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**Second report on the most-favoured-nation clause, by Mr. Endre Ustor,
Special Rapporteur**

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MOST-FAVOURED-NATION CLAUSE

[Agenda item 5]

DOCUMENT A/CN.4/228 and Add.1

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ABBREVIATIONS

AI	<i>Analytical Index (GATT)</i>
BIRPI	United International Bureaux for the Protection of Intellectual Property
BISD	<i>Basic Instruments and Selected Documents (GATT)</i>
ECA	Economic Commission for Africa
ECAFE	Economic Commission for Asia and the Far East
ECE	Economic Commission for Europe
ECLA	Economic Commission for Latin America

EEC	European Economic Community
EFTA	European Free Trade Association
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
I.C.J.	International Court of Justice
IDA	International Development Association
IFC	International Finance Corporation
IMCO	Inter-Governmental Maritime Consultative Organization
IMF	International Monetary Fund
ITO	International Trade Organization
ITU	International Telecommunication Union
LAFTA	Latin American Free Trade Association
OAS	Organization of American States
OCAM	African and Malagasy Common Organization
OECD	Organisation for Economic Co-operation and Development
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UPU	Universal Postal Union
WHO	World Health Organization
WMO	World Meteorological Organization

Introduction

1. In the history of the most-favoured-nation clause the period after the Second World War witnesses two major developments of special significance. One is that the International Court of Justice has developed an extensive jurisprudence on the operation of the clause as it appears in bilateral treaties.

2. The other is of a wider importance. Tendencies to organize world trade on a multilateral basis employ the traditional tool of the most-favoured-nation clause and try to adapt its functioning to the requirements of a changed environment—to the necessities of a community of States belonging to different social and economic systems and standing on different levels of development.

3. The present report, the purpose of which is to continue the efforts to identify the rules of contemporary international law pertaining to the most-favoured-nation clause, will accordingly be divided into two parts. The first part attempts to present an analytical survey of the views held by the parties and the judges on the nature and function of the clause in the three cases dealt with by the International Court of Justice. The second part is based on the replies from the organizations and interested agencies consulted by the Secretary-General. A greater portion of this part will reflect the existing problems surrounding the clause as a regulator of international trade.

4. It is believed that in this way the report will conform to the instructions given to the Special Rapporteur by the International Law Commission.¹

¹ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 234, document A/7610/Rev.1, para. 89.

Part I

The jurisprudence of the International Court of Justice in respect of the most-favoured-nation clause

5. In his first report on the most-favoured-nation clause² the Special Rapporteur suggested that his next report give an account of the three cases dealt with by the International Court of Justice pertaining to the most-favoured-nation clause: the *Anglo-Iranian Oil Company Case (jurisdiction)* [1952],³ the *Case concerning the rights of nationals of the United States of America in Morocco* [1952]⁴ and the *Ambatielos Case (merits: obligation to arbitrate)* [1953].⁵ This suggestion was adopted by the International Law Commission at its twenty-first session.⁶

6. The reasons for the advisability and even necessity of studying the three cases in question were given by a French author as follows:

The decisions of the International Court of Justice constitute the source of an international case law on points which have given rise to serious difficulties in the past and which involve the general theory of the clause; the solution found for their difficulties should therefore be specified as they go beyond the scope of the cases which they resolve.⁷

7. An English author writing on the same cases states that in respect of the rules of international law pertaining

² *Ibid.*, p. 159, document A/CN.4/213, para. 9.

³ *I.C.J. Reports 1952*, p. 93.

⁴ *Ibid.*, p. 176.

⁵ *I.C.J. Reports 1953*, p. 10.

⁶ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 234, document A/7610/Rev. 1, para. 89 and foot-note 92.

⁷ C. Rossillion, "The most-favoured-nation clause in case law of the International Court of Justice", *Journal du droit international (Paris)*, vol. 82, No. 1 (janv.-mars 1955), p. 77.

to the most-favoured-nation clause these three cases are the real *sedes materiae*.⁸

8. In connexion with the *Ambatielos Case* reference will be made also to the Award handed down on 6 March 1956⁹ of the Commission of Arbitration established by the agreement of 24 February 1955 between the Governments of Greece and the United Kingdom for the arbitration of the *Ambatielos* claim.

9. A relatively large amount of legal literature has evolved around the cases in question.¹⁰ In some instances reference will be made to pertinent portions of related works. Some of these works deal with the problems involved in greater detail than the present report, whose aim is limited to tracing only those aspects which could possibly lead to ascertaining the existing rules regarding the most-favoured-nation clause.

A. THE ANGLO-IRANIAN OIL COMPANY CASE

10. In 1933, an agreement was concluded between the Government of Iran and the Anglo-Iranian Oil Company. In 1951, laws were passed in Iran for the nationalization of the oil industry. These laws resulted in a dispute between Iran and the Anglo-Iranian Oil Company. The United Kingdom took up the case of the latter and instituted proceedings before the International Court of Justice on 26 May 1951.

11. Iran disputed the Court's jurisdiction on the following ground: according to a declaration made by Iran under article 36, paragraph 2 of the Statute of the International Court of Justice, the Court had jurisdiction only when a dispute related to the application of a treaty or convention accepted by Iran after the ratification of the declaration, which took place on 19 September 1932.

12. The United Kingdom questioned this interpretation of the Iranian declaration, but contended that even if the

Court accepted this construction it would have had jurisdiction in the case. It invoked three treaties concluded by Iran after 1932. Among these the Treaty of Friendship, Establishment and Commerce of 1934 between Iran and Denmark contained the following article IV:

[*Translation from French*] The nationals of each of the High Contracting Parties shall, in the territory of the other, be received and treated, as regards their persons and property, in accordance with the principles and practice of ordinary international law. They shall enjoy therein the most constant protection of the laws and authorities of the territory for their persons, property, rights and interests.¹¹

The Establishment Conventions concluded by Iran with Switzerland and Turkey in 1934 and 1937, respectively, each contained a similar article.

13. The United Kingdom relied on these three treaties by virtue of the most-favoured-nation clauses contained in article IX of the Treaty concluded between the United Kingdom and Iran in 1857, and in article II of the Commercial Convention concluded between the United Kingdom and Iran in 1903. Article IX of the Treaty of 1857 read:

The High Contracting Parties engage that, in the establishment and recognition of Consuls-General, Consuls, Vice-Consuls, and Consular Agents, each shall be placed in the dominions of the other on the footing of the most-favoured nation; and that the treatment of their respective subjects, and their trade, shall also, in every respect, be placed on the footing of the treatment of the subjects and commerce of the most-favoured nation.¹²

Article II of the Commercial Convention of 1903 provided as follows:

[*Translation from French*] [...] It is formally stipulated that British subjects and importations in Persia, as well as Persian subjects and Persian importations in the British Empire, shall continue to enjoy in all respects, the régime of the most-favoured nation [...] ¹³

1. THE MECHANISM OF THE MOST-FAVOURLED-NATION CLAUSE: THE ORIGIN OF THE RIGHTS OF THE BENEFICIARY

14. It was argued by the United Kingdom Government that the conduct of the Iranian Government towards the Anglo-Iranian Oil Company constituted a breach of the principles and practice of international law which, by its treaty with Denmark, Iran promised to observe towards Danish nationals, and which, by the operation of the most-favoured-nation clause contained in the treaties between Iran and the United Kingdom, Iran became bound to observe towards British nationals. Consequently, the argument continued, the dispute which the United Kingdom had brought before the Court concerned situations or facts relating directly or indirectly to the application of a treaty—the Treaty of 1934 between Denmark and Iran—accepted by Iran after the ratification of her Declaration.¹⁴

⁸ G. Schwarzenberger, *International Law as applied by International Courts and Tribunals*, 3rd ed. (London, Stevens & Sons, 1957), p. 240.

⁹ United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No.: 1963.V.3), p. 91.

¹⁰ In addition to those quoted above see, *inter alia*, the following works: J. de Soto, "Note on the judgment of the International Court of Justice of 27 August 1952", *Journal du droit international* (Paris, 1953), vol. 80, No. 3, p. 516; G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: Points of Substantive Law. Part II"; *British Year Book of International Law, 1955-56* (London, 1957), vol. XXXII, p. 20; B. Cheng, "Rights of United States Nationals in the French Zone of Morocco", *The International and Comparative Law Quarterly* (London, 1953), vol. 2, pp. 354-367; S. Borisov, "Dva sudebnykh dela v mezhdunarodnom sude OON v 1952 g." (Two cases before the International Court of Justice in 1952), *Sovietskoe gosudarstvo i pravo* (Soviet State and Law) [Moscow, 1953], No. 4, p. 153; G. Haraszti, *The Practice of the International Court of Justice, 1946-1956* [in Hungarian] (Budapest, 1958); J. H. W. Verzijl, *The Jurisprudence of the World Court* (Leyden, A. W. Sijthoff, 1966); E. Hambro, "The *Ambatielos* Arbitral Award", *Archiv des Völkerrechts* (Tübingen, 1957), vol. 6, No. 2, p. 152; R. Pinto, "The *Ambatielos* Award", *Journal du droit international* (Paris, 1957), vol. 84, No. 3, p. 541.

¹¹ Quoted in *I.C.J. Reports 1952*, p. 108.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*, pp. 108-109.

15. The Iranian Party—through its advocate, M. Henri Rolin—strongly objected to the contention of the United Kingdom. Referring to the treaties concluded by Iran after 1932, M. Rolin said in his statement made on 11 June 1952:

[*Translation from French*] I recognize, Gentlemen, that it was ingenious to have thus assumed that these treaties could be invoked as a basis for your jurisdiction. I imagine that the reason why those ten treaties were mentioned, rather than the treaties of 1857 and 1903, was precisely so as to avoid the grounds of incompetence which I would have deduced from the date of the treaties of 1857 and 1903. But ingenious though that attempt is, I really do not think you are deceived by it, because it is not true that the United Kingdom request is based on treaties concluded between Iran and third States, to which the United Kingdom was not a party. Taken in themselves, these treaties are *res inter alios acta* for the United Kingdom. It derives absolutely no right from these treaties. It has absolutely no title to ask you for an interpretation and an application of these treaties. It can invoke these treaties only in relation to treaties to which it is itself a party, the treaties of 1857 and 1903, and this conjuring trick with the treaties of 1857 and 1903 is not sufficient for it to be able to present the necessary treaties as the basis of its request.¹⁵

16. Sir Lionel Heald, Counsel of the British Party, held the opposite view in his argument presented on 13 June 1952:

[...] 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 [...].¹⁶

17. To this M. Rolin had the following answer:

[*Translation from French*] [...] there is a substantial legal error in the British argument. For if a most-favoured-nation clause was really a clause without content, giving rise to no right or obligation, it would be non-existent. I do not need to tell you, Gentlemen, that that is not the case. On the contrary, it 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.¹⁷

18. The last word in this debate was said by Sir Eric Beckett on behalf of the United Kingdom as follows:

We claim to be entitled, [...] to rely upon the treaty concluded in 1934 between Persia and Denmark. It is, of course, undeniable that the United Kingdom is entitled to rely upon all the provisions of that treaty only by reason of the treaties of 1857 and 1903 between herself and Persia containing most-favoured-nation clauses. Professor Rolin is quite right in saying that those treaties are the root of the obligation. But all we are concerned with here is to show, on the assumption that we are restricted to treaties subsequent to 1932, that there is a treaty subsequent to that date

to the application of which the situations or facts giving rise to the present dispute directly or indirectly relate, and it is the application of the Danish treaty which is in dispute. There is no dispute as to the application of the treaties of 1857 and 1903. What is in issue, to use Professor Rolin's metaphor, is not the root but the branch. One can agree with almost all that Professor Rolin said [...], but it is irrelevant to the question which the Court has to consider, which is not "what are the treaties which confer on Great Britain the rights in question", but "what are the treaties whose application is now in dispute". Professor Rolin recognizes that later treaties with third States can increase the content of the most-favoured-nation clause, and, indeed, may in certain circumstances give it content which it did not have before. In the present case, the rights conferred on Denmark by the 1934 Treaty became part of the content of the most-favoured-nation clause for the first time in 1934 and it is with regard to that new content that the dispute arises; that is, the dispute relates to the application not of the clause, which has remained unaltered since 1857, but of the 1934 Treaty which gives it a new content.¹⁸

19. The majority of the members of the Court upheld the thesis of Iran. Indeed it resounded the words of Henri Rolin as follows:

The treaty containing the most-favoured-nation clause is the basic treaty upon which the United Kingdom must rely. It is this treaty which establishes the juridical link between the United Kingdom 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 and Iran: it is *res inter alios acta*.¹⁹

20. The dissenting Judges held otherwise. The argument of Judge Hackworth was the most detailed and explicit:

The conclusion that the treaty containing the most-favoured-nation clause is the *basic* treaty upon which the United Kingdom must rely amounts, in my judgment, to placing the emphasis on the wrong treaty, and losing sight of the principal issue. [...] The provisions with respect to the application of the principles of international law are not to be found in the most-favoured-nation clause of the earlier treaties of 1857 and 1903 between Iran and the United Kingdom, but are embodied in the later treaties between Iran and Denmark of 1934; between Iran and Switzerland of that same year, and between Iran and Turkey of 1937. It is to these treaties and not to the most-favoured-nation clause that we must look in determining the rights of British nationals in Iran. These then are the *basic* treaties. The most-favoured-nation clause in the earlier treaties is merely the operative part of the treaty structure involved in this case. It is the instrumentality through which benefits under the later treaties are derived. It is in these later treaties that we find the *ratio decidendi* of the present issue.²⁰

21. Judge Hackworth then examined the provisions of the treaties in question and the Iranian declaration accepting the compulsory arbitration of the Court, and concluded:

All that the Declaration requires in order that the dispute shall fall within the competence of the Court, is that it shall relate to the application of treaties or conventions accepted by Iran subsequent to the ratification of the Declaration, and nothing more.

The Danish Treaty answers this description. It is in that Treaty and not in the most-favoured-nation clause that the substantive

¹⁵ *I.C.J. Pleadings*, Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), p. 492.

¹⁶ *Ibid.*, p. 533.

¹⁷ *Ibid.*, p. 616.

¹⁸ *Ibid.*, pp. 648-649.

¹⁹ *I.C.J. Reports 1952*, p. 109.

²⁰ *Ibid.*, pp. 137-138.

rights of British nationals are to be found. Until that Treaty was concluded, the most-favoured-nation clauses in the British-Persian treaties were but promises, in effect, of non-discrimination, albeit binding promises. They related to rights *in futuro*. There was a right to claim something but it was an inchoate right. There was nothing to which it could attach itself unless and until favours should be granted to nationals of another country. But when Iran conferred upon Danish nationals by the Treaty of 1934 the rights to claim treatment "in accordance with the principles and practice of ordinary international law", the right thereupon *ipso facto* became available to British nationals. This new right—based on international law concepts—came into existence not by virtue of the earlier treaties alone or even primarily, but by them plus the new treaties which gave them vitality. The new treaty is, in law and in fact, the fountain-head of the newly-acquired rights.

[. . .] It is the later treaty, and not the most-favoured-nation clause, that embraces the assurance upon which reliance is sought to be placed.²¹

22. The dissenting opinions of Judge Read²² and Judge Levi Carneiro²³ followed a similar line of thinking.

23. According to Fitzmaurice,²⁴ the view of Judge Hackworth may have been justified in relation to the rather special facts of the case. However, he continues: "there can be little doubt that the Court's was the correct view as a matter of general principle". He gives a graphic picture of the relation between the treaty containing the most-favoured-nation clause and the subsequent, third-party treaty. "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."

24. The majority view of the Court is upheld by G. Haraszti.²⁵ He considers that the opinion of Judge Hackworth put things upside down.

2. THE MECHANISM OF THE MOST-FAVOURED-NATION CLAUSE: THE CLAUSE AND THE "PACTA TERTIIS" RULE

25. The decision of the Court is of great theoretical importance. In the legal doctrine the operation of the most-favoured-nation clause was often presented as an exception to the rule *pacta tertiis nec nocent, nec prosunt*, i.e., that treaties only produce effects as between the contracting parties.²⁶

26. Had the Court adopted this view it ought to have held that a legal relation between the United Kingdom and Iran came into existence at the moment when Iran concluded a treaty with a third State. In this case it could then be held that the conclusion of a treaty between two States would produce, to the benefit of a third State (the beneficiary of the most-favoured-nation clause), a direct legal title in the creation of which it took no part.²⁷

27. The majority of the Court followed the line of thinking of those authors who held the opposite view, as for instance that of Accioly who observes:

[Translation from French] The rights or advantages of a State beneficiary of the most-favoured-nation clause are derived from the agreement or treaty to which that State was not a party, but from the aforementioned clause to which it was a party. It is by virtue of that clause that it acquires the right to claim for itself the advantages or rights stipulated in the treaties in which it took no part.²⁸

28. An English writer explains the relation between the *pacta tertiis* rule and the most-favoured-nation clause in the following graphic way:

In principle, treaties apply exclusively between the contracting parties. Thus, a contracting party cannot derive rights from treaties concluded between another contracting party and third States. Most-favoured-nation treaties do not form an exception to this rule. On the contrary, they confirm it. They owe their existence to this rule. Merely by way of an abbreviation it is permissible to state that a beneficiary of most-favoured-nation treatment is entitled to the benefits which the other contracting party has granted, or may grant, to third States.

In reality, the beneficiary claims only under his own treaty with the other contracting party and by virtue of the most-favoured-nation clause in his own treaty. This gives him the right to incorporate into his own treaty all rights and favours under treaties in the same field between the other contracting party and third States while such treaties happen to be operative.

The most-favoured-nation standard is an ingenious form of legal shorthand. This drafting device [. . .] contributes greatly to the rationalization of the treaty-making process and leads to the automatic self-revision of treaties which are based on the most-favoured-nation standard. It makes unnecessary the incorporation in the treaty between the grantor and the beneficiary of most-favoured-nation treatment of any of the relevant treaties between the grantor and third States and their deletion whenever such treaties cease to be in force. So long as this last-mentioned aspect of the matter is kept in mind, most-favoured-nation clauses are correctly described as drafting (and deletion) by reference. It depends entirely on the formulation of each particular most-favoured-nation clause whether a beneficiary is entitled not only to the advantages granted by the promisor to third States by way of treaties but also to advantages enjoyed *de facto* by third States.²⁹

29. The International Law Commission, in its report covering the work of its sixteenth session,³⁰ pointed out that while recognizing the importance of not prejudicing in any way the operation of most-favoured-nation clauses, it did not consider that these clauses are in any way touched by those draft articles on the law of treaties which deal with the relation of treaties to third States (articles 58 to 61 of the 1964 draft). The Commission maintained this position in the report on the work of its eighteenth session.³¹

30. The Vienna Conference on the Law of Treaties upheld this view. At the fourteenth plenary meeting

²¹ *Ibid.*, pp. 140-141.

²² *Ibid.*, pp. 145-147.

²³ *Ibid.*, pp. 157-158.

²⁴ G. Fitzmaurice, *op. cit.*, pp. 87-88.

²⁵ G. Haraszti, *op. cit.*, p. 162.

²⁶ See, for example, P. Fauchille, *Traité de droit international* (Paris, Librairie Rousseau, 1926), t. I, 3rd part, p. 359, and L. Oppenheim, *International Law: A Treatise*, 8th ed. [Lauterpacht] (London, Longmans, Green and Co., 1955), vol. I, pp. 928-929, para. 522.

²⁷ Cf. C. Rossillion, *op. cit.*, p. 89.

²⁸ H. Accioly, *Traité de droit international public* (Paris, Recueil Sirey, 1941), t. II, p. 479. For a similar view, see M. Sibert, *Traité de droit international public* (Paris, Librairie Dalloz, 1951), t. II, p. 255.

²⁹ G. Schwarzenberger, *op. cit.*, p. 243.

³⁰ See *Yearbook of the International Law Commission, 1964*, vol. II, p. 176, document A/5809, para. 21.

³¹ *Ibid.*, 1966, vol. II, p. 177, document A/6309/Rev. 1, part II, para. 32.

held on 7 May 1969, the President of the Conference pronounced 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."³²

B. THE CASE CONCERNING RIGHTS OF NATIONALS OF THE UNITED STATES IN MOROCCO

31. On 30 December 1948, when a greater part of Morocco was still a French protectorate, the French authorities in the protectorate issued a decree which imposed a system of licence control in respect of imports not involving an official allocation of currency, and limited these imports to a number of products indispensable to the Moroccan economy. The United States protested against this measure on the ground that it affected its rights to most-favoured-nation treatment under treaties with Morocco and contended that in accordance with these treaties no Moroccan law or regulation could be applied to its nationals in Morocco without its previous consent. In the ensuing dispute the United States vindicated a number of other rights and privileges for its nationals. As protracted negotiations did not yield results, France instituted proceedings on 27 October 1950, in the course of which the United States submitted counter-claims.

32. The Court had to pronounce judgement on seven substantial counts: conformity of the Moroccan import regulations with the international régime of Morocco; extent of the American consular jurisdiction in Morocco as regards disputes between American citizens or protected persons; extent of that same jurisdiction as regards actions against such persons; existence and possible extent of the right of assent of the United States to the application to American citizens of Moroccan laws; existence and extent of fiscal immunity of United States citizens in Morocco; legality of consumption taxes as regards United States nationals; rules applicable to customs duties.

33. The most-favoured-nation clauses whose interpretation and operation was in the forefront of the controversy in the proceedings appeared in articles 14 and 24 of the Treaty between Morocco and the United States of September 16, 1836. These clauses read as follows:

Art. 14. The commerce with the United States, shall be on the same footing as is the commerce with Spain, or as that with the most favored nation for the time being; [. . .]

Art. 24. [. . .] And it is further declared, that whatever indulgence, in trade or otherwise, shall be granted to any of the Christian Powers, the citizens of the United States shall be equally entitled to them.³³

³² See *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, para. 36.

³³ Morocco Case (France v. U.S.A.), *I.C.J. Pleadings, 1952* vol. I, pp. 511 and 513.

34. Several references were made also to article 17 of the twelve-Power Convention of Madrid of 3 July 1880 which reads as follows:

The right to the treatment of the most favoured nation is recognized by Morocco as belonging to all the powers represented at the Madrid conference.³⁴

and to the Preamble of the General Act and Additional Protocol of Algeciras of 7 April 1906 in which the participants expressed their adherence to the

triple principle of the sovereignty and independence of His Majesty the Sultan [of Morocco], the integrity of his domains, and economic liberty without any inequality, [. . .].³⁵

1. THE CONTINGENT CHARACTER OF THE MOST-FAVOURED-NATION CLAUSE

[Interpretation in accordance with the intention of the parties—No special rules of construction for certain categories of States—The clause as a means to maintain fundamental equality without discrimination]

35. In respect of the rights of the United States to the consular jurisdiction in Morocco, the French Party referred to the fact that all States which possessed such rights have renounced them and subsequently abolished their consular tribunals. The last such renunciation occurred in 1937 when the United Kingdom in a treaty concluded with France in London, on 29 July 1937, renounced "all rights and privileges of a capitulatory character in the French Zone of the Shereefian Empire"³⁶ and agreed to the submission of all British subjects in the French Zone of Morocco to the jurisdiction of the courts which have jurisdiction over French citizens and companies.³⁷

36. The French memorial of 1 March 1951 explained the position of France as follows:

[*Translation from French*] The Government of the French Republic claims that this United Kingdom renunciation has had obvious juridical consequences with regard to the status of United States nationals in Morocco. The effect has been to restore the latter to the juridical situation stemming from their own Treaty of 1836; since 1 January 1938, date of the entry into force of the Agreement of 1937, United States nationals and protected persons no longer benefit from any rights other than strictly those formally included in the Treaty of 16 September 1836.

It is indeed self-evident—and the Government of the French Republic does not think it needs to dwell on this point—that the most-favoured-nation clause cannot create any permanently acquired rights for the beneficiary; it only means that the latter can never in the future be less favoured than a third party, and hence that it may be raised to the level of a more favoured third party but only to the extent, and consequently for the period of time and within the territorial context, in which these advantages exist for that third party itself. This interpretation, which has always been accepted, of the juridical effects of the most-favoured-nation clause, is the only one compatible with the definite meaning of such a clause, which is to prevent its beneficiary from being

³⁴ Quoted in *ibid.*, p. 574.

³⁵ Quoted in *ibid.*, p. 578.

³⁶ League of Nations, *Treaty Series*, vol. CLXXXIV, p. 353.

³⁷ *Ibid.*, p. 355.

accorded treatment less favourable than that granted to other nations, but not to favour it more than others.³⁸

37. The United States in its counter-memorial of 20 December 1951 concedes:

[*Translation from French*] that the most-favoured-nation clause theory on which the French Government predicates its argument is a valid modern theory. It agrees that, as a matter of general principle, in modern practice, the most-favoured-nation clause does not continue in force rights acquired only through its effect, after the termination of the treaty which contained such rights. The Government of the United States, however, does not consider that this principle is controlling in the analysis of the most-favoured-nation clause in the Moroccan treaties.³⁹

Here follow lengthy references to authorities. Relying on these and mostly on an article of N. Politis, an arbitral decision dated 8 April 1901 and on an extract from E. Nys, *Le droit international*, the United States submits, accordingly, that:

in the absence of evidence to the contrary, the most-favoured-nation clause in treaties of capitulations with Mohammedan countries did not evolve, like the clause in European-American practice, into a device exclusively designed to guarantee to its beneficiary a position of equality with third States at any given time and to continue in force rights acquired through its effect only for the duration of the treaties with third States containing such rights.⁴⁰

38. This American argument was rejected by the majority of the members of the Court in respect of both the question of consular jurisdiction and the question of fiscal immunities. The Court interpreted the most-favoured-nation clauses in the treaties between the United States and Morocco in accordance with the intention of the parties and the general nature and purpose of the most-favoured-nation clauses. It rejected the contention of special rules of construction.

39. In the words of the Judgement of the Court

[The contention 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 to the treaties now in question. This is shown both by the wording of the particular treaties, and by the general treaty pattern which emerges from an examination of the treaties made by Morocco with France, the Netherlands, Great Britain, Denmark, Spain, United States, Sardinia, Austria, Belgium and Germany over the period from 1631 to 1892. 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.⁴¹

³⁸ Morocco Case (France v. U.S.A.), *I.C.J. Pleadings*, 1952, vol. I, p. 60.

³⁹ *Ibid.*, p. 372.

⁴⁰ *Ibid.*, p. 378.

⁴¹ *I.C.J. Reports* 1952, pp. 191-192.

40. The Court rejected on the same grounds another United States contention that, as the United States most-favoured-nation clauses apply to the whole of Morocco and the British renunciation of the right of her consular jurisdiction was limited to the French Zone, juridically the United States "which still treats Morocco as a single country" was entitled to enjoy those rights in Morocco, both in the French and in the Spanish Zones. The Court repeating itself held that

This result would be contrary to the intention of the most-favoured-nation clauses to establish and maintain at all times fundamental equality without discrimination as between the countries concerned.⁴²

41. In the matter of fiscal immunities the Court followed the same line of thought as in that of consular jurisdiction. Concerning the counter-claim of the United States relating to the question of immunity from Moroccan taxes in general and certain consumption taxes in particular, the Court held—by the same majority of 6 votes to 5 as follows:

[*Translation from French*] It is submitted on behalf of the United States that the most-favoured-nation clauses in treaties with countries like Morocco were not intended to create merely temporary or dependent rights, but were intended to incorporate permanently these rights and render them independent of the treaties by which they were originally accorded. It is consequently contended that the right to fiscal immunity accorded by the British General Treaty of 1856 and the Spanish Treaty of 1861, was incorporated in the treaties which guaranteed to the United States most-favoured-nation treatment, with the result that this right would continue even if the rights and privileges granted by the Treaties of 1856 and 1861 should come to an end.

For the reasons stated above in connexion with consular jurisdiction, the Court is unable to accept this contention. 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 are 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.⁴³

42. A French author gives the following picture of the operation of the clause:

[...] the clause can be likened into a buoy which keeps the swimmer to maintain himself at the highest level of obligations accepted by the conceding State with regard to a foreign State; if he sinks the buoy cannot be transformed into a balloon to keep the beneficiary of the clause dangling as it were above the general level of rights exercised by the other States.⁴⁴

2. THE CONTINGENT CHARACTER NOT "JUS COGENS"

43. It follows from the finding of the Court that the contingent character of the most-favoured-nation clause is but a presumption. The parties to a treaty are free to draft a clause in such a way that rights and privileges which a country is entitled to invoke by virtue of a most-

⁴² *Ibid.*, p. 192.

⁴³ *Ibid.*, p. 204.

⁴⁴ Rossillion, *op. cit.*, p. 107.

favoured-nation clause, and which are in existence at the date of its coming into force, will be incorporated permanently by reference and enjoyed and exercised even after the abrogation of the treaty provisions from which they have been derived. Such intention should, however, be clearly reflected in the text of the clause, which, if drafted in this way, would rather have the nature of a preference.

44. In this sense de Soto States:

It is indeed possible that the parties intended to make the clause a determining factor but for the standard parts of one treaty to be finally incorporated in another by the effects of the clause, the exceptional demand made upon the clause would have to be clearly expressed for, admittedly, such a determining role runs counter to the classical political aim of the clause since such incorporation would involve, not equality, but latently economic or legal inequality, once the treaty under which the clause was operative lapsed: the sliding scale is thus blocked on its upward movement.⁴⁵

3. THE POSITION OF THE BENEFICIARY OF A MOST-FAVOURLED-NATION CLAUSE IN CASES WHERE THE RIGHTS OF THE THIRD STATE EXIST "DE JURE" BUT CANNOT BE EXERCISED BY IT "DE FACTO"

45. The above problem is exposed in the Judgement of the Court as follows:

The third contention of the United States is based upon the nature of the arrangements which led to the termination of Spanish consular jurisdiction in the French Zone. By a Convention between France and Spain of November 27th, 1912, provision was made for the exercise by Spain of special rights and privileges in the Spanish Zone. By a bilateral Declaration between France and Spain of March 7th, 1914, Spain surrendered its jurisdictional and other extraterritorial rights in the French Zone, and provision was made for the subsequent surrender by France of similar rights in the Spanish Zone. This was accomplished by a bilateral Declaration between France and Spain of November 17th of the same year.

The United States contends that, as both the Convention of 1912 and the Declarations of 1914 were agreements between France and Spain, and as Morocco was not named as a party to either agreement, the rights of Spain under the earlier provision still exist *de jure*, notwithstanding that there may be a *de facto* situation which temporarily prevents their exercise.

Even if this contention is accepted, the position is one in which Spain has been unable to insist on the right to exercise consular jurisdiction in the French Zone since 1914. The rights which the United States would be entitled to invoke by virtue of the most-favoured-nation clauses would therefore not include the right to exercise consular jurisdiction in the year 1950. They would be limited to the contingent right of re-establishing consular jurisdiction at some later date in the event of France and Spain abrogating the agreements made by the Convention of 1912 and the Declarations of 1914.⁴⁶

46. The Court found that France had the power to conclude treaties binding Morocco and held that

these agreements bound and enured to the benefit of Morocco and the Spanish rights as regards consular jurisdiction came to an end *de jure* as well as *de facto*.⁴⁷

47. The Court then examined the wording of the Declarations in order to establish whether they were intended as a surrender or renunciation of all the rights and privileges arising out of the capitulatory régime or whether they must be considered as temporary undertakings not to claim those rights and privileges so long as the guarantees for judicial equality are maintained in the French Zone by the tribunals of the Protectorate and so long as the corresponding guarantees are maintained in the Spanish Zone. The Court held:

The question is academic rather than practical. Even if the words in question should be construed as meaning a temporary undertaking not to claim the rights and privileges, the fact remains that Spain, in 1950, as a result of these undertakings was not entitled to exercise consular jurisdiction in the French Zone. It follows that the United States would be equally not entitled to exercise such jurisdiction in the French Zone in the year 1950.⁴⁸

Further the Court examined the Declarations as to the real intention of the Parties and came to the conclusion that they were meant as a definite surrender of the rights of Spain. Consequently the Court found that the United States was not entitled to invoke, by virtue of the most-favoured-nation clauses, those provisions of the 1861 Spanish Treaty which concerned consular jurisdiction.⁴⁹

48. With regard to these points, the dissenting Judges came to a different conclusion. They held that the abrogation of the Spanish Treaty of 1861 has legally not taken place and what really happened was only a renunciation on behalf of Spain to claim the rights to jurisdiction and "to renounce claiming a right may be nothing more than the suspension of the exercise of that right".⁵⁰ The joint dissenting opinion held:

In these conditions, the most-favoured-nation clauses granted to the United States by the Treaty of 1836, when applied to the Treaty of 1861, viewed in the light of the 1914 Declarations, may have the effect of extending to the United States all the rights and favours granted by that Treaty, notwithstanding the suspension of their exercise by Spain.

It is recognized that the failure by a Power, to which a favour has been granted, to exercise that favour does not affect or prejudice the right of any other Power entitled to that favour by virtue of a most-favoured-nation clause. For all useful purposes, suspending the exercise of a favour is equivalent to failure to exercise it. Therefore, nothing would or should preclude the United States from exercising the capitulatory rights granted by the Treaty of 1861.⁵¹

49. As to the theoretical point involved, it is essential—according to Schwarzenberger⁵²—to distinguish clearly between situations in which third States fail to exercise their rights although remaining entitled to do so, and others in which, by renunciation or otherwise, they have temporarily or definitively forfeited their rights in law. While in the former case, the rights of the beneficiary remain unaffected, in the latter, they are suspended or extinguished. On this point, which he considers to be uncontroversial in State practice, the same author finds

⁴⁵ J. de Soto, *op. cit.*, p. 539.

⁴⁶ *I.C.J. Reports 1952*, p. 193.

⁴⁷ *Ibid.*, pp. 193-194.

⁴⁸ *Ibid.*, p. 194.

⁴⁹ *Ibid.*, p. 196.

⁵⁰ *Ibid.*, p. 225.

⁵¹ *Ibid.*, p. 226.

⁵² G. Schwarzenberger, *op. cit.*, p. 242.

it difficult to concur with the joint Dissenting Opinion and particularly with the phrase "suspending the exercise of a favour is equivalent to failure to exercise it". The two—according to Schwarzenberger—are as "equivalent" as abstention on the ground of a legal duty and in the exercise of discretionary power.⁵³

4. THE SCOPE OF THE MOST-FAVOURLED-NATION CLAUSE CONFINED TO MATTERS TO WHICH IT APPLIES

50. The Court did not have to decide whether the most-favoured-nation clauses in question covered the privilege of consular jurisdiction. The clauses (which are quoted above in para. 33) were couched in very general terms. Since, in the opinion of the Court, the clauses lost all their value, the Court did not go into the question in detail. It did seem to imply, however, that the scope of the most-favoured-nation clause in a treaty was confined to the matters dealt with in that convention, specific intention to the contrary of course excepted.⁵⁴ The Court remarked:

Even if it could be assumed that Article 17 [of the Madrid Convention of 1880] operated as a general grant of most-favoured-nation rights to the United States and was not confined to the matters dealt with in the Madrid Convention, it would not follow that the United States is entitled to continue to invoke the provisions of the British and Spanish Treaties, after they have ceased to be operative as between Morocco and the two countries in question.⁵⁵

5. INTERPRETATION OF A MOST-FAVOURLED-NATION CLAUSE AS CONDITIONAL OR UNCONDITIONAL

51. This question was raised by the French Party in connexion with the problem of the import restriction and foreign exchange regulations in Morocco and with the fiscal immunities pretended by the United States. The dispute centred on the interpretation of the most-favoured-nation clauses contained in the 1836 treaty. M. Reuter on behalf of France pleaded on 16 July 1952 as follows:

[...] the question becomes extremely important: it is whether the most-favoured-nation clause in the treaty of 1836 is a conditional clause or an unconditional clause [...] [It] is, of course, first necessary to consider the text of the clause itself. [...] jurists have made serious mistakes concerning the interpretation of treaties because they have failed to take account of two points: the signatory States of the clause and the period when the treaty was signed, for the practice of nations has varied on that point in different States and at different times.

[...]

Who is the signatory of the treaty of 1836? The United States! Now in that respect the United States has a particular doctrine. In the nineteenth century it never accepted that the most-favoured-nation clause was unconditional. [...]

It is true that the other signatory is Morocco. And it may still be said that Morocco is a Moslem State. The argument is of little weight as regards the capitulations, but it is totally inoperative with respect to trade, for the sovereigns of Morocco

very wisely, in all their nineteenth century treaties *without exception*—we will revert to this point—contracted solely reciprocal commitments. If this treaty of 1836 did not include the conditional clause, it would be the only treaty signed by Morocco, from its origins up to the Act of Algeciras, which did not involve a measure of reciprocity.⁵⁶

52. The United States Party—through Mr. Fisher—argued in the opposite sense:

The second point on which I desire to present a few remarks concerns statements made by my distinguished opponent with respect to the meaning of the most-favoured-nation clause in the treaties between the United States and Morocco. In one instance, he contends that the most-favoured-nation clause in Moroccan treaties should be interpreted by reference to the intent of the drafters at the time it was included in the treaties. Since the United States supported in the past a conditional interpretation of other most-favoured-nation clauses, in the other treaties he concludes that the most-favoured-nation clause of the United States treaties with Morocco must itself have been a conditional clause. 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.⁵⁷

53. Whether a given most-favoured-nation clause is of the so-called conditional or unconditional type is to be decided through treaty interpretation. The question remains whether there exists a presumption in favour of the unconditional form as suggested by the 1936 resolution of the Institute of International Law.⁵⁸

6. THE MOST-FAVOURLED-NATION CLAUSE AS A MEANS OF ENSURING EQUALITY OF TREATMENT IN THE FIELD OF FOREIGN TRADE

54. A decree issued by the Resident General of the French Republic in Morocco, dated 30 December 1948, concerning the regulation of imports into the French Zone of Morocco involved discrimination in favour of France. The United States contended that this discrimination contravened its treaty rights. The Court referred, in this respect, to the three principles stated in the Preamble of the General Act of Algeciras of 7 April 1906⁵⁹ and continued:

The last-mentioned principle of economic liberty without any inequality must, in its application to Morocco, be considered against the background of the treaty provisions relating to trade and equality of treatment in economic matters existing at that time.

By the Treaty of Commerce with Great Britain of December 9th, 1856, as well as by treaties with Spain of November 20th, 1861, and with Germany of June 1st, 1890, the Sultan of Morocco

⁵⁶ Morocco Case (France v. U.S.A.), *I.C.J. Pleadings*, 1952, vol. II, pp. 185-187.

⁵⁷ Rejoinder of 26 July 1952, *ibid.*, pp. 317-318.

⁵⁸ See the text of the resolution reproduced in *Yearbook of the International Law Commission*, 1969, vol. II, p. 180, document A/CN.4/213, annex II.

⁵⁹ See para. 34 above.

⁵³ For a similar view, see B. Cheng, *op. cit.*, p. 367.

⁵⁴ *Ibid.*, pp. 365-366.

⁵⁵ *I.C.J. Reports 1952*, p. 191.

guaranteed certain rights in matters of trade, including imports into Morocco. These States, together with a number of other States, including the United States, were guaranteed equality of treatment by virtue of most-favoured-nation clauses in their treaties with Morocco.

...
It follows from the above considerations that the provisions of the Decree of December 30th, 1948, contravene the rights which the United States has acquired under the Act of Algeciras, because they discriminate between imports from France and other parts of the French Union on the one hand, and imports from the United States on the other. [...]

This conclusion can also be derived from the Treaty between the United States and Morocco of September 16th, 1836, Article 24, where it is "declared that whatever indulgence, in trade or otherwise, shall be granted to any of the Christian powers, the citizens of the United States shall be equally entitled to them". Having regard to the conclusion already arrived at on the basis of the Act of Algeciras, the Court will limit itself to stating as its opinion that the United States, by virtue of this most-favoured-nation clause, has the right to object to any discrimination in favour of France, in the matter of imports into the French Zone of Morocco.⁶⁰

55. These findings of the Court were made unanimously. They amount to a restating of the generally accepted view that the most-favoured-nation clause represents and is the instrument of the principle of equality of treatment in the field of foreign trade. The clause is a means to an end—the end being the application of the rule of equality of treatment in commercial relations.⁶¹

C. THE AMBATIELOS CASE

56. The origin of the claim is to be found in a contract between Ambatielos, a Greek shipowner, and the British Ministry of Shipping for the sale of nine ships which were, at the time of the agreement in 1919, under construction. Ambatielos claimed that the contract was not properly carried out by the seller and through its failure he suffered damage. The question of the breach of the contract was submitted to English Courts by common accord of the parties. The Admiralty Court gave judgement against the claimant, who appealed against the decision but subsequently abandoned his appeal.

57. The Greek Government took up the case of its national and instituted proceedings against the United Kingdom Government before the International Court of Justice on 9 April 1951. The claim of the Greek Government related to the way in which justice was administered in the proceedings in the English Courts between Ambatielos and the Board of Trade as the successor to the Ministry of Shipping. It alleged that the officials of the Board of Trade wrongly failed to produce in the Admiralty Court all the evidence available. It complained also of the refusal by the Court of Appeal to grant leave to the claimant to adduce new evidence. All this resulted in

substantial damage to Ambatielos. The Greek Government claimed that the United Kingdom was under a duty to submit the dispute to arbitration in accordance with treaties between Greece and the United Kingdom of 1886 and 1926. In the subsequent proceedings it requested the Court itself to adjudicate upon the validity of the Ambatielos claim.

58. The United Kingdom raised preliminary objections and contended that the Court lacked jurisdiction.

59. By its Judgement of 1 July 1952 the Court held that it had no jurisdiction to decide on the merits of the claim. It found at the same time that it had jurisdiction to decide whether the United Kingdom was under an obligation to submit the dispute to arbitration.⁶² And in its Judgement of 19 May 1953 the Court gave an affirmative answer to that question.

60. The Commission of Arbitration to which the case was ultimately referred rejected by its Award of 6 March 1956 the claim definitely.⁶³

61. In the course of the proceedings before the International Court of Justice the parties referred to a most-favoured-nation clause embodied in the treaty of commerce of 1886 and a national treatment clause of the same treaty granting "free access to the Courts of Justice". They differed widely on the scope and effect of the most-favoured-nation clause and on the meaning of the term "free access to the Courts of Justice".

62. The Court itself did not decide on the substance of the dispute. Thus no discussion of the substantive issues, which would throw light on the problems connected with the operation of a most-favoured-nation clause, is to be found in the Judgement itself of the Court. They are dealt with in great detail in the written and oral submissions of the parties and in the joint dissenting opinion of four members of the Court, Judge McNair, then President of the Court, and Judges Basdevant, Klaestad and Read.

63. The most-favoured-nation clause in dispute between the parties appears in article X of the Anglo-Greek Treaty of Commerce and Navigation of 1886. This article reads as follows:

The Contracting Parties agree that, in all matters relating to commerce and navigation, any privilege, favour or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting Party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most favoured nation.⁶⁴

64. The national treatment clause which appears in the third paragraph of article XV reads as follows:

The subjects of each of the two Contracting Parties in the dominions and possessions of the other shall have free access

⁶⁰ *I.C.J. Reports 1952*, pp. 183-186.

⁶¹ Cf. R. C. Snyder, *The Most-favored-Nations Clause: An Analysis with Particular Reference to Recent Treaty Practice and Tariffs* (New York, King's Crown Press, Columbia University, 1948), p. 5.

⁶² See *I.C.J. Reports 1952*, p. 46.

⁶³ See United Nations, *Reports of International Arbitral Awards*, vol. XII, United Nations publication, Sales No.: 1963.V.3), p. 91.

⁶⁴ Quoted in *I.C.J. Reports 1953*, p. 19.

to the Courts of Justice for the prosecution and defence of their rights, without other conditions, restrictions or taxes beyond those imposed on native subjects, and shall, like them, be at liberty to employ, in all causes, their advocates, attorneys or agents, from among the persons admitted to the exercise of those professions according to the laws of the country.⁶⁵

65. The Greek Government, relying upon the most-favoured-nation clause contained in article X of the 1886 Treaty, invoked provisions embodied in earlier treaties between the United Kingdom and third States, that is to say, Denmark, Sweden and Bolivia. These provisions were the following:⁶⁶

(a) Article 16 of the Treaty of Peace and Commerce with Denmark of 1660-1661: "Each Party shall in all causes and controversies now depending, or hereafter to commence, cause justice and right to be speedily administered to the subjects and people of the other Party, according to the laws and statutes of each country without tedious and unnecessary delays and charges";

(b) Article 24 of the Treaty of Peace and Commerce with Denmark of 1670, providing that the Parties "shall cause justice and equity to be administered to the subjects and people of each other";

(c) Article 8 of the Treaties of Peace and Commerce with Sweden of 1654, and 1661, providing that "In case the people and subjects on either part . . . or those who act on their behalf before any Court of Judicature for the recovery of their debts, or for other lawful occasions, shall stand in need of the Magistrate's help, the same shall be readily, and according to the equity of their cause, in friendly manner granted them . . .";

(d) Article 10 of the Treaty of Commerce with Bolivia of 1911, reserving the right to exercise diplomatic intervention in any case in which there may be evidence of "denial of justice" or "violation of the principles of international law".

1. THE "EJUSDEM GENERIS" RULE: WHAT BELONGS TO THE "IDEM GENUS"

66. There was no disagreement between the parties as to the validity of the above rule. The disagreement centred on the operation of this rule in the context of the relevant treaties.

67. M. Rolin, agent of Greece, stated that:

. . . In his relations with the United Kingdom administration, he [Ambatielos] was not treated in accordance with the principle of fair play and did not benefit from the treatment enjoyed by British nationals in general and by the most favoured foreigners.

And in this connexion the Greek Government invokes, in the light of Article X which I have just read out, not only the direct benefit of the treaty, but also the indirect benefit of the treaty, namely, what it finds in treaties with Denmark and Sweden, which are still in force although they are certainly old (going back to 1660, 1670, 1654 and 1661), that is, a duty of Governments to comply with equity and justice, and even, according to one of the treaties, with common right.⁶⁷

68. Mr. Fitzmaurice, Counsel for the United Kingdom, invoked the *ejusdem generis* rule in the following terms:

So far as treaties are concerned, the principle involved is a well-known one: that clauses conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can only attract the rights conferred by other treaties in regard to the same matter or class of matter. [. . .] "That is very clear, and it seems to us to furnish a conclusive answer to any suggestion that Article X of the 1886 Treaty can attract any provisions in other treaties except provisions about commerce and navigation—in short, to any suggestion that it can attract provisions in other treaties (should there be any) dealing with the administration of justice and related matters."⁶⁸

69. Sir Frank Soskice, Counsel for Greece in his reply to the argument of Mr. Fitzmaurice did not deny the validity of the rule. He tried to prove that the access to courts and administration of justice in commercial matters is not outside the *genus* of the favours referred to in article X. These were his words in part:

Let us look at Article X. [. . .] It is the article on which we rely for the purpose of incorporating the most-favoured-nation provisions of other treaties entered into by the United Kingdom Government. The words which are relevant in that Article are these: "The Parties agree that [now these are the relevant words] in all matters relating to commerce and navigation", the words are "in all matters relating to commerce." Those words are wide. Those words include not merely the core and kernel of commerce itself, but they cover all words which, as it were, describe those things on the outside, the circumference of what may be described as commerce itself. [. . .] The claim is a claim which centres upon a series of transactions which form one coherent whole. [. . .] It begins with the breaking of the commercial contract relating to the purchase of the nine ships. [. . .] If the matter had rested there, of course Mr. Ambatielos could have gone to the British courts to get redress. He tried to do so, but [. . .] the British Government in effect (if I may summarize what took place) prevented him from getting his relief, because it withheld from him and from the Court evidence which was essential to enable him to get that relief, presenting itself a case in conflict and contradiction to that evidence which it possessed. We rely on the totality of those events and also on each of them individually. Now that is the gist of it. It is commercial from beginning to end. It centres upon a commercial contract and the breach of it, and then another action withholding the evidence closely intertwined with what had gone before, and it is each of these things and the whole totality of those things which give rise to the complaint which the Greek Government brings today. Now are those not matters relating to commerce?⁶⁹

70. The four dissenting Judges, whose main concern was whether the claim could be based on the 1886 Treaty and who arrived in this respect at a negative conclusion, relied heavily on the *ejusdem generis* rule. In the interpretation of the concrete clause, however, they upheld the British view:

. . . having regard to its terms, Article X promises most-favoured-nation treatment only in matters of commerce and navigation; it makes no provision concerning the administration of justice; in the whole of the Treaty this matter is the subject of only one provision, of limited scope, namely, Article XV, paragraph 3, concerning free access to the Courts, and that Article contains no reference to most-favoured-nation treatment.

⁶⁵ Quoted in *ibid.*, p. 20.

⁶⁶ Quoted in *ibid.*, pp. 20-21.

⁶⁷ *Ambatielos Case (Greece v. United Kingdom), I.C.J. Pleadings, 1953, p. 364.*

⁶⁸ *Ibid.*, p. 402.

⁶⁹ *Ibid.*, p. 457.

The most-favoured-nation clause in Article X cannot be extended to matters other than those in respect of which it has been stipulated. We do not consider it possible to base the obligation on which the Court has been asked to adjudicate, on an extensive interpretation of this clause.⁷⁰

71. According to Schwarzenberger the interpretation of the dissenting Judges is open to doubt. He observes:

It may be accepted that the *ejusdem generis* construction of most-favoured-nation clauses corresponds to normal practice in this field. Especially in the light of the evolution of the principles of freedom of commerce and navigation, this does not mean that access to courts and administration of justice in commercial matters is necessarily outside the *genus* in question. Moreover, the grant of national treatment in matters of free access to courts is hardly a self-evident argument against the cumulative application of the most-favoured-nation standard to the same subject. When, in a nineteenth century treaty national treatment was granted, the typical assumption was that such inland parity amounted to the grant of an especially privileged position. The intention was hardly to forgo rights which, under most-favoured-nation treaties, were available to third States.⁷¹

72. On the question whether the administration of justice belongs to the *genus* of "matters of commerce and navigation", the view of Fitzmaurice is exactly the opposite. He attributes a particular importance to the last sentence of that portion of the joint dissenting opinion which is quoted in paragraph 70 above, and states:

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 cause provisions not in themselves subject to an obligation of compulsory arbitration in the event of dispute, to become so by reason of their attraction by and notional incorporation into another treaty that does contain such a clause. States may thus find themselves obliged to arbitrate cases they had never contemplated submitting (and would not normally have agreed to submit) to arbitration.⁷²

73. In its Award of 6 March 1956, the Commission of Arbitration set up for the arbitration of the Ambatielos claim affirmed the *ejusdem generis* rule; the Commission held 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".⁷³ As regards the definition of the *genus* in question, however, the Award held 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 connection 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".⁷⁴

2. CAN MOST-FAVOURLED-NATION CLAUSES ATTRACT GENERAL RULES OF INTERNATIONAL LAW ?

74. This was emphatically denied by the British Party. Mr. Fitzmaurice, Counsel for the United Kingdom, stated:

[...] we think that most-favoured-nation clauses do not in principle and indeed cannot of themselves include or attract the general rules of international law at all. It is neither their normal purpose to do so nor are they framed in such a way as to accomplish it. I suggest to the Court that the true purpose of the most-favoured-nation clause is to attract rights granted to another country as a matter of favour and not as a matter of inherent obligation. A most-favoured-nation clause between two countries (call them A and B) produces no effect as between them until one of them grants some *favour* or advantage to a third country, C. That is what most-favoured-nation treatment implies. Now if B (in my example) merely promised C to treat the subjects of C in accordance with international law, that would be no *favour* at all, and therefore would not constitute a grant to which the most-favoured-nation clause could attach itself.⁷⁵

75. The Greek Party did not disagree with this thesis *in abstracto* and it did so only *in concreto*. Sir Frank Soskice on behalf of Greece stated:

... I say in answer to his [Mr. Fitzmaurice's] submission that most-favoured-nation treaties only incorporate what could be regarded as a privilege and therefore cannot incorporate the provisions of international law, that international law is of itself uncertain and does not necessarily coincide with the provisions contained in specific treaties between the United Kingdom and other countries which have been entered into in the past, such as, for example, the Treaty of Peace and Commerce with Denmark of 1660 [article 16 of which reads: "Each Party shall in all causes and controversies now pending or hereafter to commence, cause justice and right to be speedily administered to the subjects and peoples of the other Party"].⁷⁶

76. The issue was then raised that in the Anglo-Iranian Oil Co. Case the British Party itself invoked, through the most-favoured-nation clauses occurring in treaties between Iran and the United Kingdom, Iran's treaties with a number of countries in which treatment of nationals in accordance with the general principles and practices of international law was promised. It was submitted by the Greek Party that the United Kingdom ought not to object to a process which it had itself tried to employ in the Anglo-Iranian Oil Co. Case. Mr. Fitzmaurice endeavoured to extricate the British position from this dilemma in his oral argument⁷⁷ and later in his rejoinder,⁷⁸ but developed his ideas in greater detail in his article.⁷⁹

77. While maintaining his negative answer to the theoretical question raised in our sub-heading above, Fitzmaurice admits that States may have practical reasons to invoke most-favoured-nation clauses in one treaty, in order to attract provisions of other treaties promising treatment under the general rules of international law. Such can be

⁷⁰ *I.C.J. Reports 1953*, p. 34.

⁷¹ G. Schwarzenberger, *op. cit.*, p. 250.

⁷² G. Fitzmaurice, *op. cit.*, p. 85, foot-note 3.

⁷³ United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No.: 1963.V.3), p. 107.

⁷⁴ *Ibid.*

⁷⁵ Ambatielos Case (Greece v. United Kingdom), *I.C.J. Pleadings, 1953*, p. 403.

⁷⁶ *Ibid.*, pp. 460-461.

⁷⁷ *Ibid.*, pp. 407-408.

⁷⁸ *Ibid.*, pp. 481-482.

⁷⁹ G. Fitzmaurice, *op. cit.*, pp. 88-96.

a case where a State wishes to claim certain rights not simply as international law rights, but (or also) as *treaty* rights. The United Kingdom did so in the Anglo-Iranian Oil Co. Case, because the Optional Clause declaration of Iran only related to disputes concerning the "application of treaties or conventions accepted by Iran".⁸⁰

78. The real difference between the *Ambatielos* case and the Anglo-Iranian Oil Co. Case in this respect lay—according to Fitzmaurice—in the exceptional circumstances in which, in the Anglo-Iranian Case, the right to treatment in accordance with the general rules of international law had been granted. Because Iran unilaterally abolished the capitulatory régime about the year 1929, it could reasonably be argued that the grant of international law treatment, promised in a number of treaties concluded by Iran, subsequently constituted an actual favour to her treaty-partners under conditions where there was at least room for doubt as to the basis on which foreigners would be thenceforward treated there. It could be argued also that in so far as such treaties were concluded by Iran only with certain countries, and not others, they involved in some sense a privilege or favour to those countries.⁸¹

79. The Court itself did not pronounce on the theoretical question since the actual ground of decision turned on another issue. The point was, however, fully argued before the Commission of Arbitration in the third phase of the *Ambatielos* case, and the Award contains the following passage:

The Commission 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", 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.⁸²

80. The intention of this passage is made clear in a further passage reading as follows:

As stated above, the most-favoured-nation clause contained in the Treaty of 1886 applies only to privileges, favours and immunities granted to other countries, and therefore cannot incorporate the principles of international law in the said Treaty. If need be, this observation would suffice to reject the conclusion which the Greek Government considers itself entitled to draw from Article 10 of the Anglo-Bolivian Treaty.⁸³

This therefore was a decisive rejection of the whole process, at any rate when based on this type of most-favoured-nation clauses.⁸⁴

⁸⁰ *Ibid.*, pp. 90-91.

⁸¹ *Ibid.*, pp. 95-96.

⁸² United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No.: 1963.V.3), pp. 106-107.

⁸³ *Ibid.*, p. 108.

⁸⁴ See G. Fitzmaurice, *op. cit.*, pp. 93-94.

3. INTERTEMPORAL LAW

81. Because a most-favoured-nation clause may attract rights conferred by such other treaties which were concluded in an earlier period and under different circumstances, the problem of intertemporal law may have in this connexion a certain relevance.

82. This point was taken up by the British Party, on whose behalf Mr. Fitzmaurice made the following remarks:

The seventeenth century Treaties must be interpreted according to the condition of their own times and in the setting of the period in which they were concluded. It would be illegitimate to import into them ideas and legal concepts which either did not then exist [. . .]. They cannot, in our view, be regarded as incorporating references to the general rules of international law as we understand them today, for the simple reason that those rules did not then exist, or existed only in a very partial and rudimentary form. The principle involved—that of the intertemporal law—is well known and was stated by the Arbitrator, M. Huber, a former President of the Permanent Court, in the *Island of Palmas* case, as follows. He said: "A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when the dispute in regard to it arises or falls to be settled". And I think that that maxim is now accepted as an established doctrine of international law.

Now, if we transpose this dictum into the terms of the present case, the principle will be this: that the effect of a treaty must be appreciated in the light of the legal situation and concepts that existed when the treaty was entered into. Now, of course, it is not my intention to embark on a study of the state of international law in the middle of the seventeenth century. But I do not think I need to, because I do not think anyone will deny that, at that period, three hundred years ago, when the ideas of Hugo Grotius even were barely starting to gain currency, and were still largely novel, international law existed only in a relatively primitive and elementary form. Phrases which, if they occurred in a treaty drawn up today, might be read as referring to the general corpus of international law, or some particular part of it, cannot be so read in treaties framed when this general corpus scarcely existed—or, at any rate, they cannot be read as referring to parts of international law which did not then exist.

[. . .]

And here we encounter another aspect of the intertemporal law which was also stated by M. Huber in the *Island of Palmas* case, namely, the principle that facts which conferred a legal right at one period may not necessarily do so at a later period because of changes in the legal position that have occurred since.

Now, if we apply that principle to the present case, what do we find? Suppose, for the sake of argument, that some clause of one of these seventeenth century Treaties can be read as conferring a right to certain treatment in the courts, which is now a general international law right. But that would mean that, precisely because the treaty right in question is today a general international law right, its treaty basis, though not formally destroyed, is no longer the real foundation of the right. It has been superseded, and, so to speak, engulfed, and rendered superfluous by the emergence of general rules of international law that take its place, that include it and, indeed, go far beyond it, so that the right now depends on and results from those rules rather than the treaty. These seventeenth century Treaties are, of course, still in force as treaties. But the operative effect of many of the individual provisions of those Treaties is spent, because they have been superseded, overtaken, caught up, rendered unnecessary, by the emergence of general rules of international law on the subjects of those provisions dealt with, which now constitute the real basis of the rights and obligations existing between the parties on this matter.

[. . .]

[. . .] we submit to the Court that, even if the seventeenth century Treaties confer the sort of right which our adversaries contend they do, the clauses in question no longer have any relevance as such, because their operative effect has been swallowed up in general rules of international law to which the most-favoured-nation clause of the 1886 Treaty, on which our adversaries rely, has no application.⁸⁵

83. The answer of the Greek Party did not constitute a denial of the principle involved. It contended only that the principle is not applicable in the concrete case. Sir Frank Soskice, Counsel for Greece, stated:

[. . .] I submit that Mr. Fitzmaurice's argument is ill-founded. He says that in any case the obligations imposed upon the contracting governments by those treaties to treat the subjects of the other government fairly have been swallowed up in the principles of developing modern international law. That I have already answered by pointing out that often, and in particular in the case of Article 16, the obligations on each contracting government are more specific than the somewhat imprecise obligations not always stated in identical terms which are imposed by the general principles of international law, so that I would respectfully submit that that argument of Mr. Fitzmaurice also, on examination turns out not to be sustainable.⁸⁶

84. The general rule was also stated by the Arbitration Commission's Award in the following way:

The provisions of other treaties on which the Greek Government relies are concerned with the *administration of justice*. Several of them date back to the seventeenth century [. . .]. Naturally, their wording was influenced by the customs of the period, and they must obviously be interpreted in the light of this fact.⁸⁷

4. REFUSAL OF AN EXTENSIVE INTERPRETATION OF A NATIONAL TREATMENT CLAUSE

85. The joint dissenting opinion of the four Judges dealt with the problem of the interpretation of article XV of the 1886 Treaty. The opinion stated:

This Article promises free access to the Courts; it says nothing with regard to the production of evidence. Questions as to the production of evidence are by their nature within the province of the law of the Court dealing with the case (*lex fori*). The Treaty could have laid down certain requirements in this connection, but it did not do so. [. . .] An extensive interpretation of the free access clause which would have the effect of including in it the requirements of the proper administration of justice, in particular with regard to the production of evidence, would go beyond the words and the purpose of Article XV, paragraph 3. Free access to the Courts is one thing; the proper administration of justice is another. [. . .]

[. . .]

The complaint, as put before the Court in this case, does not allege that Mr. Ambatielos was refused access to the English Courts, or that he was denied national treatment as regards conditions, restrictions, taxes or the employment of counsel. The

⁸⁵ Ambatielos Case (Greece v. United Kingdom), *I.C.J. Pleadings*, 1953, pp. 408-411.

⁸⁶ *Ibid.*, p. 464.

⁸⁷ United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No.: 1963.V.3), p. 108.

Hellenic Government merely alleges that the production of evidence was effected in a manner which in its opinion was defective and detrimental to its national. Article XV, paragraph 3, is unconnected with this complaint. If any legal rule has been broken, it is not a rule contained in this Article.⁸⁸

86. The Commission of Arbitration interpreted the clause similarly and held that:

[. . .] the essence of "free access" is adherence to and effectiveness of the principle of non-discrimination against foreigners who are in need of seeking justice before the courts of the land for the protection and defence of their rights.⁸⁹

And further it stated:

The Commission is of opinion that "free access" is something entirely different from the question whether cases put forward in Courts by Governments are right or wrong, and that denial of "free access" can only be established by proving concrete facts which constitute a violation of that right as understood and defined in this award.⁹⁰

Part II

The experience of international organizations and interested agencies in the application of the most-favoured-nation clause

87. This part of the report is based on the replies of international organizations and interested agencies to a circular letter of the Secretary-General. The full list of the bodies to which the circular letter has been sent is given in annex III to the present report.

88. For reasons of convenience, the present report deals separately with the information received from those organizations whose concern lies exclusively in international trade, on the one hand, and with the information from those which are concerned with matters other than trade on the other. Dividing thus the material according to the fields of application of the most-favoured-nation clause, part II begins with the survey of fields other than international trade.

A. FIELDS OTHER THAN INTERNATIONAL TRADE

89. Several organizations working in these fields have stated that they have no practical experience whatsoever in connexion with the application of most-favoured-nation clause. These are: IBRD, IDA, IFC, IMCO, UPU, WHO, and WMO. The information received from other organizations belonging to this group can be classified according to the following fields:

- (1) privileges and immunities of international organizations;

⁸⁸ *I.C.J. Reports* 1953, pp. 33-34.

⁸⁹ United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No.: 1963.V.3), p. 111.

⁹⁰ *Ibid.*, p. 117.

- (2) telecommunications;
- (3) air transport;
- (4) shipping;
- (5) international finance;
- (6) intellectual property.

1. PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS

(a) "Most-favoured-organization" clauses

90. Both FAO and UNESCO have drawn attention to treaty provisions which—although not most-favoured-nation clauses proper—may be called "most-favoured-organization" clauses.

91. Article VIII, paragraph 4 of the FAO Constitution stipulates, *inter alia*:

Each Member Nation and Associate Member undertakes. [. . .] to accord to the Director-General and senior staff diplomatic privileges and immunities and to accord to other members of the staff [. . .] the immunities and facilities which may hereafter be accorded to equivalent members of the staffs of other public international organizations.⁹¹

92. Article 19, paragraph 2 of the Agreement signed on 2 July 1954 between France and UNESCO, regarding the Headquarters of UNESCO and the privileges and immunities of the organization on French territory, provides that certain officials defined in Annex B of the Agreement

shall be accorded during their residence in France the privileges, immunities and facilities and other courtesies accorded to members of foreign diplomatic missions in France.⁹²

Annex B, after listing certain categories of officials who shall benefit from the provisions of article 19, paragraph 2, goes on to state:

(c) officials in grades corresponding to the grades of officials of any other intergovernmental institution to whom the Government of the French Republic may grant diplomatic privileges and immunities by a headquarters Agreement.⁹³

(b) *Clauses assimilating the treatment of representatives to, and staff of, international organizations to the treatment of members of diplomatic missions*

93. One instance of such clauses is the provision of article 19, paragraph 2 of the UNESCO Headquarters Agreement, quoted in paragraph 92 above. Similar provisions are contained in the same Agreement:

- (i) In article 18 on the privileges, immunities and facilities due to representatives of member States of the Organization at sessions of the various organs of the Organization and at conferences and meetings called by it and certain other categories of delegates, who shall enjoy, during their stay in France on official duty, such privileges, immunities

and facilities as those accorded to diplomats of equal rank belonging to foreign diplomatic missions accredited to the Government of the French Republic;

- (ii) In article 19, paragraph 1 on the status of the Director-General and Deputy Director-General of the Organization who shall have the status accorded to the heads of foreign diplomatic missions accredited to the Government of the French Republic; and
- (iii) In article 22, paragraph (e), according to which the officials of the Organization shall, with regard to foreign exchange, be granted the same facilities as are granted to members of foreign diplomatic missions.⁹⁴

94. The FAO Headquarters Agreement⁹⁵ and Regional Office agreements⁹⁶ contain clauses dealing with facilities regarding the application of foreign exchange regulations and repatriation in the event of international crisis. These provide for the treatment of FAO staff in a way not less favourable than that of the staff of diplomatic missions accredited to the host country.

(c) "Most-favourable conditions"

95. A peculiar type of clause can be found in article 17, paragraph 2 of the UNESCO Headquarters Agreement. This clause, regulating financial and foreign exchange matters, stipulates, *inter alia*, as follows:

The competent French authorities shall grant all facilities and assistance to the Organization with a view to obtaining the most favourable conditions for all transfers and exchanges.

The provision may be implemented by common agreement:

Special arrangements to be made between the French Government and the Organization shall regulate, if necessary, the application of this Article.⁹⁷

2. TELECOMMUNICATIONS

96. ITU states that the spirit of the International Telecommunication Convention (Montreux, 1965)⁹⁸ is that in relations governed by it all members shall enjoy equal rights and be subject to the same obligations. The Convention and the Regulations annexed to it do not contain most-favoured-nation clauses. The concept is not one that, to the knowledge of the Union, is generally applied to telecommunications.

97. The Union, however, draws attention to article IV, section 11 of the Convention on the Privileges and Immu-

⁹⁴ *Ibid.*, pp. 16, 18 and 20.

⁹⁵ See United Nations Legislative Series, *Legislative Texts and Treaty Provisions Concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. II (United Nations publication, Sales No.: 61.V.3), p. 187.

⁹⁶ *Ibid.*, pp. 206, 212 and 220.

⁹⁷ United Nations, *Treaty Series*, vol. 357, p. 16.

⁹⁸ *United Nations Juridical Yearbook*, 1965 (United Nations publication, Sales No.: 67.V.3), p. 173.

⁹¹ FAO, *Basic Texts*, 1970 edition, p. 11.

⁹² United Nations *Treaty Series*, vol. 357, p. 18.

⁹³ *Ibid.*, p. 26.

nities of the Specialized Agencies,⁹⁹ which stipulates that each specialized agency shall enjoy, in the territory of each State party to the Convention, for its official communications, treatment not less favourable than that accorded by the State to any other Government. ITU states that successive Plenipotentiary Conferences of the Union have drawn attention in resolutions to the fact that section 11 seems to conflict with the definition of Government Telegrams and Government Telephone Calls contained in annex 2 of the International Telecommunication Convention.¹⁰⁰

A number of Governments have declared, at the time of agreeing to apply the Convention on Privileges and Immunities of the Specialized Agencies, that they could not agree to give full effect to section 11 unless and until all other Governments did so.¹⁰¹

98. The UNESCO Headquarters Agreement, while giving in article 4 the organization the right of free radio communication, grants in article 10 to the organization terms for communication by post, telegraph, etc., at least as favourable as those granted by the French Government to other Governments including diplomatic missions as regards priorities, tariffs, taxes and other charges.¹⁰²

3. AIR TRANSPORT

99. ICAO, making known its experience in relation to the application of the most-favoured-nation clause, mentions three cases:

(a) *The Convention on International Civil Aviation (Chicago, 1944)*¹⁰³

100. This constituent instrument of ICAO contains several provisions to ensure equality of treatment by a contracting State with respect to aircraft of all other contracting States. The formula employed for this purpose is to the effect that the treatment accorded to such other aircraft should not be less favourable than that which the State accords to its own aircraft engaged in similar operations. ICAO states in this regard that, while not formulated as a most-favoured-nation clause, such provisions would produce, nevertheless, like effect as such a clause, it being assumed that a State is unlikely to give some other State (for example, a State which is not a contracting State of ICAO) treatment more advantageous than that which it accords to its own national aircraft. Examples of such national treatment clauses are contained in article 9, article 11, article 15 and article 35, paragraph (b) of the Chicago Convention.

(b) *Bilateral air transport agreements*

101. A number of such agreements provide for most-favoured-nation treatment in respect of customs duties, inspection fees and other national duties or charges on fuel, lubricating oils, spare parts, regular equipment and aircraft stores. The clauses usually combine national and most-favoured-nation treatment.

(c) *A rare case*

102. According to ICAO it is rare that a bilateral air transport agreement contains a most-favoured-nation clause in regard to the exchange of traffic rights. Such a clause is found in Schedules I and II of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Greece for air services in Europe, signed at Athens on 26 November 1945.¹⁰⁴ The text of Schedule I reads as follows:

BRITISH ROUTES

London-Vienna-Belgrade-Athens.

London-Lyons-Marseilles-Genoa-Naples-Athens.

The above-mentioned routes may be varied by agreement between the competent aeronautical authorities of the contracting parties.

The designated airline of the United Kingdom shall be entitled, [. . .] to set down or pick up at places in Greece traffic embarked in or destined for places outside Greece on the routes specified in this Schedule provided that the capacity shall not exceed that agreed for the routes in question.

If the Government of Greece grants to any other airline rights more favourable than those accorded in this Schedule to the designated airlines of the United Kingdom, the Government of Greece will immediately grant to the designated airline of the United Kingdom rights not less favourable than those granted to the airline(s) of the most favoured nation.¹⁰⁵

Schedule II, concerning the Greek Routes, contains similar provisions. (The designation of the routes was modified several times by subsequent exchanges of notes between the two Governments.)

103. ICAO remarks in this connexion that because of its rarity, the clause could hardly be called typical. ICAO has no information concerning the application of such clauses. To this the Special Rapporteur may add that the clause in question throws light on the fact that the field of application of the clause has its limits and that the clause in question is perhaps on the borderline of the field where a most-favoured-nation clause can play its role as a useful instrument. Without going into details here, it can be safely stated that one of the factors which determine the applicability and usefulness of a most-favoured-nation clause is the easy comparability of the favours in question.

4. SHIPPING

104. OECD—while drawing attention to clauses in several OECD instruments, which do not have direct

⁹⁹ United Nations, *Treaty Series*, vol. 33, p. 270.

¹⁰⁰ *United Nations Juridical Yearbook, 1965* (United Nations publication, Sales No.: 67.V.3), p. 202.

¹⁰¹ See United Nations, *Multilateral Treaties in Respect of which the Secretary-General Performs Depositary Functions* (United Nations publication, Sales No.: E.69.V.5), chap. III, sect. 2, pp. 40-42.

¹⁰² United Nations, *Treaty Series*, vol. 357, pp. 6 and 12.

¹⁰³ *Ibid.*, vol. 15, p. 295.

¹⁰⁴ *Ibid.*, vol. 35, p. 163.

¹⁰⁵ *Ibid.*, p. 188.

bearing on a study of the most-favoured-nation clause—made available a note, prepared by its Secretariat under the instructions of its Maritime Transport Committee, entitled “Treaty provisions to safeguard equitable treatment of shipping”.¹⁰⁶ The note was based on the papers submitted respectively by the delegations of Denmark, the Netherlands and Norway and on a list of various treaty clauses submitted by the United States delegation.

105. The study found that most-favoured-nation clauses and national treatment clauses were the two traditional types of treaty clauses to safeguard equitable treatment of shipping. In some instances national treatment and most-favoured-nation treatment were combined.

106. Most-favoured-nation and national treatment clauses in their traditional form related to such matters as access to ports, discharging and loading, taking in of supplies, payment of dues, compliance with quarantine measures and other formalities, etc. Both the most-favoured-nation and the national treatment clauses safeguarded against certain areas of possible discrimination, i.e., the former by prohibiting discrimination in relation to third countries, and the latter by prohibiting discrimination in relation to the contracting parties’ own nationals.

107. The main preoccupation of the members of the Maritime Transport Committee—or at least of the Governments, upon whose information the study of the Secretariat was based (i.e., Denmark, the Netherlands and Norway)—was the insufficiency of the traditional types of clauses to cover certain particularly sensitive areas.

108. The paper submitted by Denmark pointed out:

What must be secured [. . .] is protection against quantitative restrictions of various kinds rather than equality as regards the abstract possibility of concluding such contracts—most favoured nation or national treatment being appropriate expedients for that purpose. The discriminatory measures particularly indicated are those where a certain percentage of cargoes to and from the country concerned must be carried in ships flying the flag of that country. Such cases may also occur where state-controlled trading concerns or import and export organizations deliberately accord certain benefits to ships of a particular nationality.¹⁰⁷

109. The Netherlands contribution gave a more detailed description of cases which may not be successfully invoked under a most-favoured-nation clause:

1. *discrimination in favour of the national flag*

It is abundantly clear that a most favoured nation clause will not stop a state from protecting its national merchant fleet in every possible way.

2. *bilateralism in shipping*

Various developing countries are doing their utmost to achieve bilateral division of the seaborne goods traffic between themselves and all their trade partners (preferably on a 50/50 basis).

3. *regional regulations governing shipping*

Certain groups of developing countries wish to achieve closer co-operation on a regional basis. The Latin American Free Trade Association is an example of such a group. The shipowners’ associations in the countries concerned are trying to persuade

their governments to reserve all or part of the regional goods traffic for ships sailing under the flags of the member states of the Free Trade Association.¹⁰⁸

110. While the same paper pointed out that national treatment or non-discrimination clauses might be involved in the three cases mentioned above, no clause whatsoever seemed to constitute sufficient defence against the practice, especially of state-trading countries, of using national ships to carry state-owned or state-generated imports and exports: “in such cases it is virtually impossible to prove that the State in question is guilty of flag discrimination”. The Danish paper, in addition, did not believe that “national treatment is a suitable remedy in cases where 50% of the cargoes must be carried in national ships. No single country can claim the remaining 50% in this case.”¹⁰⁹

111. Summing up, it appeared to the drafters of the note that:

[. . .] the traditional most favoured nation and national treatment clauses are insufficient safeguard against certain discriminatory practices taken—especially since the Second World War—by developing or state-trading countries, although at least the national treatment clauses might be interpreted to cover most of the recent forms of discrimination [. . .]. The shipping countries are thus faced with the problems of sufficiently wide interpretation of existing clauses on the one hand, and of formulation of adequate future clauses on the other.¹¹⁰

112. What remedies were envisaged against these complaints? These were summarized, in particular, by the Norwegian paper in the following way:

The principal task of today, from the OECD point of view, should be to find and formulate the arguments and measures that may be used to give the most favoured nation, national treatment and non-discrimination clauses such a broad scope of application that they cover the problem of quota regulations with respect to freight contracts. Second in importance is probably the question whether the clauses should be regarded as conditional or unconditional, and what grounds could support the latter interpretation.

As for clauses negotiated in the future, the best possible protection of OECD shipping interests seems to be to obtain a combination of all three clauses. If this is not possible, the non-discrimination formula seems to have certain advantages as compared to the others.¹¹¹

113. This non-discrimination formula was considered as a third type of treaty clauses besides the most-favoured-nation and national treatment clauses. It was pointed out that from a purely logical point of view, such non-discrimination clauses were not distinct from the two traditional types. They were only wider in scope and extended to areas not traditionally dealt with by the customary formulas. The following two texts were submitted by the Netherlands. Text (a) was a clause included in an agreement on economic and technical co-operation between the Netherlands and Senegal of 1965; text (b) is a draft clause of more general character which was not yet included in any bilateral agreement.

¹⁰⁸ *Ibid.*, para. 17.

¹⁰⁹ *Ibid.*, para. 18.

¹¹⁰ *Ibid.*, para. 19.

¹¹¹ *Ibid.*, para. 20.

¹⁰⁶ OECD document TP/MTC/66.33.

¹⁰⁷ OECD document TP/MTC/66.33, para. 16.

(a) Each Contracting Party shall abstain from taking discriminatory action which may prejudice the ocean-going shipping of the other Contracting Party or adversely affect the choice of flag contrary to the principles of free competition. This rule shall not apply to fishing and coastal shipping in the parts of the Kingdom of the Netherlands situated outside Europe, whose special laws shall apply exclusively in this matter or to the special advantages which the Republic of Senegal may grant to fishing and coastal shipping and harbour and coastal towing.

(b) The Contracting Parties agree to promote the development of international shipping services. In doing so they shall observe free and normal competitive conditions. They agree to refrain from discriminatory measures restricting the free participation of sea-going ships of whatever nationality in international trade.¹¹²

Both texts were followed by the customary clause on access to ports, customs formalities, charges, etc.

114. According to the information given by OECD, the Maritime Transport Committee, having considered the papers submitted to it and the summary presented by its Secretariat, agreed on 24 June 1966 to take no further action in the matter.

115. As can be seen from this material, the papers submitted by OECD reflect the one-sided views of States possessing a big and competitive shipping industry and witness their efforts to serve their interests against measures of States which may wish to protect their shipping as an "infant industry".

5. INTERNATIONAL FINANCE

116. IMF points out that the principle of non-discrimination—which lies at the heart of the most-favoured-nation clause—has been embodied in the Fund's law and practice as the standard of treatment among members. Details given by the Fund have been omitted from the present report as they do not involve the use of a most-favoured-nation clause.

6. INTELLECTUAL PROPERTY

117. BIRPI stated that the two principal multilateral treaties for whose administration BIRPI is responsible (i.e. the Paris Convention for the Protection of Industrial Property, 1883¹¹³ and the Berne Convention for the Protection of Literary and Artistic Works, 1886¹¹⁴) are based on the principle of "national treatment", and do not contain provisions having the effect of a most-favoured-nation clause. In the opinion of BIRPI:

Member States are free to enter into new agreements relating to the protection of intellectual property with non-member States, without having bound themselves to offer any more favourable

terms contained in such agreements to other member States. Similarly, member States may make special agreements with a limited number of other member States, without having bound themselves to offer any more favourable terms contained in such agreements to other member States not parties to such agreements. (See article 15 of the Paris Convention, and article 20 of the Berne Convention.) If such agreements were in some way prevented by the application of the principle of the most-favoured-nation clause, then such desirable developments as the establishment of regional agreements (e.g. OAMPI—Office africain et malgache de la propriété industrielle) would be difficult or impossible.

118. In the view of BIRPI, therefore, the principle underlying the clause is incompatible with the purpose of treaties of the sort administered by BIRPI, and cannot, therefore, be regarded as a principle of general application without express provisions.

B. THE FIELD OF INTERNATIONAL TRADE

1. INTRODUCTION

119. The following organizations and agencies working in the field of international trade replied to the circular letter of the Secretary-General: UNCTAD, ECA, ECAFE, ECE, ECLA, GATT, OAS, OCAM, EFTA and LAFTA.

120. The secretariat of UNCTAD transmitted a report which it had prepared on "International trade and the most-favoured-nation clause"¹¹⁵ (hereinafter referred to as the UNCTAD memorandum). In its accompanying letter the secretariat pointed out that the most-favoured-nation clause is of special importance to UNCTAD; it has a direct bearing on the rules of conduct to govern world trade and, as such, it affects the trade prospects of many countries, particularly developing countries. The secretariat stated that, in drafting its report, it had taken the decision to base its interpretation of UNCTAD's position on the recommendations and resolutions adopted by the Conference at its first and second sessions. While some of these recommendations were unanimously adopted, others were only adopted by a majority vote. Moreover, some of the points covered by these recommendations were still under discussion in the different organs of UNCTAD. The UNCTAD memorandum stressed that the purpose was to bring out as clearly as possible the scope of application of the most-favoured-nation clause as well as the extent to which it should be qualified for the sake of the accelerated growth of developing countries and, indeed, of world trade at large.

121. ECA stated in its reply that it had no material from which an assessment could be readily made of the scope and practical effect of the most-favoured-nation clause. It enclosed a document entitled "Bilateral trade and payments agreements in Africa",¹¹⁶ containing the main data on all of the trade agreements applicable to Africa concluded up to 1965, and singled out those

¹¹² *Ibid.*, para. 12.

¹¹³ For the text of the 1883 Paris Convention and subsequent acts of revision, see BIRPI, *Manual of Industrial Property Conventions*, Paris Convention, Section A1.

¹¹⁴ For the text of the 1886 Berne Convention and subsequent acts of revision, see International Union for the Protection of Literary and Artistic Works, *Le Droit d'Auteur*, 1888, p. 4; *ibid.*, 1896, p. 77; *ibid.*, 1908, p. 141; *ibid.*, 1914, p. 45; *ibid.*, 1928, p. 73; *ibid.*, 1948, p. 73; *Copyright*, 1967, pp. 165-178.

¹¹⁵ UNCTAD, Research memorandum No. 33/Rev.1.

¹¹⁶ E/CN.14/STC/24/Rev.1 and Corr.1.

agreements which included a most-favoured-nation clause.

122. ECAFE stated in its reply that its limited experience of the legal implications of the clause precluded it from making technical contribution to the work done in this field.

123. ECE referred in its reply to the effort which it had initiated in 1963, on the basis of its resolution 4 (XVIII), to make "an intensive examination" of the "most-favoured-nation principle and non-discriminatory treatment as applied under different economic systems, and problems concerning the effective reciprocity of obligations under the different systems".¹¹⁷ It made available all ECE documents relating to the discussions which had taken place in ECE on the application of the most-favoured-nation clause and gave a brief summary of the situation existing with regard to the application of the clause in trade relations between ECE countries having different economic and social systems.

124. The secretariat of ECLA stated in its reply that it had participated as secretariat in the negotiations leading to the Montevideo Treaty which created LAFTA and made available the text of that treaty. It stated further that the clause forms part of almost all Latin American bilateral treaties on commerce signed in the last eighty years between Latin American countries or between them and countries outside the area.

125. The secretariat of GATT prepared and made available a paper entitled "The most-favoured-nation clause in the General Agreement on Tariffs and Trade: The rules and the exceptions" (hereinafter referred to as the GATT memorandum).

126. OAS drew attention to the Agreement on the application of the most-favoured-nation clause, opened for signature at the Pan American Union on July 15, 1934, and made available its text and the current state of ratifications.¹¹⁸ OAS indicated that a further examination of the topic was being undertaken within the general secretariat of OAS for the purpose of transmitting the relevant information.

127. OCAM drew attention in its reply to the Association Convention between the European Economic Community and the Associated African and Malagasy States.

128. EFTA stated in its reply that it had no particular experience with the most-favoured-nation clause, as the EFTA Convention and the Agreement with Finland, which provides for a free trade area, are not based on this concept. Several of the articles of the Convention, however, were based on the principle of not less favourable treatment which had to be accorded to nationals of the other member States in certain circumstances.¹¹⁹

¹¹⁷ See *Official Records of the Economic and Social Council, Thirty-sixth Session, Supplement No. 3 (E/3759)*, p. 64.

¹¹⁸ See *Yearbook of the International Law Commission, 1969*, vol. II, pp. 174-175, document A/CN.4/213, paras. 104-105.

¹¹⁹ See P. Pescatore, *La clause de la nation la plus favorisée dans les conventions multilatérales* (rapport provisoire présenté à l'Institut de droit international), Genève, Imprimerie de la Tribune de Genève, 1968, pp. 67-68, para. 68.

129. LAFTA drew particular attention in its reply to the problem of the compatibility of subregional arrangements with the most-favoured-nation clause of the Montevideo Treaty.¹²⁰

130. The bulk of the information received came from GATT, UNCTAD, ECE and ECLA. Their contribution is, indeed, complementary.

131. The General Agreement on Tariffs and Trade applies to three fourths or more of world trade. The Agreement is based on the most-favoured-nation principle, whose application is, however, substantially restricted by numerous exceptions. Although the rules of the General Agreement are adapted primarily to the economic systems and policies of highly industrialized market economies, increasing attention has been given by GATT, particularly in recent years, to the problems and needs of the developing countries (see paras. 191-193 below). It is now generally recognized that the principle of "equal treatment" needs to be qualified by reference to the stage of development reached by a country.¹²¹ It is also recognized that more action is needed in the interest of the developing countries. The main thrust in this direction comes from UNCTAD, which would like to replace in respect of the developing countries the formal equality offered by the most-favoured-nation principle, by a balanced system of preferences.

132. The problems facing ECE and ECLA are of a different magnitude, their interest being focused on one region of the world each. In ECE a special problem is the application of the most-favoured-nation principle between countries having different social and economic systems.

133. The contributions submitted by the different organizations and agencies testify to the fact that the most-favoured-nation clause was and still is an important organizer of international trade. It has been performing this function mostly in the bilateral form but in recent times it has appeared in a more ambitious multilateral form, as conspicuously exemplified by GATT and the Montevideo Treaty.

134. The field with which this part of the report is concerned presents manifold challenging problems. In the exploration of the functioning of the most-favoured-nation clause in general, shall specific rules be found which apply exclusively to clauses regulating trade? Will it be possible to deduce from the relatively short experience of GATT and LAFTA, generally valid rules pertaining to multilateral most-favoured-nation clauses? What are the rules governing the conflict of obligations arising out of the participation of a State in more than one treaty containing bilateral or multilateral clauses? Is it within

¹²⁰ *Ibid.*, pp. 68-72, paras. 70-74; in particular, see also J. B. Schroeder, "La compatibilidad de los Acuerdos Subregionales con el Tratado de Montevideo" and M. A. Vieira, "La cláusula de la nación mas favorecida y el Tratado de Montevideo, in *Anuario Uruguayo de Derecho Internacional (1965-1966)*, vol. 4, Montevideo, Fac. de Derecho y de Ciencias Sociales, Universidad de la República, pp. 189-238.

¹²¹ See ECE, *Analytical Report on the State of Intra-European Trade* (United Nations publication, Sales No.: E.70.II.E/Mim.21), p. 25, foot-note 1.

or beyond the powers of the International Law Commission to transform at least some of the "wish principles" of UNCTAD into "reality principles" or legal rules and thereby contribute to the growth of that body of rules which some authors (Michel Virally, André Philip, Guy de Lacharrière) call "the law of development"? Will it be possible to extricate in this field legal rules from the perplexities of economic theories?

135. The present part of the report does not purport to give straight answers to these or similar questions. Based on the studies obligingly submitted by the interested organizations and agencies, it aims at giving food for further thinking on the subject. Most of the materials presented in this part can only be considered as background to the legal problems which have to be dealt with. The Special Rapporteur is, of course, aware that substantial parts of the replies from organizations and agencies which are reproduced here are not directly relevant to the "scope and effect of the clause as a legal institution".¹²² While conscious that the problems of international trade policy are not within the domain of interest of the Commission, he nevertheless believes that a closer acquaintance with some aspects of these problems, which represent the context of the practical application of the clause, may prove useful and that their disclosure corresponds to the wish of the Commission "to base its studies on the broadest possible foundations".¹²³

2. HISTORICAL NOTE

136. The UNCTAD memorandum included the following historical exposé, which can be read as a sequel to paragraphs 38-40 of the Special Rapporteur's first report on the most-favoured-nation clause:

From about the middle of the 19th century down to the Great Depression world trade was largely conducted on the basis of the most-favoured-nation (MFN) treatment. During this period, which also saw the heyday of free trade, the MFN clause served to provide the framework for the expansion of world trade. The clause appeared in most of the commercial treaties concluded by the principal trading countries. But even without explicit reference these countries adhered to the principle as a basic tenet of commercial policy.

As a consequence of this rule of behaviour it was possible to contain and keep to a minimum discrimination in world trade. Each country, in principle, provided equal conditions of access to all trading partners in its own market. In return it enjoyed equal treatment with competitors in all the export markets. On the basis of largely free and equal conditions of access the world economy could reap the benefits of international division of labour along the lines of comparative advantage.

The great depression in the early thirties marked a turning point in the world monetary and commercial system. One country after another was constrained to abandon the gold standard, thereby bringing to a close a long era of stable exchange rates and free convertibility. The world economy was thrown into a vicious circle of competitive devaluation, excessive protectionism, foreign exchange controls and bilateralism. In the field of commercial policy, quantitative restrictions rather than tariffs, became,

in a large number of countries, the principal instrument of control over the flow of trade. Under these circumstances the most-favoured-nation clause lost a great deal of its effectiveness as a means of ensuring non-discrimination in world trade.

The disintegration of the world trade and payments system was reflected in the emergence of discriminatory trading arrangements. It was in the midst of the depression that the United Kingdom, until then the champion of free trade and MFN treatment, sought with the other Commonwealth countries to solve the problems of external imbalance through the establishment of the system of Imperial and Commonwealth preferences. Under this arrangement Britain secured preferential conditions of access in the markets of the Commonwealth Countries and Colonies in return for preferential treatment accorded to these countries in its own market. Needless to say that such an arrangement represented a drastic departure from the principle of the most-favoured-nation treatment. The British example was followed by most of the colonial powers. As a result the principle of most-favoured-nation treatment was to a large extent banished from the commercial relationship between the metropolitan power and its dependencies.

GATT and the most-favoured-nation clause

The post-Second World War period witnessed a far-reaching reorganization of the world economy through the United Nations and the Specialized Agencies. The Bretton Woods Agreement of 1944 resulted in the establishment of two important international institutions in the economic field, namely, the International Bank for Reconstruction and Development (IBRD) and the International Monetary Fund (IMF). The first was designed to promote and organize long-term capital movement and international investment, the second to ensure stability of exchange rates and the adoption by member countries of the appropriate monetary and foreign exchange policies. In the area of international trade an International Trade Organization (ITO) was supposed to complement the trinity of United Nations specialized agencies set up to restore economic order to the post-war world. The ITO Charter was adopted at the United Nations Conference on Trade and Employment in Havana in 1948. However, for reasons which fall outside the scope of this note, the Havana Charter failed to receive the number of ratifications required. Accordingly, it was not possible to proceed with the establishment of ITO.

While the Havana Charter was still under consideration, some of the principal trading countries decided to hold a multilateral tariff negotiation conference at Geneva in 1947. Besides agreeing on certain tariff reductions, this conference agreed upon a multilateral trade treaty incorporating in advance the commercial policy clauses of the Havana Charter. The treaty was called the General Agreement on Tariffs and Trade (GATT). The GATT was intended to be a temporary arrangement pending the establishment of ITO. When the ITO failed to appear, the GATT emerged as the only international instrument for the liberalization and multilateralization of world trade.¹²⁴

137. To the foregoing description it should be added that the Soviet Union did not attend the Havana Conference, did not participate in the preparatory work which led to the establishment of GATT and did not join the organization. Of the East-European countries, only Czechoslovakia signed the Havana Charter and the General Agreement. Poland participated in the Havana Conference but did not sign the Final Act.

138. The representatives of Poland and the Soviet Union were highly critical of the results of the Conference

¹²² See *Yearbook of the International Law Commission, 1969*, vol. II, p. 158, document A/CN.4/213, para. 3.

¹²³ *Ibid.*, para. 4.

¹²⁴ UNCTAD, Research memorandum No. 33/Rev.1, paras. 2-7.

and explained vigorously their differing views at the seventh session of the Economic and Social Council in 1948 during the discussion of the Secretary-General's report on the Havana Conference.¹²⁵ Referring to these statements, a paper of ECE stated:

The non-participation of virtually all east European countries in these activities designed to reach agreement on international trading relations certainly reflected differences of view as to the principles which should govern such relations. But it was also a consequence of their refusal to accept a minority role in the administration of these agreements and of the deterioration in the political climate.¹²⁶

3. THE STRUCTURE OF THE GATT

139. The GATT memorandum stated:

The General Agreement on Tariffs and Trade entered into force in 1948 as a multilateral commercial agreement accepted by twenty-three Governments. There are now 76 contracting parties, two Governments have accepted the GATT provisionally and thirteen others apply the GATT on a *de facto* basis. [. . .] A Government acceding to the Agreement acquires all the rights and assumes all the obligations of the GATT. Newly independent States, to whose territories the Agreement had been applied prior to independence, have the right to become contracting parties.

140. The basic treaty, the "General Agreement" itself, was completed in October 1947. Technically, it has never come into force, being applied by a "Protocol of Provisional Application", dated 30 October 1947, and, in addition, by the special protocols of accession agreed between the individual Governments and the CONTRACTING PARTIES.¹²⁷ These special protocols enter into force upon the decision taken by the CONTRACTING PARTIES by a two-thirds majority (Art. XXXIII).

141. The Protocol of Provisional Application of the General Agreement (30 October 1947) provides that contracting parties need apply Part II of the GATT (i.e. Articles III-XXIII) only "to the fullest extent not inconsistent with existing legislation."¹²⁸ Referring to the Protocol of Provisional Application, the GATT memorandum explained:

(i) [. . .] The CONTRACTING PARTIES agreed in 1949 that a measure not consistent with the provisions of Part II can be permitted during the period of provisional application "provided that the legislation on which it is based is by its terms or expressed intent of a mandatory character—that is, it imposes on the executive authority requirements which cannot be modified by executive action". (AI/169).¹²⁹

¹²⁵ See *Official Records of the Economic and Social Council, Seventh Session, 195th meeting*, pp. 315 *et seq.*

¹²⁶ See ECE, *Analytical Report on the State of Intra-European Trade* (United Nations publication, Sales No.: E.70.II.E/Mim.21), pp. 25-26.

¹²⁷ In the present part of the report, as regards GATT, the words "contracting parties" refer collectively to the member nations of GATT acting in their individual capacities; when printed in capitals as above, they mean "the Contracting Parties acting jointly as provided for in Article XXV".

¹²⁸ GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 77. (Italics supplied by the Special Rapporteurs.)

¹²⁹ "AI/169" signifies "page 169 of the Analytical Index (second revision)" [GATT publication, Sales No.: GATT/1970-1]. Other

(ii) This provisional application of Part II may have the consequence that some contracting parties do not fully observe the non-discrimination provisions of Articles V, IX, XIII and XVII. In accordance with a Supplementary Provision in Annex I, this applies also to the obligations incorporated in paragraph 1 of Article I by reference to paragraphs 2 and 4 of Article III which are considered as falling within Part II for the purposes of the Protocol of Provisional Application.

142. In this connexion, a learned commentator has written:

[. . .] the GATT, as applied through the Protocol of Provisional Application, has been amended a number of times and affected by other protocols and international agreements, including some not technically "in force". Thus the basic GATT treaty is a complex set of instruments applying with varying rigor to different countries. For the lawyer to ascertain at any given time the precise legal commitments between any two nations that are contracting parties to GATT is no easy task.¹³⁰

4. THE MOST-FAVOURLED-NATION CLAUSES IN THE GATT AND IN THE MONTEVIDEO TREATY

143. The GATT memorandum stated:

One of the fundamental provisions of the General Agreement is equality of treatment. This is established in an unconditional most-favoured-nation clause relating to trade.

In fact, the General Agreement contains several most-favoured-nation clauses, which are quoted in the GATT memorandum and are reproduced below. The GATT memorandum classes them among "the provisions of GATT establishing the rule of non-discrimination". The GATT memorandum states also that "during the twenty-one years that the Agreement has been in force certain interpretations have been developed" and it describes those interpretations. They are only partially reproduced below, owing to their highly technical character. The Treaty Establishing a Free-Trade Area and Instituting the Latin American Free-Trade Association, signed at Montevideo on 18 February 1960, contains some clauses which can be paralleled to the GATT clauses. The text of such LAFTA clauses is also given below.

(a) *The general most-favoured-nation clause in the GATT*

144. The GATT memorandum stated:

(i) Paragraph 1 of Article I establishes general most-favoured-nation treatment as a rule governing trade among the contracting parties to the GATT:

"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,

references in the GATT memorandum are to the volumes and supplements of the "Basic Instruments and Selected Documents" (BISD) or to other GATT documents.

¹³⁰ J. H. Jackson, *World Trade and the Law of GATT: A Legal Analysis of the General Agreement on Tariffs and Trade* (Indianapolis, The Bobbs-Merrill Company, 1969), p. 59.

and with respect to all matters referred to in paragraphs 2 and 4 of Article III, 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." [131]

(ii) This paragraph was modelled on the standard League of Nations most-favoured-nation clause (see AI/2). Except for the exclusion of "governmental contracts for public works", the text is, substantially, that contained in the "Suggested Charter for an International Trade Organization", submitted by the Government of the United States to the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, London, October 1946. (See Report of the First Session, page 9.)

145. The contents of the principal most-favoured-nation clause of GATT have been described by one learned commentator as "[. . .] divisible into two concepts: (1) the scope of the clause, *i.e.*, to what activity does it apply? and (2) the obligation of the clause, *i.e.*, what does it require?"¹³² These two concepts are set out in the following graphic way:

Scope of the clause

- (1) Customs duties and charges of any kind imposed on or in connexion with:
 - (a) importation,
 - (b) exportation, and
 - (c) international transfer of payments for imports or exports
- (2) The method of levying such duties and charges;
- (3) All rules and formalities in connection with:
 - (a) importation and
 - (b) exportation;
- (4) All matters referred to in Article III, paragraph 2, and Article III, paragraph 4 (which cover internal taxes and regulatory laws).
- (5) All of the above apply only to *products*.¹³³

Obligation of the clause

[A]ny 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.¹³⁴

146. Some of the explanatory notes given in the GATT memorandum are reproduced below:

In 1948 the Chairman of the CONTRACTING PARTIES ruled that "charges of any kind" cover consular taxes [and] [. . .] that the most-favoured-nation principle was applicable to "any advantage, favour, privilege or immunity" granted with respect to internal taxes, e.g. rebates of excise duties. (11/12)

The words "all matters referred to in paragraphs 2 and 4 of Article III" relate to national treatment on internal taxation and regulation; in particular, to "internal taxes or other internal charges of any kind" and to "all laws, regulations and requirements affecting their [i.e. the imported products'] internal sale, offering for sale, purchase, transportation, distribution or use."¹³⁵

¹³¹ GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 2.

¹³² J. H. Jackson, *op. cit.*, p. 256.

¹³³ *Ibid.*

¹³⁴ *Ibid.*, pp. 256-257.

¹³⁵ GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 6.

The words "originating in" are intended to exclude the concept of "provenance", so that the application of the most-favoured-nation provision depends upon proof that the goods had in fact originated in a particular country even if they entered the importing country by way of a third country. (AI/4)

When the clause was drafted it was not thought necessary to define the phrase "like product", but it was suggested that the method of tariff classification could be used for determining whether products were "like products" or not. (AI/5)

147. A renowned expert on matters of GATT has made the following remarks on the expression "like product":

[The expression] is not altogether clear and inevitably leads to disputes over interpretation. The example of different types of flour, which are listed individually, in practically all tariffs, comes to mind. If a tariff on wheat flour is reduced, does the clause oblige a contracting party also to reduce the tariff on rye flour coming from another country?

While the text gives no answer, practice has also failed to help. One of the complaints dealt with in GATT has been that of Norway against Germany, which had granted a special concession to Portugal on sardines. Norway exported herring to Germany prepared in a "like" manner, and Norway claimed that being a "like" product it should benefit from the same concession as Portugal's product. Unfortunately for the formalists this case was settled by a compromise and left Contracting Parties without a precedent. GATT, however, remains flexible over this point and can deal with any situation as it presents itself. The absence of overt disagreement suggests that it is no major problem. Contracting Parties have indeed formally agreed to avoid the pitfall of too narrow definitions.¹³⁶

148. 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".¹³⁷ In 1904 Germany granted a duty reduction to Switzerland on

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.¹³⁸

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.¹³⁹ However, the Food and Agriculture Organ-

¹³⁶ G. Curzon, *Multilateral Commercial Diplomacy* (London, Michael Joseph, 1965), p. 62-63.

¹³⁷ See *Yearbook of the International Law Commission*, 1968, vol. II, p. 170, document A/CN.4/L.127, para. 31.

¹³⁸ League of Nations, Economic and Financial Section, *Memorandum on Discriminatory Classifications* (Ser. L.o.N.P. 1927.II.27), p. 8.

¹³⁹ H. C. Hawkins, *Commercial Treaties and Agreements: Principles and Practice* (New York, Rinehart and Co., Inc., 1951), pp. 93-94; J. E. S. Fawcett, "Trade and Finance in International Law" (text in English) in *Recueil des cours de l'Académie de droit international de La Haye*, 1968 (Leyden, Sijthoff, 1969), vol. 123, p. 263.

ization 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.

(b) *The general most-favoured-nation clause in the Montevideo Treaty*

149. In contradistinction to the general most-favoured-nation clause of GATT, the corresponding clause of the Montevideo Treaty is drafted in simpler language:

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.¹⁴⁰

(c) *Special most-favoured-nation clauses*

150. The distinction between a "general" and a "special" most-favoured-nation clause is, indeed, arbitrary; what is really meant is that the first, covering a larger field, is more important, more general than the second, which relates to a more particular subject.

151. The GATT memorandum mentions the following clauses in the GATT which, in addition to the major commitment of Article I., contain obligations to most-favoured-nation treatment:

Traffic in transit

Most-favoured-nation treatment for traffic in transit is provided for in paragraph 5 of Article V:

With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.¹⁴¹

In accordance with paragraph 7, the above does not apply to the operation of aircraft in transit, but it does apply to air transit of goods (including baggage).

A Supplementary Provision in Annex I provides that, with regard to transportation charges, the principle laid down in paragraph 5 refers to "like products being transported on the same route under like conditions".¹⁴²

¹⁴⁰ 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.

¹⁴¹ GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 9.

¹⁴² *Ibid.*, p. 64.

Marking requirements

Most-favoured-nation treatment is provided for in paragraph 1 of Article IX:

Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country.¹⁴³

152. The Montevideo Treaty contains a most-favoured-nation clause pertaining to a special field:

Capital movement

Article 20

Capital originating in the Area shall enjoy, in the territory of each Contracting Party, treatment not less favourable than that granted to capital originating in any other country.¹⁴⁴

5. THE NATURE AND FUNCTIONING OF A MULTILATERAL MOST-FAVOURLED-NATION CLAUSE

153. The basic aim of the most-favoured-nation principle is to secure the benefits of multilateral trade,¹⁴⁵ and this can be achieved through bilateral most-favoured-nation clauses. What greater advantage can then be acquired by adopting a multilateral most-favoured-nation system? This is illustrated by the following example taken from an article by John H. Jackson.

If a most-favored-nation clause is generally inserted in bilateral trade treaties, then when nation A agrees with nation B to reduce tariffs on widgets, A may have to grant the same reduction to C under a prior treaty which has MFN. But A will be able to extract from B only such reciprocal tariff reductions that compensate for B's advantage received from A. C will get a windfall. This knowledge will inhibit A from offering very much to B in their negotiations, at least as to goods which are traded with nations other than B. The only way out of this dilemma is for A, B, and C to negotiate "together". This GATT attempts to allow.¹⁴⁶

154. Another expert more passionately describes the advantage of multilateralism inherent in the GATT rule as follows:

While the most-favoured-nation clause in GATT is the direct descendant of the unconditional most-favoured-nation clause as enshrined for decades in bilateral agreements, in its multilateral context it has a significance, and perhaps even has a purpose, which goes beyond that of bilateral agreements. The original purpose behind its inclusion in bilateral agreements was simply to make sure that each signatory obtained the best possible treatment from his partner. If that treatment were better than the treatment accorded to others, so much the better. In its multilateral context, however, the significance of the clause goes deeper and is the most essential element in the basic idea that runs through the first experiment in multilateral co-operation in the field of trade. That idea is that discrimination in any form is likely to lead to more discrimination, and that in the long run all countries will suffer from the inevitable distortion of trade patterns which will arise out of discrimination, even though they may be the temporary beneficiaries. However, because there are

¹⁴³ *Ibid.*, p. 15.

¹⁴⁴ 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.

¹⁴⁵ H. C. Hawkins, *op. cit.*, p. 185.

¹⁴⁶ J. H. Jackson, "The Puzzle of GATT", in *Journal of World Trade Law* (London, 1967), vol. I, No. 2, p. 145.

undoubted benefits that can be obtained in the short run from reciprocal discrimination, the only way to prevent a country or a pair of countries from making the move that will set off this chain reaction is to obtain the simultaneous pledge of the largest possible number of trading countries that they will not discriminate against each other.¹⁴⁷

155. According to Patterson,¹⁴⁸ the unconditional most-favoured-nation clause which is generally regarded as the cornerstone of the GATT is a major extension of the principle because the General Agreement is a many-faceted multilateral commitment. This means that for a member to back out of its non-discriminatory obligations would threaten an unravelling of a huge package—not just a few commitments with one other country, as has been possible when the most-favoured-nation clause was only part of a bilateral accord.

156. Another scholar develops this idea a little further:

[. . .] the clause in the Agreement makes it practically impossible to cancel bilateral concessions. The only way for a contracting party to avoid most-favoured-nation treatment is to walk out of GATT. But this would mean that the Contracting Party would also lose all the other concessions negotiated, quite apart from the one it wishes to avoid. It is hardly possible to conceive any single obligation which would make a country give up all the negotiated advantages which make up the GATT package deal. Before GATT it was possible to renegotiate with just the one country with whom one had difficulties without touching one's rights and obligations with any other trading partner. This is an important new development and shows that the multilateral character of the Agreement adds up in tariff concessions to more than just a sum of bilateral concessions. In addition, the old argument of free concessions to third countries has also died with the simultaneity of the tariff negotiations with all Contracting Parties. Any presumed "free" concessions can now be made to yield their value by immediate inclusion in the negotiable list with any country likely to benefit. Moreover, the greatest objection to the most-favoured-nation clause—the non-negotiable tariff as it existed in the United States—has disappeared by definition. For GATT is an instrument to lower duties and the *sine qua non* of membership is thus a negotiable tariff.¹⁴⁹

157. A special feature of the most-favoured-nation system of GATT is that each party to the General Agreement, in negotiating with the other parties (mostly with "principal suppliers"), makes concessions in respect of customs duties on certain products. These reductions are listed in Schedules. According to Article II of the GATT each contracting party is obliged to apply its duty reductions to all other parties. The Agreement goes beyond the most-favoured-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.¹⁵⁰ Thus, the operation of the GATT clause differs from that of a usual bilateral most-favoured-nation clause. Because Article XXVIII of the General Agreement prescribes a

cumbersome procedure for the modification of the Schedules, the GATT clause is not as easily and automatically a "floating device" (*échelle mobile*) as bilateral clauses in general.

158. According to a French author:

[. . .] the multilateral treaty technique has made it possible to improve the mechanism of the clause and to meet certain criticisms made during the inter-war period, so that the old lady has acquired a new lease of life.¹⁵¹

6. OTHER CLAUSES AIMING AT NON-DISCRIMINATION

159. The GATT memorandum describes the most-favoured-nation clauses quoted above and the clauses on quantitative restrictions and State-trading enterprises under the same heading: "The provisions of GATT establishing the rule of non-discrimination". From a technical point of view, however, a distinction should be made between the most-favoured-nation clauses proper and the clauses included below. While aiming at a similar effect, the latter are not drafted in the form of most-favoured-nation clauses. In the provision relating to quantitative restrictions on the import of goods, the "relative" treatment represented by the most-favoured-nation clause takes a form somewhat different from the form it takes when it is applied to other matters. Similarly, the provision relating to State-trading represents a variant in the application of the principle underlying the most-favoured-nation clause.¹⁵² In these instances the application of the most-favoured-nation principle demands not *equal* but *equitable* treatment.¹⁵³

(a) Quantitative restrictions in the GATT

160. Quantitative restrictions are in principle prohibited by the General Agreement (Art. XI). They are, however, authorized on account of a country's balance-of-payments difficulties (Art. XII, Art. XVIII, Sect. B) or development needs (Art. XVIII, Sect. C). The Contracting Parties are required to apply the quantitative restrictions in a non-discriminatory manner (Art. XIII). On this question the GATT memorandum has the following to say:

(i) Paragraph 1 of Article XIII provides that the administration of quantitative restrictions shall be non-discriminatory:

"No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted."¹⁵⁴

¹⁵¹ "[. . .] la technique du traité multilatéral a permis d'améliorer le mécanisme de la clause et de parer à certains reproches qui lui ont été adressés durant l'entre-deux-guerres. Voici donc une nouvelle jeunesse pour cette vieille dame". E. Sauvignon, *La clause de la nation la plus favorisée* (thesis, Université de Nice, 1968), p. 143.

¹⁵² H. C. Hawkins, *op. cit.*, p. 12.

¹⁵³ *Ibid.*, p. 165.

¹⁵⁴ GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 21.

¹⁴⁷ J. W. Evans, quoted by G. Curzon, *op. cit.*, pp. 67-68.

¹⁴⁸ G. Patterson, *Discrimination in International Trade: The Policy Issues, 1945-1965* (Princeton, N. J., Princeton University Press, 1966), p. 18.

¹⁴⁹ G. Curzon, *op. cit.*, p. 62.

¹⁵⁰ H. C. Hawkins, *op. cit.*, p. 226.

(ii) The rules for the non-discriminatory administration of quantitative restrictions are set out in paragraphs 2 to 5 of Article XIII. Under paragraph 2 contracting parties, in applying import restrictions to any product, are required to "[...] aim at a distribution of trade [...] approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions".¹⁵⁵ In cases in which a quota is allocated among supplying countries, the contracting party applying the restrictions "[...] may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product",¹⁵⁶ and in cases in which this method is not reasonably practicable the contracting party "shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions supplied by such contracting parties during a previous representative period".¹⁵⁷

(b) *Quantitative restrictions
in the Montevideo Treaty*

161. Article 23 of the Montevideo Treaty authorizes the Contracting Parties "to impose non-discriminatory restrictions upon imports" if they have, "or are liable to have, serious repercussions on specific productive activities of vital importance to the national economy".¹⁵⁸ Restrictions can also be introduced "without discrimination" under Article 24 in order to improve the balance-of-payments situation. In Article 26 the Parties undertake to initiate appropriate action with a view to eliminating the restrictions which should as a rule be introduced as transitory measures only. A special provision of Article 28 permits that under certain circumstances a Party may apply "in respect of trade in agricultural commodities of substantial importance to its economy"¹⁵⁹ non-discriminatory measures designed to limit imports to the amount required to meet the deficit in internal production.

(c) *State-trading enterprises*

162. The GATT memorandum stated in this respect:

(i) Paragraph 1 of Article XVII provides for the application of the general principles of non-discriminatory treatment to the foreign purchases and sales of State enterprises:

"(a) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.

"(b) The provisions of sub-paragraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase

or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales."¹⁶⁰

(ii) A supplementary provision in Annex I provides that the "operations of Marketing Boards, which are established by contracting parties and are engaged in purchasing or selling, are subject to the provisions of sub-paragraphs (a) and (b)" [of para. 1].¹⁶¹

(iii) A further Supplementary Provision, relating to paragraph 1 (b), provides that a country receiving a "tied loan" may take this loan into account as a "commercial consideration" when purchasing requirements abroad.¹⁶²

(iv) Paragraph 2 of the Article relates to products imported for governmental use:

"The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment."¹⁶³

163. The State trading provision merits some comments:

(i) The provision is based on the assumption that leaving trade in the hands of private enterprises will result in a better allocation of international resources, while State trading is necessarily uneconomic. This assumption is, however, not—or not necessarily—true. The private firm may have a significant power in the market and may, as it not infrequently does, exercise this power in such a way as to cause economic detriment instead of benefit. This was well known to the draftsmen of ITO,¹⁶⁴ who included in their draft a whole chapter on "restrictive business practices". Although this chapter died with ITO, a case can be made for holding that under Article XXIX of GATT, which makes the Havana Charter "principles" applicable, the said provisions are not altogether extinct.¹⁶⁵

(ii) The text of Article XVII reveals that its title ("State Trading Enterprises") is misleading. The provision is not restricted to State enterprises proper, i.e. to enterprises established, owned, controlled and maintained by a State, but it covers also enterprises (whether State-owned or privately-owned) to which a State party to GATT grants "formally, or in effect, exclusive or special privileges".¹⁶⁶

(iii) When the provision was drafted, representatives of States with active State-trading programmes (e.g. New Zealand) feared that the Agreement would place greater restrictions on State traders than on private enterprise.¹⁶⁷ That fear has not proved to have been completely unfounded;

¹⁶⁰ GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 27.

¹⁶¹ *Ibid.*, p. 69.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*, p. 28.

¹⁶⁴ See para. 136 above.

¹⁶⁵ See J. H. Jackson, *World Trade and the Law of GATT...*, *op. cit.*, p. 330.

¹⁶⁶ GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 27.

¹⁶⁷ See J. H. Jackson, *World Trade and the Law of GATT...*, *op. cit.*, p. 334.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*, p. 22.

¹⁵⁷ *Ibid.*

¹⁵⁸ United Nations, *Multilateral Economic Co-operation in Latin America*, vol. I, *Text and documents* (United Nations publication, Sales No.: 62.II.G.3), p. 60.

¹⁵⁹ *Ibid.*

(iv) Any organization aspiring to regulate world trade as a whole has to take into account the fact that a growing segment of this trade is carried on by socialist States. Attention was drawn to this fact as early as 1946, when in the London session the delegate of France made the following statement:

France wishes to see that the organization which we are planning here extends to the rest of the world [. . .]. There does not exist, in our opinion, any necessary connexion between the form of the productive regime and the internal exchanges in one nation, on the one hand, and on her foreign economic policy, on the other. The United States may very well continue to follow the principle, the more orthodox principle, of private initiative. France and other European countries may turn towards planned economy. The USSR may uphold and maintain the Marxist ideals of collectivism without our having to refuse to be in favour of a policy of international organization based on liberty and equality [. . .].¹⁶⁸

These and similar thoughts will have to be taken into account if arrangements are to be made for the organization of international trade on a fully universal level.

7. EXCEPTIONS AND ESCAPE CLAUSES IN THE GATT¹⁶⁹

164. According to Jackson, it has sometimes been said that

GATT is "riddled with exceptions" [. . .] there are a number of provisions that relax the GATT obligations under various circumstances. But arguably these provisions are essential to an institution as new (and therefore experimental) as GATT, which purports to regulate the complex and politically sensitive subject of international trade. The escape clauses and exceptions provide the necessary flexibility without which the General Agreement might never have been concluded or might never have endured in the face of the pressures that have buffeted it.¹⁷⁰

165. The GATT memorandum distinguishes between "exceptions provided for in the GATT to the rule of non-discrimination" and further "exceptions granted by the CONTRACTING PARTIES" which

"meet from time to time for the purpose of giving effect to those provisions of the Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of the Agreement."

166. Following the system of the GATT memorandum, the first set of exceptions is described below:

(a) *Exceptions (provided for in the GATT) to the rule of non-discrimination*

(i) *Preferences in respect of import duties and charges*

Paragraph 2 of Article I provides that the rule of general most-

favoured-nation treatment does not require the elimination of certain preferences, in respect of import duties or charges, which were in force on established base dates. Corresponding exemptions for existing preferences have been provided for in the protocols of accession of certain countries (Argentina and Uruguay) and in declarations on provisional accession (United Arab Republic).

(ii) *Anti-dumping and countervailing duties*¹⁷¹

Under paragraphs 2 and 3 of Article VI a contracting party may in certain circumstances levy a special duty on any product which is introduced into its commerce from the territory of another contracting party at less than its normal value, in order to offset or prevent dumping or to offset any bounty or subsidy bestowed, directly or indirectly, upon its manufacture, production or export. By their very nature, anti-dumping and countervailing duties cannot be other than discriminatory.

In 1960 a group of experts on anti-dumping duties considered *inter alia* the relationship between the application of anti-dumping duties and the most-favoured-nation clause. They stated in their report: "In equity and having regard to the most-favoured-nation principle [. . .] where there was dumping to the same degree from more than one source and where that dumping caused or threatened material injury to the same extent, the importing country ought normally to be expected to levy anti-dumping duties equally on all the dumped imports." (*Basic Instruments and Selected Documents*, (BISD) *Ninth Supplement*, p. 198.)

In 1967 the CONTRACTING PARTIES drew up an Anti-Dumping Code "to provide for equitable and open procedures as the basis for a full examination of dumping cases" and "to interpret the provisions of Article VI of the General Agreement and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation".¹⁷² The Code was incorporated in an Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade,¹⁷³ which entered into force on 1 July 1968 and has been accepted by eighteen contracting parties. In November 1968 the Director-General was asked for a ruling as to "whether parties to the Agreement have a legal obligation under Article I of the GATT to apply the provisions of the Anti-Dumping Code in their trade with all GATT contracting parties, or only in their trade with those GATT contracting parties which are also parties to the Agreement". The Director-General's answer was to the effect that the most-favoured-nation provisions of Article I are applicable. Basing himself on paragraph 1 of Article I, he said "for a contracting party to apply an improved set of rules for the interpretation and application of an Article of the GATT only in its trade with contracting parties which undertake to apply the same rules would introduce a conditional element into the most-favoured-nation obligations which, under Article I of GATT, are clearly unconditional". He referred also to paragraph 3 (a) of Article X of the GATT and said that these provisions "would not permit [. . .] the application of one set of regulations and procedures with respect to some contracting parties and a different set with respect to the others". (L/3149.)

(iii) *Retaliation for the discriminatory application of quantitative restrictions*

It is provided in paragraphs 4 (c) and (d) of Article XII and in paragraphs 12 (c) and (d) and paragraph 21 of Article XVIII that, if quantitative restrictions are imposed in a manner contrary to the rules of GATT requiring the non-discriminatory application of such restrictions, the CONTRACTING PARTIES may release a

¹⁶⁸ Document EPCT/PV.3 (1946), p. 18 (quoted by J. H. Jackson, *World Trade and the Law of GATT* . . ., *op. cit.*, pp. 361-362).

¹⁶⁹ Similar clauses in the Montevideo Treaty (e.g. Chapter VI on saving clauses, Chapter VII on special provisions concerning agriculture, Chapter VIII on measures in favour of countries at a relatively less advanced stage of economic development, article 19 concerning frontier traffic and article 53 concerning other exceptions) are not dealt with in the present report.

¹⁷⁰ J. H. Jackson, *op. cit.*, pp. 535-536.

¹⁷¹ See *Yearbook of the International Law Commission*, 1969, vol. II, p. 171, document A/CN.4/213, para. 88.

¹⁷² GATT, *Basic Instruments and Selected Documents*, *Fifteenth Supplement* (Sales No.: GATT/1968-1), p. 24.

¹⁷³ *Ibid.*

contracting party whose trade is adversely affected from obligations under GATT towards the contracting party applying the restrictions.

(iv) *Exceptions to the rule of non-discrimination in the administration of quantitative restrictions*

A contracting party which is applying import restrictions to safeguard its external financial position and its balance of payments may deviate from the rule of non-discrimination in accordance with the provisions of Article XIV. The principal exception is set out in paragraph 1 of the Article which allows a contracting party to deviate "[. . .] in a manner having equivalent effect to restrictions on payments and transfers for current international transactions which that contracting party may at that time apply under Article VIII or XIV of the Articles of Agreement of the International Monetary Fund".¹⁷⁴ Minor exceptions are permitted under the other paragraphs of the Article and under paragraph 9 of Article XV.

(v) *Response to emergency action affecting imports*

Under Article XIX a contracting party may, in certain circumstances, suspend temporarily an obligation which it has assumed under the GATT. In that event the CONTRACTING PARTIES may authorize a contracting party which has a substantial interest as exporter of the product concerned to suspend substantially equivalent obligations to the trade of the contracting party taking the action.

(vi) *Sanitary and health regulations*

Article XX provides general exceptions, which have been traditional in commercial treaties, permitting a contracting party to adopt or enforce measures for certain special purposes. It is under point (b), i.e., measures "necessary to protect human, animal, or plant life or health",¹⁷⁵ that such measures are most likely to be discriminatory; but they are not to constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail".¹⁷⁶

(vii) *Security regulations*

It is provided in Article XXI that nothing in the GATT will be construed to prevent a contracting party from taking any action which it considers necessary for the protection of its essential security interests (relating to traffic in arms, etc.) or in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

(viii) *Nullification or impairment*

Following an investigation of a complaint by a contracting party that a benefit accruing to it under the GATT is being nullified or impaired, the CONTRACTING PARTIES may authorize the complainant to suspend the application to any other contracting party of such GATT obligations as they determine to be appropriate.

(ix) *Frontier traffic*

According to paragraph 3 (a) of Article XXIV the provisions of the GATT do not prevent a "dvantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic".¹⁷⁷

(x) *Non-application of the GATT between particular contracting parties*

Article XXXV was added to the GATT in 1948. Paragraph 1 of this Article reads: "This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if:

- (a) the two contracting parties have not entered into tariff negotiations with each other, and
- (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application."¹⁷⁸

(xi) *Customs unions and free-trade areas*

167. Important provisions of article XXIV (not quoted in the GATT memorandum) read as follows:

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that *the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.*

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided that:*

(a) with respect to a customs union, or an interim agreement leading to the formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement *shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce* applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;

(b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement *shall not be higher or more restrictive than the corresponding duties and other regulations of commerce* existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement, as the case may be; and

(c) any interim agreement referred to in sub-paragraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

[. . .]

7. (a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.¹⁷⁹

168. On customs unions and free-trade areas the GATT memorandum contained the following passages:

The GATT does not prevent, as between the territories of contracting parties, the formation of a customs union or of a

¹⁷⁴ GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 23.

¹⁷⁵ *Ibid.*, p. 37.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*, p. 41.

¹⁷⁸ *Ibid.*, p. 52.

¹⁷⁹ *Ibid.*, pp. 41-42. (Italics supplied by the special Rapporteur.)

free-trade area. The definitions of a customs union and of a free-trade area, set out in paragraph 8 of Article XXIV, include the following provisions relevant to the most-favoured-nation rule:

(a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,

(ii) [. . .] substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.¹⁸⁰ The original (1947) text of the GATT recognized only customs unions as legitimate exceptions to the most-favoured-nation rule. Provision for free-trade areas was added by protocol in 1948, following the introduction of this concept in the Havana Charter for an International Trade Organization.

Certain conditions and procedures are laid down in paragraphs 5 to 9 of Article XXIV, but under paragraph 10 the CONTRACTING PARTIES may approve, by a two-thirds majority, proposals for the formation of a union or area which do not fully comply with the requirements of those paragraphs. The expression "substantially all the trade" has not been quantified by the CONTRACTING PARTIES.

The plans for customs unions and free-trade areas which have been notified to the CONTRACTING PARTIES under Article XXIV are listed in the Analytical Index (AI/128-131).

(xii) *The problems raised by article XXIV*

169. Hardly any other provisions of the General Agreement have been so vehemently criticised as those of Article XXIV on customs unions and free-trade areas. One of the critics, K. W. Dam, after a profound examination of the contents of article XXIV, has written as follows:

If a single adjective were to be chosen to describe article XXIV, that adjective would be "deceptive". First, the standards established are deceptively concrete and precise; any attempt to apply the standards to a specific situation reveals ambiguities which, to use an irresistible metaphor, go to the heart of the matter. Second, while the rule appears to be carefully conceived, the principles enunciated make little economic sense. Third, the dismaying experience of the Contracting Parties has been that no customs union or free-trade area agreement presented for review has complied with article XXIV and yet, every such agreement has been approved by a tacit or explicit waiver.

[. . .]

Perhaps the most troublesome ambiguity in article XXIV lies in the requirement that, in the case of a customs union, "duties and other regulations of commerce imposed [on external trade] [. . .] shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union [Art. XXIV, para. 5 (a)].

[. . .]

Further ambiguity lies in the meaning of the requirement that, in order for a regional grouping to qualify as a customs union or free-trade area under article XXIV, "duties and other restrictive regulations of commerce [must be] [. . .] eliminated with respect to substantially all the trade between the constituent territories".

[. . .]

While article XXIV does not set forth its rationale, it is not too difficult to surmise the underlying theory. The General Agreement has two grand designs: That free trade be promoted through multilateral tariff negotiation and that discrimination be eliminated by means of the most-favoured-nation principle. For the draftsmen of the General Agreement, customs unions and free-trade areas produced a conflict between those two goals. Such regional groupings seemed to be movements toward free trade to the extent that tariffs were lowered between member countries, but they also seemed to involve discrimination against non-member countries. The solution adopted by the draftsmen was to permit customs unions provided the plans went all the way toward unfettered trade by full elimination of barriers on "substantially all" intermember trade, even though, in a sense, discrimination was thus increased, but to assure through the "higher or more restrictive" criterion that creation of the customs union or free-trade area was not seized upon as an opportunity to raise tariffs against nonmembers beyond the preexisting level.

What may not have been appreciated at the time of the drafting of the General Agreement was that customs unions and free-trade areas need not involve movements toward free trade. They may just as easily be, and perhaps in view of the widespread propensity toward protectionism are more likely to be, movements away from free trade."¹⁸¹

170. Another expert sees the problem in a somewhat different way:

[. . .] at least two goals were desired by various factions of the draftsmen of GATT, namely, the goal of increasing free trade and benefiting efficient world allocation of resources and production, and the goal of less developed countries to ally themselves with neighbours so as to provide wider markets and assist in the industrial development process. It is probable that these two goals are inconsistent when applied to specific cases. In addition, it is clear that some parties of GATT have had, in supporting and promoting regional arrangements, political goals that do not accord with either of the two economic goals just mentioned. A political goal that urges economic integration of certain nations so as to more closely ally those nations for defence or other purposes may result in the advocacy of a regional arrangement that is detrimental in the economic sense.

The author concludes with resignations:

But who is to say that the political goal, or one or the other of economic goals, should prevail?¹⁸²

171. Not a single customs union or free-trade area agreement which has been submitted to the contracting parties has conformed fully to the requirements of article XXIV. Yet, the contracting parties have felt compelled to grant waivers of one kind or another for every one of the proposed agreements.¹⁸³ The contracting parties have not been able to say whether the major schemes examined by them qualified as customs unions or free-trade areas under the GATT rules. The formal

¹⁸¹ K. W. Dam, "Regional economic arrangements and the GATT: The legacy of a misconception", in *The University of Chicago Law Review*, vol. 30, No. 4 (Summer 1963), pp. 619-623.

¹⁸² J. H. Jackson, *op. cit.*, p. 621.

¹⁸³ K. W. Dam, *op. cit.*, pp. 660-661.

¹⁸⁰ *Ibid.*, p. 43.

action in the case of the European Economic Community was to lay aside "for the time being" questions of law and the compatibility of the Rome Treaty with the General Agreement. In the case of the European Free Trade Association and the Latin American Free Trade Association it was concluded that the legal question "could not be fruitfully discussed further at this stage" and that "at this juncture" it would not be "appropriate to make any formal legal findings".¹⁸⁴

(b) *Exceptions (granted by the contracting parties) to the rule of non-discrimination*

172. The GATT memorandum described these exceptions as follows:

(i) *Waivers authorizing discriminatory treatment*

Under paragraph 5 of Article XXV the CONTRACTING PARTIES in exceptional circumstances not elsewhere provided for, may, waive an obligation imposed upon a contracting party by the GATT, provided the decision is approved by a two-thirds majority of the votes cast and the majority comprises more than half of the contracting parties. In 1956 the CONTRACTING PARTIES adopted guiding principles to be followed in considering applications for waivers from Part I or other important obligations of the GATT. These include the principle that an application should not be granted unless the CONTRACTING PARTIES are satisfied "that the legitimate interests of other contracting parties are adequately safeguarded" (BISD, *Fifth Supplement*, p. 25). Acting pursuant to Article XXV, paragraph 5, the CONTRACTING PARTIES have granted some fifteen waivers involving deviations from the rule of most-favoured-nation treatment (these are listed on pages 7 and 8 of the Analytical Index).

(ii) *Preferences for developing countries*

Many of the waivers granted under Article XXV, paragraph 5, permit the application of preferential rates of customs duty to imports from developing countries. The most important is that granted to Australia in 1966 to permit the application of reduced tariff rates to imports of certain products from a long list of developing countries; this waiver itself contains an element of discrimination in that some of the preferences are explicitly withheld from one of the beneficiaries (BISD, *Fourteenth Supplement*, p. 23).

At the second session of the United Nations Conference on Trade and Development, in March 1968, the developed countries which are contracting parties to GATT participated in the adoption of resolution 21 (II) expressing agreement with the objectives of "a generalized non-reciprocal, non-discriminatory system of preferences in favour of the developing countries".¹⁸⁵ The developed countries are now engaged in discussion of the preferential treatment which they might agree to accord to goods imported from developing countries. The CONTRACTING PARTIES, in November 1968, affirmed "their readiness to take appropriate action when the scheme has been negotiated" (16S/15).

In the belief that preferential tariff treatment accorded by

developing countries to their mutual trade could make an important contribution to an expansion of trade among them, the CONTRACTING PARTIES have arranged for a multilateral negotiation and have agreed that they will look at the results "in a constructive and forward-looking spirit". Several developing countries which are not contracting parties to the GATT are participating in the negotiations (BISD, *Sixteenth Supplement*, p. 15).

In 1967 India, the United Arab Republic and Yugoslavia concluded an Agreement to grant to certain goods, imported from one another, advantages with respect to customs duties which are not accorded to like products originating in the territories of other contracting parties. The participating States announced their intention "to seek the extension of the concessions embodied in the Agreement to all other developing countries by appropriate negotiations and to make their best endeavours to integrate these concessions within the framework of multilateral arrangements [referred to in the preceding paragraph] . . . and to adapt or modify the Agreement as may be appropriate in the event of adoption of a general multilateral scheme of trade and economic co-operation among developing countries". The CONTRACTING PARTIES decided that the three participating States could implement their Agreement notwithstanding the provisions of paragraph 1 of Article I of the GATT. On the basis of a report by the participating States on the operation of the Agreement and taking account of progress achieved in the negotiations referred to [in the preceding paragraph], the CONTRACTING PARTIES at their twenty-sixth session will review their Decision "with a view to deciding on its extension, modification or termination" (BISD, *Sixteenth Supplement*, pp. 17-18).

8. TREATIES IN CONFLICT WITH A MULTILATERAL MOST-FAVOURED-NATION CLAUSE

173. Possible conflicts may be settled in advance. Thus, Article I of GATT provides for the maintenance of certain preferences existing on certain dates. These include preferential arrangements within the British Commonwealth and the French Union.¹⁸⁶

174. On other bilateral treaties conflicting with the provisions of the General Agreement the GATT memorandum had the following to say:

In 1961 the CONTRACTING PARTIES were asked whether bilateral trade agreements, which provide for quotas or differential treatment, are compatible with the GATT. The Executive Secretary expressed the opinion that any discriminatory measures taken by a contracting party pursuant to the terms of a bilateral agreement should not go beyond the limits laid down in the relevant provisions of the GATT (L/1636). During a discussion of this question at the nineteenth session, the Executive Secretary said that "the existence of a bilateral agreement could in no circumstances be justified as a basis for non-observance of the non-discrimination provisions of the GATT (SR.19/8.)".

175. It is submitted that the same applies to conflicting multilateral treaties. The special case of treaties, whether bilateral or multilateral, establishing customs unions or free-trade areas is governed by the *lex specialis* of Article XXIV of the General Agreement (see paras. 167 above and 177 below).

¹⁸⁴ G. Patterson, *op. cit.*, pp. 157-158. For further details on these cases, see G. P. Verbit, "Preferences and the public law of international trade: the end of most-favoured-nation treatment?" in Hague Academy of International Law, *Colloquium 1968: International Trade Agreements* (Leyden, Sijthoff, 1969), pp. 48-49.

¹⁸⁵ See *Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. I and Corr.1 and 3 and Add.1-2, *Report and Annexes* (United Nations publication, Sales No.: E.68.II.D.14), p. 38.

¹⁸⁶ Cf. article 30, paragraph 2, of the Vienna Convention on the Law of Treaties, in *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 293.

176. It may happen that two States members of GATT conclude a separate bilateral commercial treaty embodying a most-favoured-nation clause. The existence between two States of two parallel most-favoured-nation obligations poses generally no problem and is not a case of conflict. One secondary question may arise, namely whether the most-favoured-nation clause in the bilateral treaty extends the benefits also of a special preference authorized by the CONTRACTING PARTIES under Article XXV of GATT. In some such bilateral treaties this is expressly excluded.¹⁸⁷ It has been held, however, that the absence of such excluding stipulation in several other treaties indicated the belief that special benefits of the kind mentioned might not be claimed anyway.¹⁸⁸

(a) "Regional" or "subregional" arrangements

177. The question of the compatibility of a bilateral or multilateral treaty establishing a customs union or a free-trade area with the General Agreement on Tariffs and Trade is to be decided by the CONTRACTING PARTIES. According to Article XXIV, paragraph 10, a two-thirds majority is required to approve proposals "which do not fully comply with the requirements [...] provided that such proposals lead to the formation of a customs union or a free-trade area in the sense [of the Agreement]".¹⁸⁹ The approval of such a regional arrangement leads to the result that the arrangement will prevail over the most-favoured-nation clause of the General Agreement, i.e., the contracting parties not members of the special arrangement will not be entitled to the favours which the members of such arrangements grant to each other. This applies, obviously, to all contracting parties not members of the customs union or free-trade area in question independently of whether they voted for or against the approval of the arrangement.

178. The compatibility of subregional agreements with the Treaty of Montevideo poses a special problem. The Montevideo Treaty, unlike the General Agreement, has no provisions concerning special arrangements concluded among the parties to the Treaty. How can subregional integration agreements be reconciled with the most-favoured-nation clause of the Montevideo Treaty? This question arises because of various agreements concluded among Latin American States which have the effect of granting to the signatories advantages that are not extendible to the other member countries of LAFTA (the Latin American Free Trade Association established by the Montevideo Treaty). Of course, the question of compatibility can be solved by the agreement of all parties to the Treaty. However, constitutional doubts have been

raised by commentators against such a solution on the ground that an agreement of this kind would amount to a waiver of rights of individuals and also on the ground that the agreement could not be concluded without action by the legislatures of the signatory States. In the opinion of some experts the question can be solved by a "flexible" teleological interpretation of the most-favoured-nation clause of the Montevideo Treaty.¹⁹⁰

(b) *The 1969 resolution of the Institute of International Law*

179. In the resolution, based on the report of Pescatore, which was adopted at the Edinburgh session of the Institute on 10 September 1969, the Institute:

(Translation from French) [...] emphasizes in particular, as regards the most-favoured-nation clause in multilateral conventions on international trade, the importance of the following points:

[...]

(b) States beneficiaries of the clause shall not be able to invoke it in order to claim a treatment identical with that which States participating in an integrated regional system concede to one another on a reciprocal basis.

(c) It is important that the power of derogation from the clause should be linked with adequate guarantees of an institutional and procedural character, such as those provided by a multilateral system.¹⁹¹

180. Paragraph (b) of the resolution seemingly suggests that the customs union and free-trade area exception has or should have general validity. It does not clarify, however, what should be understood by an "integrated regional system". For clarification one probably would have to go back to the Pescatore report, on which the resolution is based. This report links the derogation from the clause to the condition that such systems

[...] have the nature of a truly economic integration based upon a radical, total and lasting elimination of obstacles to economic currents between the participating countries and upon the generalisation of the national treatment principle both in regard to economic activities and to the factors of production in such a way that they create, between two or more States, analogous conditions to those characterizing an internal market.¹⁹² (Translation from French.)

The reference in the resolution to "adequate guarantees of an institutional and procedural character, such as those provided by a multilateral system" (see para. 179 above) expresses the desirability of a "multilateral forum"¹⁹³ for the settlement of disputes which may arise between the parties to the system, i.e., the multilateral treaty embodying the most-favoured-nation clause.

¹⁸⁷ For example, article XXI of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Denmark, Copenhagen, 1951 (United Nations, *Treaty Series*, vol. 421, pp. 128 and 130), and article XXII of the Treaty of Friendship, Commerce and Navigation between the Kingdom of the Netherlands and the United States of America, The Hague, 1956 (*ibid.*, vol. 285, p. 263).

¹⁸⁸ E. Sauvignon, *op. cit.*, p. 154.

¹⁸⁹ GATT, *Basic Instruments and Selected Documents* vol. IV (Sales No.: GATT/1969-1), p. 44.

¹⁹⁰ For details of the legal questions involved and for the pertinent resolutions of the Conference of the contracting parties to the Montevideo Treaty, see J. B. Schroeder, *op. cit.*, and M. A. Vieira, *op. cit.*

¹⁹¹ See *Annuaire de l'Institut de droit international, session d'Edimbourg, septembre 1969* (Bâle, Editions juridiques et sociologiques S.A.), t. II, p. 362.

¹⁹² *Ibid.*, t. I, p. 146.

¹⁹³ *Ibid.*, p. 46.

(c) *Relation of free-trade area members to non-member States*

181. A conflict similar in nature to those mentioned in the present section has arisen in the case of EFTA. Member countries of EFTA—such as the United Kingdom and Sweden—have argued that the inclusion of the customs union and free-trade area exemptions to the most-favoured-nation clause in the General Agreement had established a point of accepted international commercial law and practice which allowed the setting up of free-trade areas with specific partners, in spite of most-favoured-nations obligations towards third countries. Non-member countries, such as the USSR and Hungary, have not accepted this view.¹⁹⁴

182. The legal question involved is as follows: can the contents of a bilateral most-favoured-nation clause be emptied unilaterally through the participation of the conceding State in a multilateral most-favoured-nation agreement, like GATT or another system having similar effect? Or, putting the question in a different way, can international treaties establishing such systems violate rights of outsiders? A firmly negative answer has been given to these questions by E. T. Usenko,¹⁹⁵ who refers to the authority of Oppenheim, Schwarzenberger and V. M. Shurshalov, i.e., to their views on the effect of treaties on third States. His view is supported by the provisions of articles 34 to 38 of the Vienna Convention on the Law of Treaties.¹⁹⁶

(d) *Relation of GATT members to States not parties to the General Agreement*

183. Article 98, paragraph 4, of the Havana Charter for an International Trade Organization (ITO) provided that

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 or the spirit of the Charter.¹⁹⁷

184. This provision was severely criticized as long ago as 1948. The representative of the Soviet Union, Mr. Arutiunian, stated in the Economic and Social Council that

¹⁹⁴ G. Curzon, *op. cit.*, p. 65.

¹⁹⁵ E. T. Usenko, *Formy regulirovaniya socialisticheskogo mezh-dunarodnogo razdeleniya truda* [Forms of the regulation of the socialist international division of labour] (Moscow, 1965), part III, chap. 9, para. 3. See also the German edition, E. T. Usenko, *Sozialistische internationale Arbeitsteilung und ihre rechtliche Regelung* (Berlin, Staatsverl. d. Deutschen Demokratischen Republik, 1966), p. 209.

¹⁹⁶ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 294.

¹⁹⁷ *United Nations Conference on Trade and Employment* (Havana, Cuba, November 1947-March 1948), *Final Act and Related Documents* (United Nations publication, Sales No.: 1948.II.D.4), p. 51.

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 [. . .].¹⁹⁸

185. Of course, 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 propaganda effect even if one does not assume 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 GATT, 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 [. . .].¹⁹⁹

186. The idea of the provision contained in article 98 of the Havana Charter is, according to Hawkins,²⁰⁰ 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. To this extent there is deviation from the principle that most-favoured-nation treatment should be withheld only from countries that fail to apply that principle.

187. The absence of a provision in the General Agreement relating in general to other incompatible treaties must be taken to mean that the usual rules of international law regarding incompatible treaties must apply.²⁰¹ Concerning the relation of the General Agreement to treaties concluded between parties to the General Agreement and non-member States, this must mean that parties are allowed to extend unconditionally most-favoured-nation treatment to non-party States. What is not allowed is the contractual preference, i.e. that kind of agreement under which a non-party grants preferential treatment to a party and precludes similar agreements with other parties. During the negotiation of the General Agreement a proposal was considered and rejected to the effect that GATT benefits be limited to GATT parties, i.e. that Parties to the Agreement should not extend GATT benefits to countries not parties to GATT. A similar proposal submitted to the CONTRACTING PARTIES at their 1954-1955 session was likewise rejected.²⁰²

¹⁹⁸ See *Official Records of the Economic and Social Council, Seventh Session, 195th meeting*, p. 329.

¹⁹⁹ GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 49. For a contrary view, see J. H. Jackson, *op. cit.*, p. 118.

²⁰⁰ H. C. Hawkins, *op. cit.*, p. 85.

²⁰¹ J. H. Jackson, *op. cit.*, p. 84.

²⁰² GATT, *Basic Instruments and Selected Documents, Third Supplement* (Sales No.: GATT/1955-2), p. 243. See also J. H. Jackson, *op. cit.*, p. 118.

9. DEVELOPING COUNTRIES AND THE MOST-FAVOURLED-NATION CLAUSE IN GENERAL

188. Under the heading "Towards a trade policy for development" section C of the UNCTAD memorandum points out the following matters of principle:

The position of the United Nations Conference on Trade and Development with respect to the scope and limits of the most-favoured-nation clause is stated in General Principle Eight of Recommendation A.I.1. of the first session of the Conference.^[203] According to this principle:

International trade should be conducted to mutual advantage on the basis of the most-favoured-nation treatment and should be free from measures detrimental to the trading interests of other countries. However, developed countries should grant concessions to all developing countries and extend to developing countries all concessions they grant to one another and should not, in granting these or other concessions, require any concessions in return from developing countries. New preferential concessions, both tariff and non-tariff, should be made to developing countries as a whole and such preferences should not be extended to developed countries. Developing countries need not extend to developed countries preferential treatment in operation amongst them. 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.*

* General Principle Eight was adopted by a roll-call vote of 78 to 11, with 23 abstentions.

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? [204] 205"

189. The idea that unorganized free trade may be harmful to the interests of less developed countries is not

²⁰³ 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.

²⁰⁴ *Ibid.*, vol. V, *Financing and Invisibles: Institutional Arrangements* (United Nations publication, Sales No.: 64.II.B.15), p. 468, para. 257.

²⁰⁵ UNCTAD, Research memorandum No. 33/Rev.1, paras. 16-17.

new. The effect of such trade on the economically backward nations was poetically illustrated at the 1891 Session of the Indian National Congress:

"Of course, I know that it was pure philanthropy which flooded India with English-made goods, and surely, if slowly, killed out every indigenous industry—pure philanthropy which, to facilitate this, repealed the import duties and flung away three crores a year of revenue which the rich paid, and to balance this wicked sacrifice raised the Salt Tax, which the poor pay; [. . .] Free trade, fair play between nations, how I hate the sham. What fair play in trade can there be between impoverished India and the bloated capitalist England? As well talk of a fair fight between an infant and a strong man—a rabbit and a boa constrictor. No doubt it is all in accordance with high economic science, but, my friends, remember this—this, too, is starving your brethren."²⁰⁶

10. THE 1969 RESOLUTION OF THE INSTITUTE OF INTERNATIONAL LAW

190. The resolution of the Institute of International Law adopted on 10 September 1969 at its Edinburgh session expressly supports the recommendation of UNCTAD. In its resolution the Institute:

[. . .] emphasizes in particular, as regards the most-favoured-nation clause in multilateral conventions on international trade, the importance of the following point[s]:

(a) Preferential treatment in favour of developing countries by means of a general system of preferences based on objective criteria should not be hampered by the clause [. . .]²⁰⁷

11. DEVELOPING COUNTRIES AND THE GATT

191. The Havana Charter and, consequently, the General Agreement on Tariffs and Trade were largely products of American and British thinking. The draftsmen of those two instruments were principally concerned with trade in the developed world. They took little account of the problems of the developing countries.²⁰⁸ This characteristic of the Havana Charter was attacked by the representatives of Poland and the Soviet Union already in 1948 in the Economic and Social Council.²⁰⁹ The General Agreement has also been the subject of the continuous criticism of a growing number of developing countries, culminating in the first session of the United Nations Conference on Trade and Development, held at Geneva in 1964.²¹⁰

²⁰⁶ Address by Lala Murlidhar, quoted by T. Balogh, *Unequal Partners* (Oxford, Blackwell, 1963), vol. I, p. v.

²⁰⁷ See *Annuaire de l'Institut de droit international, session d'Edimbourg, septembre 1969* (Bâle, Editions juridiques et sociologiques S.A.), t. II, p. 362.

²⁰⁸ R. Gardner, *Sterling-Dollar Diplomacy* (Oxford, Clarendon Press, 1956), p. 365. See also G. P. Verbit, *op. cit.*, p. 43.

²⁰⁹ See *Official Records of the Economic and Social Council, Seventh Session*, 195th meeting.

²¹⁰ See para. 188 above. See also I. Trofimova, "GATT and the Developing Countries", in *New Times* (Moscow, 1964), No. 15, pp. 6-8.

192. As regards the response of GATT to the trade needs of developing countries, i.e. the new Part IV which was added to the General Agreement, the UNCTAD memorandum stated the following:

[Part IV] came legally into effect on 27 June 1966, when it was accepted by the necessary two-thirds majority of the CONTRACTING PARTIES to the GATT. However, its provisions had previously been applied on a *de facto* basis by most developed countries since February 1965. Three new articles have thus been added to the text of the Agreement. Article XXXVI sets out the principles and objectives which should govern international trade policies in relation to developing countries, with reference to the need for improved market access for products of interest to developing countries, to price stabilization for primary products, and to diversification of the structure of their economies. It was also laid down that developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries. Article XXXVII contains undertakings by developed and developing countries designed to further these objectives, in particular, undertakings by developed contracting parties to refrain from increasing barriers to imports of products of particular interest to developing countries, and to give high priority to the reduction of existing barriers to trade in such products. Article XXXVIII provides for various forms of joint action to promote, through trade, the development of developing countries.

It is interesting to note that nowhere in Part IV is there any explicit reference to a possible departure from the MFN rule in the interest of developing countries. However, on the basis of a report by an *ad hoc* group, the Trade and Development Committee of the GATT concluded "that the establishment of preferences among less-developed countries, appropriately administered and subject to the necessary safeguards, can make an important contribution to the expansion of trade among these countries and to the attainment of the objectives of the General Agreement".²¹¹ The Committee also gave consideration to the form and scope of such preferential arrangements, to the measures for safeguarding the interests of other contracting parties as well as to the legal provisions for such arrangements. In the light of this conclusion by the Trade and Development Committee it would seem that the door is open for preferential arrangements among developing countries within the framework of GATT. Still, no decision has been reached as to what are the "necessary safeguards" or the criteria which such preferences might have to obey and the contracting parties, including the developed countries, reserved their right to pronounce on the concessions or formulae that might emerge from negotiations among developing contracting parties of GATT. Developing countries cannot yet, therefore, count on an automatic approval of what they might negotiate among themselves; they might be expected to resort to the waiver procedure of Article XXV.²¹² It is interesting, however, to note that the tripartite agreement between Yugoslavia, the United Arab Republic and India, providing for mutual tariff concessions was taken note of by the contracting parties without explicit reference to the waiver procedure under Article XXV. In a decision adopted without dissent in November 1966 the Contracting Parties recognized that it is not possible at the present time to assess fully the implications of the agreement in terms of its stated objective and its effects on the trade of other contracting parties. It was decided that, notwithstanding the provisions of Article I, the three participating countries may

implement the agreement subject to certain conditions including reporting and consultations.

In view of the spirit underlying Part IV of the General Agreement, the contracting parties can be expected not to oppose the introduction of a general, non-reciprocal scheme of preferences in favour of the developing countries in the markets of developed countries. This is more so since the developed countries, comprising all the leading contracting parties, have already accepted, within the framework of UNCTAD, the principle of a general and non-reciprocal scheme of preferences. However, the waiver procedure will have probably to be applied. In November 1968 the contracting parties noted the recommendation adopted at the second session of the United Nations Conference on Trade and Development regarding a general non-reciprocal scheme of preferences in favour of developing countries and affirmed their readiness to take appropriate action when the scheme has been negotiated.²¹³

193. The Director-General of GATT, Mr. Olivier Long, in an interview with *The Times*, had the following to say on the possible actions which GATT may take in favour of developing countries:

Q: . . . everyone is working for one major departure from the principle of non-discrimination, with the proposal that special preference should be given to imports from developing countries. No one seems to know how this could be dealt with in GATT. Mr. Long: But there are three ways in which such special preferences could be dealt with in GATT.

The first, which I personally exclude, would be to alter or add to the present GATT articles. I exclude this because preferences in favour of developing countries would take the form of a temporary concession and I think it would be wrong to embody them, as such, permanently in the GATT. Another way would be to grant a waiver from GATT under the normal waiver procedure. And finally it would be possible and perhaps best to create a separate and temporary framework and procedure to take in what is required. It would be, if you like, a sort of temporary annex alongside the main GATT building. I am sure that this can be covered within the framework of GATT, provided that the contracting parties show the necessary political and intellectual readiness to accept that temporary preferences of this sort for developing countries are likely to be with us for some time.²¹⁴

12. SUCCESSES AND FAILURES OF THE GATT IN ORGANIZING INTERNATIONAL TRADE ON A MOST-FAVOURED-NATION BASIS

194. As stated in the GATT memorandum, "[. . .] the Agreement at present governs the trade relations among ninety-one countries and covers more than four-fifths of world trade."

195. The UNCTAD memorandum contains the following evaluation of the achievements of the GATT:

The remarkable expansion of world trade during the post-war era must be attributed, partly at least, to the efforts and activities initiated or sponsored by GATT. In contrast to the inter-war period of chaos, GATT introduced a new code of behaviour in world trade. Within the framework of its rules and consultative machinery, it has brought about considerable reductions in the

²¹¹ GATT, *Basic Instruments and Selected Documents, Fourteenth Supplement* (Sales No.: GATT/1966-1), p. 136.

²¹² See *Trade expansion and economic integration among developing countries* (United Nations publication, Sales No.: 67.II.D.20), p. 93.

²¹³ UNCTAD, Research memorandum No. 33/Rev.1, paras. 13-15.

²¹⁴ *The Times* (London), 16 February 1970.

tariffs and other restrictions on world trade; the latest and most far-reaching of which are those realized through the Kennedy Round.

It is true, however, that these reductions have been of benefit mainly to the industrial countries and that the developing countries generally have obtained very little direct benefit from this process.²¹⁵ In most cases tariff negotiations tended to cover products of concern only to the industrial countries. Products of interest to the developing countries belonged, to a great extent, to the so-called "sensitive" products which were for the most part excluded from the scope of reductions. Moreover, tariff negotiations within the GATT framework were conducted on the basis of reciprocity of concessions. In other words, each country's offer of tariff reductions was conditional upon the receipt of roughly equal benefit from a reciprocal offer. As a consequence tariff negotiations became largely the affair of the so-called "principal suppliers" who have substantial interest in the world trade of certain items and, as such, are in a position to offer concessions. Since developing countries do not qualify as "principal suppliers" in most items they were relegated, perforce, to a position of secondary importance.²¹⁶

196. An American author summarizes the legitimate complaints of the developing countries against the basic philosophy of GATT as follows:

[...] the most-favoured-nation principle actually discriminates against countries with less economic bargaining power and against a country whose producers cannot compete effectively with the most efficient foreign producers at the given most-favoured-nation tariff rates. Drawing on these arguments, the developing countries claim the most-favoured-nation provision inhibits their efforts to compete effectively in world markets. They insist that preferential tariff treatment is necessary for them to develop foreign markets for their struggling manufacturing industries [...].²¹⁷

197. A high-ranking officer of the GATT secretariat holds the opposite views:

... I believe the most-favoured-nation clause, which certainly has disadvantages, protects mostly the weakest; the strongest countries do not need the clause, [...] they can live without the most-favoured-nation treatment, they will always get what they want. [...] But the weak countries, they need legal protection and the clause gives them just that.²¹⁸

198. Writing in 1964 a Soviet author, in an article entitled "GATT: Illusions and reality",²¹⁹ while recognizing the achievements of GATT, pointed to its lack of representative character: ten out of the fourteen Socialist States do not participate in GATT although they represent one-third of world trade. This circumstance in itself undermines the international authority of GATT and unfavourably influences its activities. The author further pointed, among other things, to the following: there

²¹⁵ See *Towards a New Trade Policy for Development: Report by the Secretary-General of the United Nations Conference on Trade and Development* (United Nations publication, Sales No.: 64.II.B.4), pp. 27-28.

²¹⁶ UNCTAD, Research memorandum No. 33/Rev.1, paras. 11-12.

²¹⁷ G. C. Fischer, "The most-favoured-nation clause in GATT: A need for reevaluation?", in *Stanford Law Review* (April, 1967), p. 843. See also G. P. Verbit, *op. cit.*

²¹⁸ H. W. Dittman, in Hague Academy of International Law, *Colloquium 1968: International Trade Agreements* (Leyden, Sijthoff, 1969), p. 69.

²¹⁹ G. Zotov, in *Mirovaia trgovlia i ekonomicheskoe razvitie* (World trade and economic development), 1964, p. 67.

is hardly any other international agreement violated as often and with such impunity as GATT. The Agreement is being arbitrarily interpreted by the Contracting Parties. GATT has been unable to abolish quantitative restrictions. It does not stand up against cartels and restrictive trade practices. It did nothing for the development of East-West trade. In 1951 the United States of America refused to fulfil its contractual obligations towards Czechoslovakia and still maintains its economic blockade against Cuba, one of the Contracting Parties.

199. The Director-General of GATT, Mr. Olivier Long, in the interview with *The Times* mentioned above (see para. 193) gave the following evaluation:

Q: There seems to be a growing, almost headlong, retreat from the principles of the GATT. Almost all countries are turning a blind eye to it when it suits their purposes, for example to impose import quotas or import deposits or to make special arrangements for agriculture or steel and textiles. What is your reaction to the view that the GATT is developing a creeping irrelevance to the trade problems and policies of the 1970s?

Mr. Long: Imagine the disorder that trading nations would now be in if they were no longer bound by agreed principles as in the GATT on the rules of the game. The foundation-stones of GATT are the twin principles of non-discrimination and reciprocity, the most-favoured-nation principle that every country party to the GATT should trade on an equal and identical basis with all other signatories. These are the principles on which the phenomenal expansion of world trade has been based during the first post-war generation.

[...] The leading trading nations of the world must now face up to the requirement for a positive trade policy. Since 1967 they have not faced up to the need to find a positive policy for the second post-war generation. [...]

[...] My concern is to stop a process whereby regions of the world drift into separate trading groups, centred on special preferences. We are drifting towards a situation where the world could split into such groups—one centred on the present EEC would cover Europe and the greater Mediterranean area, one would be the United States with Latin America and Canada, and there could be a third zone in Asia with Japan as the central donor country.

Q: But given the present strong tendency for the EEC, the United States and other countries to entertain trade policies that offend against the spirit of the GATT, why do you think that some new declaration of support for the principle of the "most favoured nation" is likely?

Mr. Long: I am not convinced that the present deviations from the GATT are the result of a deliberate change of policy. I do not think that the consequences of what is happening have been properly thought out by the major trading nations. There is perhaps a tendency at the moment for national governments to look inwards when facing their problems, rather than to seek the solution in mutual co-operation.

Q: Apart from strengthening the resolve to abide by the principles of GATT, the next major advance towards freer trade must be on the side of reducing the so-called non-tariff barriers, things like restrictive government-buying policies, special export finance, or the Buy American legislation. Many people think that it will not be possible to reduce these barriers by negotiation in GATT in the way that was achieved for tariffs themselves. What is the position?

Mr. Long: [...]

Now our different working groups are looking at the ways in which these barriers can be tackled. We have divided those that have been identified into several categories, such as those that could be eliminated through bilateral trade-offs between individual contracting parties, those that may require some new general

code for conduct and those where the right course might be some elaboration of existing rules.

13. THE CASE FOR PREFERENCES IN FAVOUR OF DEVELOPING COUNTRIES IN THEIR TRADE WITH DEVELOPED COUNTRIES

200. The UNCTAD memorandum referred to preferences in the following passages:

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 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."^[220] 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."^[221]

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."^[222]

²²⁰ 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.

²²¹ *Ibid.*, p. 39.

²²² *Ibid.*, *Second Session*, vol. I and Corr.1 and 3 and Add.1-2, *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."^[223]

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

²²³ *Ibid.*, [First Session], vol. I, *Final Act and Report* (United Nations publication, Sales No.: 64.II.B.11), p. 20.

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." [284]

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 the preferential arrangements between the 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 the 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.²²⁵

201. The case for preferences in favour of developing countries has been very eloquently and convincingly stated by Gros Espiell²²⁶ who feels that the operation of the most-favoured-nation clause is not an appropriate and constructive means of ensuring that international trade constitutes—as it is now unanimously agreed it should—a means of achieving advancement, with special reference to the developing countries.

14. THE MOST-FAVOURLED-NATION CLAUSE IN EAST-WEST TRADE

202. Under the heading "Trade between market economies and centrally-planned economies", the GATT memorandum included the following passages:

²²⁴ *Ibid.*, p. 30.

²²⁵ UNCTAD, Research memorandum No.33/Rev.1, paras. 19-27.

²²⁶ H. Gros Espiell, "La cláusula de la nación más favorecida: Su sentido actual en el Acuerdo General de Aranceles y Comercio" (The most-favoured-nation clause: Its present meaning in the General Agreement on Tariffs and Trade), in *Revista Española de Derecho Internacional* (Madrid, January-March 1968), vol. XXI, No. 1, pp. 37-53.

In the negotiations for the accession of Poland in 1967 the CONTRACTING PARTIES were faced with problems arising from the fact that the foreign trade of Poland is conducted mainly by State enterprises and that the Foreign Trade Plan, rather than the customs tariff, is the effective instrument of Poland's commercial policy. The customs tariff is applicable only to a part of imports effected by private persons for their personal use and is in the nature of a purchase tax rather than a customs tariff. The Government of Poland gave an undertaking that it would grant to each contracting party, in respect of imports into Poland and purchases by Polish agencies, treatment no less favourable than that accorded to any other country (BISD, *Fifteenth Supplement*, p. 110). However, the application of the most-favoured-nation provisions of the GATT vis-à-vis Poland are subject to the following exceptions.

In the Protocol of Accession, dated 30 June 1967 (*ibid.*, p. 46). Poland undertook to increase the total value of its imports from the territories of contracting parties by not less than 7 per cent per annum. Should Poland subsequently modify this commitment, without the agreement of the CONTRACTING PARTIES, contracting parties will be "free to modify equivalent commitments" (*ibid.*, p. 52). Action under this latter provision could involve discriminatory treatment for imports from Poland.

The Protocol permits contracting parties to continue to apply to imports from Poland prohibitions or quantitative restrictions which are inconsistent with Article XIII of the GATT, provided that the discriminatory element is not increased and is progressively relaxed so that at the expiry of a transitional period (the length of which has not yet been determined) any inconsistency with the provisions of article XIII will be eliminated.

The Protocol further provides that if any product is being imported from Poland into the territory of a contracting party "in such increased quantities or under such conditions as to cause or threaten serious injury to domestic producers" and if consultations do not result in agreement between Poland and the contracting party concerned, the contracting party will be free "to restrict imports from Poland of the product concerned to the extent and for such time as it is necessary to prevent or remedy the injury". In that event Poland will be free "to deviate from its obligations to the contracting party concerned in respect of substantially equivalent trade". These provisions are similar to those permitted under Article XIX of the GATT, except that under Article XIX it is only the action by the exporting country which may be discriminatory.

203. In this connexion, the following comments must be made. The conditions under which the accession of Poland to GATT took place are not necessarily a pattern to be followed in the case of the possible accession of other socialist countries, owing mainly to the difference in the autonomy of their respective trade enterprises and in the role of customs tariffs in their foreign trade. GATT has not considered it useful or advantageous to try to evolve any general formula to cover trade relations with centrally-planned economies. Its approach has been essentially pragmatic and on a country-by-country basis.²²⁷ After the formal application of Hungary for accession to GATT, the contracting parties asked the secretariat to prepare a paper on the operation of the Hungarian tariff and on its role in Hungary's foreign trade.²²⁸

204. The UNCTAD memorandum, under the title

²²⁷ GATT, *The Activities of GATT, 1967/68* (Sales No.: GATT/1969-2), p. 13.

²²⁸ This request is recorded in GATT document C/M/56, p. 5.

"Trade among countries having different economic and social systems", had the following to say:

In the trade relations between countries having different economic and social systems the recommendations adopted by both the first and second sessions of the United Nations Conference on Trade and Development stress the importance of promoting this trade, and the need for conducting it on the basis of non-discrimination. General Principle Two lays down:

"There shall be no discrimination on the basis of differences in socio-economic systems. Adaptation of trading methods shall be consistent with this principle."²²⁹

General Principle Six states that:

"[. . .] All countries should co-operate in creating conditions of international trade conducive, in particular, to the achievement of a rapid increase in the export earnings of developing countries and, in general, to the promotion of an expansion and diversification of trade between all countries, whether at similar levels of development, at different levels of development, or having different economic and social systems."^[230]

The [second session of the] Conference emphasized once more [in resolution 15(II)] "[. . .] that East-West trade is an integral part of world trade and that the expansion of this flow of trade would positively affect the expansion of international trade as a whole, including the trade of developing countries [. . .]"^[231] It was also pointed out that as a "consequence of growing international interdependence [. . .] the constriction of any one channel of economic relationship tends to react adversely upon other channels as well."^[232]

It was there recommended that countries participating in East-West trade:

"Continue their common efforts towards the expansion of trade and, to this end, to seek to remove the economic, administrative and trade policy obstacles to the development of trade."^[233]

Moreover, it was recommended that developing countries should grant to the socialist countries "conditions for trade not inferior to those granted normally to the developed market economy countries."^[234]

As to the imports of socialist countries from developing countries, the scope of the most-favoured-nation clause is not as clear-cut as it is in the case of developed market-economy countries. Evidently, the ideal situation to which the most-favoured-nation clause applies is one in which tariffs represent the only instrument of control over the flow of trade. In this case the presence or absence of discrimination is easily ascertainable. In the case of socialist countries the flow of trade is primarily determined by the quantitative targets specified in the national plans. Tariff rates play only a very secondary role.^[235] Under these circumstances the application of uniform tariff rates to all suppliers does not necessarily mean that they are treated equally. To determine that, it is essential to examine how the quantitative plan targets are implemented; for instance, how import quotas are allocated between different suppliers.

According to UNCTAD recommendations, developed centrally-planned economy countries are to accord favourable treatment

²²⁹ 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. 18.

²³⁰ *Ibid.*, p. 19.

²³¹ *Ibid.*, *Second Session*, vol. I, and Corr. 1 and 3 and Add.1-2. *Report and Annexes* (United Nations publication, Sales No.: E.68.II.D.14), p. 32.

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Ibid.*, p. 33.

²³⁵ This does not apply to all the socialist countries. Since the introduction of the economic reform on 1 January 1968, customs tariff is an important regulator of trade in Hungary.

to imports from developing countries. Thus, in recommendation A.II.1. of the first session of the Conference it is laid down that:

"In all matters affecting decisions relating to imports [the developed centrally planned economy countries] should, within the framework of their trade system, grant such favourable terms to imports from the developing countries and to consumption of products imported from them as should result in further expansion of imports from those countries."^[236]

In the field of manufactures and semi-manufactures, recommendation A.III.7 calls upon centrally planned economies to:

"(1) Within the framework of their long-term plans, take appropriate measures which would result in the diversification and significant growth of their imports of manufactures and semi-manufactures from the developing countries;

"(2) Reduce or abolish customs duties on goods imported from and originating in the developing countries."^[237]

At the second session of the Conference it was recommended that the socialist countries of Eastern Europe:

"Adopt the necessary measures, taking duly into consideration the trade needs of the developing countries when quantitative targets are fixed in their long-term economic plans, to expand further their trade with developing countries and, at the same time, to promote the diversification of the structure and of the geographical basis of this trade with these countries [. . .]"
"[. . .]"

"Abolish or reduce, on a preferential basis, tariffs on manufactures and semi-manufactures imported from developing countries;

"Accord preferential conditions in their procurement policies for products imported from developing countries, it being understood that each of them will do so in accordance with the modalities of its foreign trade system;

"Take all practical steps, within the framework of their respective national economic policies, in order to grant such favourable terms to imports from developing countries and to consumption of products imported."^[238]

In the light of the above it is clear that imports of socialist countries from developing countries should enjoy preferential treatment. Preferential treatment of these imports is to take two basic forms: (a) in the field of tariffs, imports from developing countries are to be admitted duty-free or under reduced rates; (b) in fixing the quantitative targets in their long-term economic plans, socialist countries are to take into account trade needs of developing countries so as to ensure the further expansion of imports from those countries.²³⁹

205. The Executive Secretary of ECE, in his reply to the circular letter of the Secretary-General, summarily described the existing situation with regard to the application of the most-favoured-nation clause in trade relations between ECE countries having different economic and social systems as follows:

Most-favoured-nation undertakings are contained in the commercial agreements concluded between most ECE Governments of States having different economic and social systems; this is true also for agreements concluded in recent years [. . .] However, the argument put forward by some Western countries is (i) that such undertakings apply to tariff treatment only or mainly and

²³⁶ 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. 30.

²³⁷ *Ibid.*, p. 40.

²³⁸ *Ibid.*, *Second Session*, vol. I and Corr.1 and 3 and Add.1-2, *Report and Annexes* (United Nations publication, Sales No.: E.68.II.D.14), p. 33.

²³⁹ UNCTAD, Research memorandum No. 33/Rev.1, paras. 32-37.

not to the prohibition of discriminatory treatment under quantitative restrictions or market regulations or export discrimination on "strategic" grounds, especially in view of the fact that such restrictions and regulations are implicit in the systems of Eastern European countries and assurances of a lack of discrimination by them cannot therefore be relied upon to be effective in practice; (ii) that such undertakings, even when applied only to tariffs, require special forms of application because of the differences in economic and social systems; and (iii) that the European Economic Community is a customs union and is therefore a legitimate exception to the most-favoured-nation undertaking. On the other hand, the Eastern European countries argue (i) that most-favoured-nation undertakings apply not only to tariffs but to all forms of trade restrictions or regulations; (ii) that there is no discrimination in their own systems except in response to discrimination exercised by other countries; (iii) that they are prepared to consider with their trade partners the question of "mutual advantage" but that the principle of most-favoured-nation treatment should be the basis for trade relations; and (iv) that while they recognize a customs union as an exception to the most-favoured-nation rule the European Economic Community is not yet a full customs union.

This argument of principle has not been resolved, despite efforts in recent years in ECE to find a formula which would recognize that non-discriminatory commercial treatment is an objective to be sought and that its application in trade between countries with different economic systems requires some arrangements or understandings in the interests of "effective reciprocity" or "mutual advantage". The formula found for the recent accession of Poland to GATT (whereby most-favoured-nation treatment is promised alongside with parallel undertakings regarding quantitative trade targets and other desiderata) and the observer status accorded to Hungary, Bulgaria and Romania in GATT may provide a practical solution which could eventually lead to a general agreement of principle applicable to all ECE countries

having different economic and social systems. In fact, the adoption by ECE at its last session of resolution 1(XXIII) and of the Declaration of the ECE's Commemorative Session in 1967—without special mention of the problem of the most-favoured-nation treatment—might imply a general willingness to leave aside the question of principle or of a multilateral agreement on this problem and a desire to deal with it on a practical bilateral basis. In this connexion it is significant that in recent years Western European countries have removed a large number of discriminatory quantitative restrictions and that the United States Government (which does not apply such restrictions but does apply tariff discrimination to some Eastern European countries) has asked the Congress for authority to grant most favoured-nation treatment to all Eastern European countries.

206. The Executive Secretary of ECE drew attention in his accompanying letter to the work of an *Ad Hoc* Group of Experts set up under resolution 4 (XVIII) of ECE. In this resolution, ECE instructed the *Ad Hoc* Group to make "an intensive examination of [. . .] the most-favoured-nation principle and non-discriminatory treatment as applied under different economic systems, and problems concerning the effective reciprocity of obligations under the different systems".²⁴⁰ The *Ad Hoc* Group met in September 1963 and December 1964.²⁴¹ Since that time no further studies have been made in ECE on this problem.

²⁴⁰ See *Official Records of the Economic and Social Council, Thirty-sixth Session, Supplement No. 3 (E/3759)*, p. 64.

²⁴¹ For the relevant portions of the documents summarizing the deliberations and conclusions of the *Ad Hoc* Group of Experts (documents TRADE/140, paras. 16-26 and TRADE/162, paras. 6-7), see annex II below.

ANNEXES

ANNEX I

The views of UNCTAD on the rôle of the most-favoured-nation clause in trade among developed countries and in trade among developing countries ²⁴²

Trade among developed countries

UNCTAD recommendations relating to trade among developed countries are set out in General Principles Eight and Nine. According to General Principle Eight:

"International trade should be conducted to mutual advantage on the basis of the most-favoured-nation treatment and should be free from measures detrimental to the trading interests of other countries. [. . .] developed countries should [. . .] extend to developing countries all concessions they grant to one another and should not, in granting these or other concessions, require any concessions in return from developing countries."²⁴³

According to General Principle Nine:

"Developed countries participating in regional economic groupings should do their utmost to ensure that their economic integration does not cause injury to, or otherwise adversely

affect, the expansion of their imports from third countries, and, in particular, from developing countries, either individually or collectively."²⁴⁴

These recommendations would appear to be perfectly in line with the provisions of the General Agreement on Tariffs and Trade. In other words, trade among developed countries should, in principle, be subject to the most-favoured-nation clause. Tariff or non-tariff concessions which they grant to each other should be extended to all developing countries without requiring concessions in return. This recommendation is simply a reaffirmation of the *unconditional* most-favoured-nation clause whereby concessions to trade partners extend automatically to all beneficiaries of the most-favoured-nation clause even though they may not be in a position to reciprocate. The need to reaffirm the unconditional character of the most favoured-nation clause in the trade among developed countries may be explained by the fact that the first session of the United Nations Conference on Trade and Development took place while the Kennedy Round of tariff concessions was well under way within the framework of GATT. Since tariff negotiations were being conducted on the basis of reciprocity it was important to emphasize that developing countries cannot, and should not, be expected to offer significant tariff concessions.

In line with the provisions of GATT, developed countries may depart from the most-favoured-nation rule in the context of a customs union or free trade areas. UNCTAD recommendations

²⁴² This annex reproduces paragraphs 28-31 and 38-43 of UNCTAD, Research memorandum No. 33/Rev. 1.

²⁴³ 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.

²⁴⁴ *Ibid.*

do not stand in the way of such an arrangement among developed countries. These countries are expected, however, to ensure that their economic integration does not cause injury to, or otherwise adversely affect, the expansion of their imports from third countries, and, in particular, from developing countries. It is difficult, however, to construe this requirement as limiting in any way the process of preferential reductions of tariff (or non-tariff) barriers within the framework of a customs union or free trade area. In the first place, to determine whether the interests of third parties have or have not been adversely affected by the process of integration is far from simple. But even if injury or adverse effects could be clearly demonstrated, it is doubtful that the remedy is to be sought in halting the process of integration or in requiring the extension of tariff reductions to the injured third party. The proper interpretation of UNCTAD recommendations in this respect would seem to be that members of the integration scheme would be expected to aim at the expansion not only of their national trade, but also of world trade at large and, consequently, take some action which need not be in the domain of tariff or non-tariff concessions, in order to redress the injury or alleviate the adverse effects.

Trade among developing countries

For historical as well as economic considerations the trade of developing countries has been very largely oriented towards the developed market economies. As much as 70 per cent of the total exports and imports of the developing countries is destined to, or originates from, developed market economies. Trade among developing countries, on the other hand, does not account for more than one-fifth of their total trade. Nevertheless, it is generally agreed that there is a considerable scope for the expansion of trade among developing countries, and that such an expansion would go a long way towards accelerating their rate of growth. Accordingly, a number of recommendations were made by UNCTAD with a view to strengthening the trade and economic ties among these countries.²⁴⁵

General Principle Ten adopted at the first session of the United Nations Conference on Trade and Development states that:

"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 and encouraging their economic growth and their industrial and agricultural diversification [...]. It will be necessary to ensure that such co-operation makes an effective contribution to the economic development of these countries, and does not inhibit the economic development of other developing countries outside such groupings."²⁴⁶

Recommendation A.II.5 adopted at the first session of the Conference lays down that:

"Developing countries should provide for preferential arrangements in order to promote an increase in trade between developing countries at the regional and sub-regional level; such arrangements should not, in principle, adversely affect the exports of other developing countries;

"Developing countries should grant each other mutually in primary products the most advantageous commercial treatment which they grant to developed countries."²⁴⁷

In more explicit terms recommendation A.III.8. recommends that:

"... rules governing world trade should make provision to accommodate forms of regional and sub-regional co-operation [...] taking account of the interests of third countries, especially developing countries, and, in particular, permit developing countries to grant each other concessions, not extended to developed countries, in view of the requirement to meet the needs, during a transitional period, of developing countries for the purpose of promoting their exchanges of goods and services;"²⁴⁸

The second session of the United Nations Conference on Trade and Development adopted without dissent a concerted declaration on trade expansion, economic co-operation and regional integration among developing countries,²⁴⁹ incorporating a statement of intent by the developing countries and a declaration of support by the developed market-economy countries and by the socialist countries of Eastern Europe. The concerted declaration recognized the role of trade expansion and economic integration among developing countries in promoting their industrialization and economic growth, the special difficulties inherent in this kind of endeavour, and the need for international action through financial and technical measures to help developing countries overcome these difficulties. The developed market-economy countries declared "their general readiness to support initiatives of the developing countries to increase their trade and strengthen their economic co-operation".²⁵⁰ More specifically they declared that they "are ready, after examination and consultation within the appropriate international framework, to support particular trading arrangements among developing countries [...]. This support could include their acceptance of derogations from existing international trading obligations, including appropriate waivers of their rights to most-favoured-nation treatment".²⁵¹

Both the recommendations of the first session of the Conference and the concerted declaration adopted by the second session would seem to indicate that concessions in favour of trade among developing countries should not be subject to the most-favoured-nation clause as in the case of concessions among the developed market-economy countries. For the sake of promoting trade among developing countries departure from most-favoured-nation treatment would be tolerated although the discriminatory tariff (or non-tariff) concessions involved may fall short of a full customs union or free-trade area as envisaged in Article XXIV of GATT.

However, it is not clear to what extent developing countries can discriminate against other developing countries. For this purpose a distinction should be made between preferential tariff reductions made in connexion with a regional integration scheme and those which are not related to such a scheme. To the first type belong tariff reductions given in the context of the Central American Common Market, the Latin American Free Trade Association, the West African Customs and Economic Union, the Customs and Economic Union of Central Africa, Arab Common Market, the Maghreb Integration Scheme, and the like. Members of such schemes can grant each other tariff or non-tariff concessions which could not be claimed by non-member countries whether they are developing or developed. The assumption here is that such tariff concessions would eventually lead to full regional integration, a target that may be jeopardized by the extension of these concessions to non-member countries; unless these are willing and able to become members subject to the same rights and obligations. A different situation arises if tariff concessions were granted to developing countries which do not, and are not likely to, belong to a regional integration scheme. The Tripartite Agreement be-

²⁴⁵ See *Trade expansion and economic integration among developing countries: Report by the secretariat of UNCTAD* (United Nations publication, Sales No.: 67.II.D.20), chap. II.

²⁴⁶ 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.

²⁴⁷ *Ibid.*, p. 31.

²⁴⁸ *Ibid.*, p. 42.

²⁴⁹ *Ibid.*, *Second Session*, vol. I and Corr.1 and 3 and Add.1-2, *Report and Annexes* (United Nations publication, Sales No.: E.68.II.D.14), p. 51.

²⁵⁰ *Ibid.*, p. 53.

²⁵¹ *Ibid.*

tween India, the United Arab Republic and Yugoslavia²⁵² is a case in point. According to the spirit, if not the letter, of UNCTAD recommendations such tariff concessions should be open to other developing countries. In fact, article IX of the Tripartite Agreement provides that it shall be open for accession by other developing countries "on a basis of mutual benefit". It is important, however, to realize that the extension of tariff concessions to other developing countries is not made in application of the unconditional most-favoured-nation clause. Third developing countries wishing to benefit from such concessions should be in a position to offer mutual concessions. Otherwise, third countries would be placed in a better position than the original members who exchanged tariff concessions with each other. Stated differently, tariff concessions made by one developing country to another outside an integration scheme should be applicable to third developing countries only as required by the *conditional* most-favoured-nation clause.

While developing countries can discriminate in favour of each other within or without integration schemes, it is doubtful that they can discriminate in favour of a developed country or a group of developed countries. This interpretation would seem to follow from UNCTAD recommendations regarding preferential arrangements between some developed countries and some developing countries (including reverse preferences enjoyed by EEC in the markets of the associated countries). As has been mentioned before, it is assumed that such preferential arrangements are destined to be phased out. The fact that UNCTAD does not favour existing trading arrangements involving discrimination among different groups of developed countries would seem to speak against the establishment of such new arrangements. Moreover, it should be noted that developing countries granting reverse preferences to some developed countries are called upon to extend the same privileged treatment to other developing countries. In the words of conference recommendation A.II.5: "Developing countries should grant each other mutually in primary products the most advantageous commercial treatment which they grant to developed countries."²⁵³

ANNEX II

Extracts from reports of the ECE *Ad Hoc* Group of Experts to study problems of East-West trade

FROM THE 1963 REPORT:²⁵⁴ *Most-favoured-nation principle and problems concerning effective reciprocity—Item 5*

Under item 5 of the agenda the experts examined the most-favoured-nation principle and non-discriminatory treatment as applied in different economic systems as well as problems concerning the effective reciprocity of obligations in these systems. Views were exchanged on the juridical content and interpretation of the most-favoured-nation undertakings as well as on the application of such obligations in practice in countries with planned economies on the one hand in countries with market economies on the other.

According to the experts from the countries with market economies, undertakings among these countries to grant most-

favoured-nation treatment are embodied in bilateral agreements and in multilateral agreements, principally the GATT. Such undertakings in bilateral agreements generally apply to tariffs and other regulations. Under the GATT, in practice, the obligation extends to virtually the full range of governmental action which may affect competition between domestic production and imports. According to the GATT provisions contracting parties are required to give each other not only most-favoured-nation treatment but "national treatment" as well in regard to taxation, transport rates and certain other regulations. There are certain recognized exceptions to the obligation as contained in the GATT: customs unions and free-trade areas, purchases by government agencies for their own use, some traditional preferences as in regard to the Commonwealth, the franc zone, etc. In cases where tariff protection is low and there are no other restrictions on imports, most-favoured-nation treatment gives foreign producers an opportunity to compete on favourable terms not only with other foreign producers but also with domestic producers.

According to the experts from countries with planned economies, unconditional most-favoured-nation treatment is a basic element in international trade relations. It comprises non-discriminatory treatment in regard not only to tariffs but to other trade facilities as provided normally in existing trade agreements. In some agreements exceptions to the rule are recognized to be justified for customs unions, for frontier trade and trade between neighbouring countries, etc., but these exceptions must be specifically agreed as such. If questions arise concerning the detailed application of the most-favoured-nation principle or exceptions to the principle they should be settled by negotiation between the States concerned.

In relations between countries with market economies and countries with planned economies, undertakings to grant most-favoured-nation treatment have been regular features of the bilateral commercial agreements concluded between them and in many cases these undertakings had been in force for a long time.

The discussion on this question brought out two problems:

(a) The general problem of the significance of the most favoured-nation provision in the relations between countries with different economic systems; and

(b) The special problem of the application of this provision by certain Western European countries in connexion with their entry into the EEC and EFTA.

Regarding the general question of the meaning of the most-favoured-nation clause as it affects international trade between countries with different economic systems, experts from countries with market economies pointed out that because of the differences in systems it is difficult to define in practical terms and to verify the meaningful application in planned economies of most-favoured-nation undertakings; they also stated that certain provisions of bilateral trade and payments agreements may lead to practices difficult to reconcile with the most-favoured-nation principle.

Experts from countries with planned economies stated that there was no difficulty in applying the most-favoured-nation principle in countries with planned economies or in verifying that real benefits were granted under this principle to exporters from countries with market economies: foreign trade organizations were autonomous bodies obliged by law and regulations to operate according to commercial considerations and the planning of import policy did not discriminate between foreign suppliers or fail to take into account the availability and prices of goods which could be imported. They also pointed out that quotas and quantitative indications in bilateral trade and payments agreements did not mean that foreign trade transactions would take place under other than competitive conditions; these provisions of bilateral agreements were not in any sense discriminatory and had never been regarded as involving practices incompatible with the most-favoured-nation principle. The experts from countries with planned economies also pointed out that application to their countries of discriminatory quantitative restrictions and tariffs in certain market economies was incompatible with the principle of

²⁵² India, United Arab Republic and Yugoslavia: Trade Expansion and Economic Co-operation Agreement, signed at New Delhi, 23 December 1967. See *Indian Trade Journal*, 3 January 1968. The Agreement is also reproduced in *International Legal Materials: Current documents* (Washington, D.C., American Society of International Law, 1968), vol. VII (July 1968).

²⁵³ 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. 31.

²⁵⁴ "Preliminary report of *Ad Hoc* Group to twelfth session of the Committee on the Development of Trade", ECE document TRADE/140, paras. 16-26.

most-favoured-nation treatment and that such practices took place in spite of provisions in bilateral agreements or, in the case of Czechoslovakia, also of the GATT.

The experts from countries with planned economies stated that a number of countries in Western Europe which, under bilateral agreements, had undertaken to apply to countries with planned economies most-favoured-nation treatment in the matter of tariffs were unjustifiably violating those undertakings in connexion with their entry into the EEC and EFTA, thus hindering the normal development of East-West trade. The argument that, as a customs union, the EEC fell outside the régime of the most-favoured-nation clause was untenable, since the EEC could not be regarded as a customs union either in substance or in form. As to the common trade policy of the countries members of the EEC towards third countries, the experts of countries with planned economies pointed out that some points of this policy provided for discriminatory treatment towards them. The proposals made in connexion with the above considerations by a number of planned economy countries to certain Western European countries regarding the carrying out of bilateral negotiations on customs tariff questions were designed to promote the development of trade with those countries on a basis of mutual advantage and non-discrimination.

The experts from countries with market economies stated that customs unions and free-trade areas constituted rightful exceptions to the clause, on the basis either of customary international law and/or of multilateral conventional law (in particular the GATT) and bilateral agreements (many treaties, as for example the commercial agreement between France and the USSR, provide for an exception in favour of customs unions). This exception clearly applied to the measures necessary for the purpose of the establishment of those unions or areas, for otherwise their formation would in practice be prevented since such formation virtually necessitated a period of transition. Consequently, the countries members of the European Economic Community and of the European Free Trade Association were not legally bound to extend to the third countries to which they granted most-favoured-nation treatment the special régime applied between countries signatories of the Treaties of Rome and of Stockholm. The experts of countries with market economies observed that, if judgements on the legitimacy of the exception to the most-favoured-nation clause in favour of customs unions or free-trade areas would be applied in a manner which would discriminate according to the particular countries making up these groups, such action would constitute a specific violation of most-favoured-nation treatment. They noted with interest the proposal that these divergencies of views should be settled by negotiation between States. The French expert pointed out, however, that in the case of countries members of the European Economic Community a negotiation, in order to be successful, should take into account the fact that there had taken place, in tariff matters in particular, a transfer of competence from the national level to the community level. Furthermore, he stated that in his opinion the treatment which might be envisaged by the European Economic Community with respect to imports from countries with planned economies would be governed by the special features of this trade and not by the intention of applying to those countries a treatment less favourable than that applied to other third countries.

Following this discussion there was a general consensus that detailed discussions on the theoretical concept of the most-favoured-nation clause and its application in trade between countries with different economic systems would be less profitable at present than a realistic and practical approach to the subject. It was agreed that the general objective should be to achieve an equitable and mutually advantageous balance and increased trade on the basis of the principle of the most-favoured-nation concept. To this end it would be useful to work out a *quid pro quo* technique for negotiating multilaterally meaningful and balanced concessions on the basis of effective reciprocity under different economic

systems. The experts agreed that at a future date a review should take place jointly of practical problems involved in the application of the most-favoured-nation principle; such a review should concentrate on the main obstacles to trade expansion and on establishing a basis for negotiations to remove trade obstacles to the maximum extent possible under prevailing conditions.

The *Ad Hoc* Group also examined the problem of effective reciprocity in trade and trade obligations of countries with different systems. Although the experts understood and interpreted this concept somewhat differently—in the opinion of the experts of countries with planned economies this concept signifies trade conducted on the basis of mutual advantage and equality while in the opinion of the experts of countries with market economies this also signifies the practical equivalence of advantages and obligations received and granted—they agreed on the following:

(a) The aim should be to achieve effective reciprocity/mutual advantage by means of a realistic and practical approach to this problem both in intergovernmental negotiations and in joint discussions within the framework of ECE and/or other appropriate bodies;

(b) Effective reciprocity/mutual advantage should be measured in terms of concrete and comparable results, i.e. the increase in the volume and composition of trade between countries with different systems which would satisfy the trading partners and would serve as a basis for its further development on a long-term and balanced basis;

(c) The acceptance of mutual obligations with respect to the application of the most-favoured-nation treatment, non-discrimination in customs tariffs, quantitative restriction, licencing etc., will not, however important in themselves, necessarily lead to the desired development of trade. In this connexion it appears useful that these obligations, whenever possible and appropriate, be accompanied by concrete mutual commitments of the trading partners intended to result in the maximum increase of the volume and in the widening of the composition of imports (combined with a corresponding increase in exports). In endeavouring to achieve trade expansion it is necessary to give due consideration to the need for a fair degree of continuity and stability in the pattern and composition of trade.

In the opinion of experts from countries with planned economies, the most appropriate way of reaching the above-mentioned aims would be the mutual application of most-favoured-nation treatment, the removal of discriminatory obstacles to trade, the conclusion of long-term trade agreements and a more flexible payments system.

The experts agreed that a more continuous and detailed exchange of information, with due regard to security and commercial interest considerations, about the criteria and methods used for national and regional planning affecting foreign trade, and about foreign trade and market policies and practices, could substantially facilitate commercial relations between countries with different economic systems.

FROM THE 1964 REPORT:²⁸⁵ *Practical problems involved in the application of the most-favoured-nation principle—item 3.*

6. The experts, basing their work on the agreement reached on this subject at their first session—"that a review should take place jointly of practical problems involved in the application of the most-favoured-nation principle" and that this review "should concentrate on the main obstacles to trade expansion and on establishing a basis for negotiations to remove trade obstacles to the maximum extent possible under prevailing conditions"—examined the following problems of trade between ECE countries having different economic and social systems:

²⁸⁵ "Report of *Ad Hoc* Group to twentieth session of the Economic Commission for Europe", ECE document TRADE/162, paras. 6-7.

A. Quantitative and other restrictions

It was pointed out by the experts of market-economy countries that quantitative restrictions applied by these countries against imports from planned-economy countries represented a minimum control retained by the market economies in dealing with countries with planned economies. For example there were apprehensions in business circles in countries having market economies that exports from countries having centrally-planned economies might in some cases disrupt markets, particularly since it was not possible to apply to these exports the same price criteria as were applied in the case of exports from market-economy sources.

Moreover, the experts of the market-economy countries stressed that the removal of quantitative restrictions by their countries immediately opened up their markets to imports from the planned economies in the sense that these would be able to compete both with imports from other countries, and—subject usually only to any tariff which might apply—with the products of their own national industries.

On the other hand, it was pointed out by the experts of the planned-economy countries that such restrictions had an immediate effect in hampering exports from countries with one system to countries with the other and that the system of restrictions introduced uncertainties which did not encourage plans for production for export to or imports from the individual markets affected.

The experts of the planned-economy countries also pointed out that exports from the planned-economy countries could not disrupt the markets of their trading partners because they conducted their trade in these markets on the basis of world market prices.

As to the remarks of the experts of the market-economy countries that the planned-economy countries could compete with the national industries of the market economies, the experts of the planned-economy countries stated that market-economy countries could take full advantage of the possibilities of the international division of labour.

It was also pointed out by experts of market-economy countries that in their view where differential tariffs were applied to countries with centrally-planned economies the reduction of these tariffs to the most-favoured-nation level posed a similar problem of how mutual advantage might be achieved in terms of equivalence in access to markets. The experts of the centrally-planned economies indicated that the above mentioned question had been discussed during the first session of the *Ad Hoc* Group and their position on it had been formulated.²⁵⁶ In addition, they repeated that the granting to the countries with centrally-planned economies of the régime of most-favoured-nation treatment by the countries having market economies should not in their view be linked with any supplementary concessions or obligations.

B. Increased stability

It was generally recognized that flexibility was important for expansion of trade but that increased stability would be desirable in trading relations between countries with different economic systems. This stability should be founded on reciprocity and ensure the establishment of continuity in trading relations. Such stability would strengthen confidence among the trading partners and make them more interested in the development of their economic relations on the basis of a rational international division of labour. To this end it might be useful to carry out, on the basis of reciprocity, an exchange of information as set out in paragraph 7B (iii) below. It was also recognized that long-term understandings regarding basic trading conditions could be useful in furthering stable trade relations.

C. Verification

As regards the application of most-favoured-nation treatment, it was pointed out that there needed to be a reasonable possibility of verifying that equal treatment was in practice accorded and that this might require systematic consultations and procedures for the examination of specific questions which might arise regarding such equality of treatment. It was also indicated by experts from countries having market economies that in a number of these countries the technique was used of announcing the results of competitive bidding which made it possible for interested suppliers to ascertain the terms of bids accepted; it was further indicated by experts from countries having centrally-planned economies that in their countries the reasons for the choices made by the purchasing foreign trade corporations in relation to competitive offers were in fact made known to interested parties.

D. Qualitative equilibrium

It was pointed out that governments irrespective of their economic systems were concerned over the commodity composition of the trade between their countries and wished to ensure that it corresponded to their national needs, possibilities and interests. From this point of view many governments sought at present to obtain a qualitative as well as a quantitative equilibrium in their countries' trade.

E. Multilateral consultations

It was pointed out that bilateral trade negotiations and reviews had been valuable but that there seemed to be a continuing need for consultations of a multilateral character on trade policies and trade practices designed to clarify and remove obstacles to trade between countries having different systems.

7. The following paragraphs describe the views expressed in further discussion and the consensus that was reached on certain points:

A. The agreement reached at the first meeting was reaffirmed: "that the general objective should be to achieve an equitable and mutually advantageous balance and increased trade on the basis of the principle of the most-favoured-nation concept". Also reaffirmed was the agreement reached at the first meeting that "effective reciprocity/mutual advantage should be measured in terms of concrete and comparable results . . .", and achieved "by concrete mutual commitments of the trading partners intended to result in the maximum increase of the volume and in the widening of the composition of imports (combined with a corresponding increase in exports)".

B. In their efforts to attain a further expansion of trade between ECE countries having different economic systems ECE governments might in line with these objectives arrange between them for—

- (i) Removal by countries having market economies of quantitative restrictions limiting imports from ECE countries having centrally-planned economies. In this connexion, suggestions were made by experts from countries having market economies for a progressive liberalization of imports on the part of these countries provided these measures were linked with certain safeguards against the possibly harmful effects of such liberalization on the importing countries' economies. In commenting upon these suggestions experts from countries having centrally-planned economies expressed the opinion that the problem of such safeguards should be kept apart from the granting of most-favoured-nation treatment. In their opinion liberalization meant only the return to normal conditions of trade and therefore could not be linked with any obligation on the part of the planned-economy countries. The question

²⁵⁶ ECE document TRADE/140, para. 12.

of obligations or guarantees could be considered only if the conditions of reciprocity were observed.

- (ii) Confirmation by the countries having centrally-planned economies that it remains their intention to use their best endeavours to avoid price disturbances in the domestic markets of the countries having market economies and a confirmation by governments having market economies that it remains their intention to use their best endeavours to avoid action which would interfere with the orderly expansion of the markets for exports from countries with centrally planned economies. In cases of any difficulties over trading practices in this regard, procedures agreeable to the parties concerned for consultations, bilateral and/or multilateral, might be utilized.
- (iii) The establishment, in the interests of trade stability, of long term understandings regarding basic trading conditions satisfactory to the trade partners concerned and regarding the avoidance of measures affecting the trading interests of these partners without appropriate consultation. To this end also, arrangements might be made as far as possible for the exchange on the basis of mutual benefit of information concerning economic policies, programmes and forecasts regarding economic developments, particularly in respect of their impact on foreign trade.
- (iv) The review at periodic intervals of the effects of the policies referred to above in order to determine whether the results are mutually satisfactory in bringing about the growth of total trade at the rates desired and with a satisfactory commodity composition. Such reviews might take place under appropriate multilateral procedures in the framework of the ECE Committee on the Development of Trade as well as on a bilateral basis.
- (v) Appropriate joint action along the lines indicated above as well as other suitable measures might be taken to increase the total volume of trade between countries with different social and economic systems, which although it has developed in recent years at a rather high rate is still relatively small and is clearly capable of expansion.

ANNEX III

List of organizations and agencies to which the circular letter of the Secretary-General was sent

United Nations Conference on Trade and Development (UNCTAD)
 Economic Commission for Africa (ECA)
 Economic Commission for Asia and the Far East (ECAFE)
 Economic Commission for Europe (ECE)
 Economic Commission for Latin America (ECLA)
 International Atomic Energy Agency (IAEA)
 International Labour Organisation (ILO)
 Food and Agriculture Organization of the United Nations (FAO)
 United Nations Educational, Scientific and Cultural Organization (UNESCO)
 World Health Organization (WHO)
 International Bank for Reconstruction and Development (IBRD)
 International Finance Corporation (IFC)
 International Development Association (IDA)
 International Monetary Fund (IMF)
 International Civil Aviation Organization (ICAO)
 Universal Postal Union (UPU)
 International Telecommunication Union (ITU)
 World Meteorological Organization (WMO)
 Inter-Governmental Maritime Consultative Organization (IMCO)
 General Agreement on Tariffs and Trade (GATT)
 United International Bureaux for the Protection of Intellectual Property (BIRPI)
 African and Malagasy Common Organization (OCAM)
 Council of Europe
 League of Arab States
 Organization of African Unity (OAU)
 Organization of Central American States (OCAS)
 Organization of American States (OAS)
 Benelux Economic Union
 Customs and Economic Union of Central Africa (UDEAC)
 Council of Mutual Economic Aid (CMEA)
 Customs Co-operation Council (CCC)
 European Economic Community (EEC)
 European Free Trade Association (EFTA)
 Permanent Secretariat of the General Treaty on Central American Economic Integration
 Latin American Free Trade Association (LAFTA)
 Organization for Economic Co-operation and Development (OECD)