, Fourth Session*, vol. I, *Report and Annexes* (op. cit.), pp. 14 and 15.

<sup>367</sup> General Assembly resolution 3281 (XXIX) of 12 December 1974.

<sup>365</sup> *Ibid.*, pp. 20-22.