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

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MOST-FAVOURED-NATION CLAUSE

[Agenda item 3]

DOCUMENT A/CN.4/257 AND ADD.1

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by Mr. Endre Ustor, Special Rapporteur

Draft articles with commentaries

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ABBREVIATIONS

GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
<i>I.C.J. Pleadings</i>	<i>I.C.J., Pleadings, Oral Arguments, Documents</i>
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
UNCTAD	United Nations Conference on Trade and Development

Article 1. — Use of terms

For the purpose of the present articles:

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

(b) "Contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(c) "Party" means a State which has consented to be bound by the treaty and for which the treaty is in force;

(d) "Granting State" means a contracting State which has consented to accord most-favoured-nation treatment;

(e) "Beneficiary State" means a contracting State which has consented to accept most-favoured-nation treatment;

(f) "Third State" means a State not a party to the treaty in question.

COMMENTARY

(1) Because the most-favoured-nation clause is a treaty provision and because in most, but not all, cases¹ a collateral treaty (one concluded between the "granting State" and a "third State") is also involved, it is necessary to define in what sense the term "treaty" will be used in this context. Paragraph (a) of article 1 reproduces the definition contained in article 2, paragraph 1 (a) of the 1969 Vienna Convention on the Law of Treaties.² This has the obvious advantage that the term as it is used in one study of the Commission will not have a different meaning from that attributed to the same term in the Commission's earlier work and in the Convention adopted on that basis. As a result, the draft articles will not apply to cases where most-favoured-nation treatment is promised orally by one State to another—cases which hardly if ever occur. This restriction is perhaps already inherent in the expression "clause" which probably implies that it is part of a written agreement. The collateral treaty, if there is one,³ is in practically all cases also concluded in written form and the other possible cases, extremely rare, can be covered by appropriate drafting.

The proposed wording will also exclude cases where States make contractual promises in "Headquarters agreements" to accord to international organizations and their staffs treatment similar to that granted to other organizations or to diplomatic missions.⁴ Such cases are, however, rather rare and, furthermore, they do not constitute "most-favoured-nation" clauses in the strictest

¹ See article 3, paragraph 2 below.

² For the text of the Convention, 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. 289.

³ See article 3, paragraph 2 below.

⁴ See *Yearbook of the International Law Commission, 1970, vol. II, p. 214, document A/CN.4/228 and Add.1, paras. 90-92.*

sense of the term. These are the reasons why the Special Rapporteur suggests that, at least for the time being, the definition of the term "treaty" in the wording proposed in sub-paragraph (a) should be retained.

(2) The terms "contracting State" and "party" and their meanings are also borrowed from the Convention on the Law of Treaties for the same reasons as stated above. It may be seen later whether the use of both terms and the fine distinction drawn between their meanings will be warranted also for the purpose of the draft articles on the most-favoured-nation clause.

(3) The term "third State" is likewise defined on the line of article 2, paragraph 1 (h) of the 1969 Convention, with the addition of the words "in question". These have been added because in the context of the topic under consideration the third State, although not a party to the treaty in question, i.e., the one which contains the clause, is in most cases a party to another treaty concluded with the granting State (the collateral treaty).

(4) The terms "granting State" and "beneficiary State" and their meanings do not seem to be in need of explanation. Although the original intention was to refer in the commentary to the obvious fact that when States reciprocally grant each other most-favoured-nation treatment, which is the usual case, each contracting State becomes both granting State and beneficiary State *uno actu*, the statement has been made in the article itself (article 2, paragraph 2).

(5) The definitions of other terms will be added to the list contained in article 1 if in the course of further work the need arises.

Article 2. — Most-favoured-nation clause

1. "Most-favoured-nation clause" means a treaty provision whereby an obligation is undertaken by one or more granting States to accord most-favoured-nation treatment to one or more beneficiary States.

2. When, as is the usual case, the contracting States undertake to accord most-favoured-nation treatment to each other, each of them becomes thereby a granting and a beneficiary State simultaneously.

Article 3. — Most-favoured-nation treatment

1. "Most-favoured-nation treatment" means treatment upon terms not less favourable than the terms of the treatment accorded by the granting State to any third State in a defined sphere of international relations with respect to determined persons or things.

2. Unless otherwise agreed, paragraph 1 applies irrespective of the fact whether the treatment accorded by the granting State to any third State is based upon treaty, other agreement, autonomous legislative act or practice.

COMMENTARY TO ARTICLES 2 AND 3

1) Articles 2 and 3 attempt to define the notions of most-favoured-nation clause and most-favoured-nation treatment respectively. Although the character of the

articles is similar to that of article 1 on the use of terms, it was considered more convenient to treat these matters, around which all the other articles will be centred, in articles separate from article 1.

(2) Legal literature abounds in definitions of the most-favoured-nation clause. The few examples quoted below are classified under two headings: (a) definitions restricted to clauses as they appear in commercial treaties and (b) definitions of a general character, not restricted to commerce.⁵

(a) *Definitions restricted to clauses, as they appear in commercial treaties*

- (i) A most-favoured-nation clause is a provision, generally inserted in a commercial agreement between two States, which obligates the contracting parties to extend all concessions or favours made by each in the past, or which might be made in the future, to the articles, agents or instruments of commerce of any other State in such a way that their mutual trade will never be on a less favourable basis than is enjoyed by that State whose commercial relations with each is on the most favourable basis. The fundamental point is equality based upon the treatment received by any third country...⁶
- (ii) Briefly defined, the most-favoured-nation clause is simply a pledge of non-discrimination against the commerce of the other party to the treaty, or a pledge to make the other party equally favoured with any third country. The customary wording, however, has been a pledge to grant to the other party treatment not less favourable than may be granted to the "most favoured" among other countries...⁷

⁵ For other definitions, see C. Calvo, *Le droit international théorique et pratique*, 4th ed. (Paris, Guillaumin, 1887), vol. III, p. 365; N. Ito, *La clause de la nation la plus favorisée* (Paris, Les Editions internationales, 1930); D. Anzilotti, *Cours de droit international*, translated from the Italian of the 3rd edition by G. Gidel (Paris, Sirey, 1929), p. 432; P. Guggenheim, *Traité de droit international public*, 2nd ed., rev. and augmented (Geneva, Georg, 1967), vol. I, p. 205; L. Oppenheim, *International Law: A Treatise*, 8th ed. [Lauterpacht] (London, Longmans, Green, 1955), vol. I, p. 971; D. M. Genkin, "Printsip naibolshego blago-priyatsvovania v torgovykh dogovorakh gosudarstv", [The most-favoured-nation principle in trade treaties between States], *Sovetskoe gosudarstvo i pravo* [The Soviet State and Law], (Moscow), No. 9, September 1958, p. 22; A.S. Korolenko, *Torgovyie dogovory i soglasenia SSSR s inostrannymi gosudarstvami* [Trade treaties and agreements concluded between the USSR and foreign countries] (Moscow, Vnechtorgizdat, 1953); P. Level, "Clause de la nation la plus favorisée" in *Encyclopédie Dalloz—Droit international* (Paris, Dalloz, 1968), vol. I, p. 332; M. A. Vieira, "La Cláusula de la nación más favorecida y el Tratado de Montevideo", in *Anuario Uruguayo de Derecho Internacional* (Montevideo, Facultad de Derecho y Ciencias Sociales, Universidad de la República), vol. 4 (1965-1966), p. 189.

⁶ R. C. Snyder, *The Most-Favored-Nation Clause: An Analysis with Particular Reference to Recent Treaty Practice and Tariffs* (New York, King's Crown Press, Columbia University, 1948) p. 10.

⁷ C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 2nd rev. ed. (Boston, Little, Brown, 1947), vol. II, p. 1503, citing a statement made by the United States Tariff Commission in 1933.

(iii) The term "most-favoured-nation clause" refers, in its general application, to "a treaty provision whereby two contracting parties A and B agree that if one of them subsequently concludes with a third State C a trade treaty granting C special trade advantages, those advantages will *ipso facto* be granted to the earlier contracting party."⁸ [Translation from French]

(b) *Definitions of a general character, not restricted to commerce*

- (i) The most-favoured-nation clause is a provision, generally contained in an agreement between States, whereby the contracting parties grant each other all such advantages, greater than they have previously enjoyed, as they have already granted or may subsequently grant to a third Power, without the need for the conclusion of a new agreement between them for that purpose."⁹ [Translation from French]
- (ii) The most-favoured-nation clause may be defined as a provision whereby two Governments arrange for their—in principle—mutual participation in any more advantageous legal system which they may already have established, or may subsequently establish, in agreement with other Governments.¹⁰
- (iii) The most-favoured-nation clause is an agreed provision under which a nation pledges itself to grant another, i.e., the favoured nation, all the rights and privileges it guarantees to other nations under different agreements. To give this clause meaning it is necessary to grant some privilege to a third nation.¹¹
- (iv) The most-favoured-nation clause... is the obligation embodied in bilateral or multilateral treaties under international law to grant the other contracting party most-favoured-nation treatment. A State grants another State most-favoured-nation treatment, when, in its legislative or administrative measures, it treats the other State, or the latter's nationals, vessels, goods and products, in a manner corresponding to the most favourable treatment which it accords in the same regard and under the same conditions to any third State.¹²
- (v) Under the most-favoured-nation principle is understood the stipulation contained in international treaties according to which each contracting party is obliged to grant the other contracting

⁸ T. Flory, *Le G.A.T.T., droit international et commerce mondial* (Paris, Librairie générale de droit et de jurisprudence, 1968) p. 14, quoting from C.-A. Colliard, *Institutions internationales*, 4th ed. (Paris, Dalloz, 1967), p. 248.

⁹ S. Basdevant, "Clause de la nation la plus favorisée", in A. G. de Lapradelle et J.-P. Niboyet, *Répertoire de droit international* (Paris, Sirey, 1929), vol. III, p. 464.

¹⁰ G. Scelle, *Précis de droit des gens—Principes et systématique* (Paris, Sirey, 1934), vol. II, p. 384.

¹¹ M. Bartoš, "The most-favoured-nation clause in international law", *Review of International Affairs* (Belgrade), vol. 13, No. 303 (1962), p. 11.

¹² K. Strupp, *Wörterbuch des Völkerrechts*, 2nd ed. [Schlochauer] (Berlin, de Gruyter, 1961), vol. II, p. 497.

party in a certain domain of their mutual relations defined in the treaty the same rights, advantages, privileges and favours as it grants or will grant in the future to any third State.¹³

(vi) The most-favoured-nation clause is a provision in a treaty whereby a State grants another State such advantages as it has already granted or may subsequently grant to any other State.¹⁴

(3) The definitions proposed in articles 2 and 3 do not purport to contain all the elements which characterize the clause and its operation. They should be read, therefore, in the context of the whole draft, in conjunction with the other articles of the draft.

(4) According to article 2, paragraph 1, "most-favoured nation treatment" is the aim and purpose of the clause. No mention is made of such related notions as the "most-favoured-nation principle", the "most-favoured-nation régime" and the "most-favoured-nation standard". While all these expressions may have their merits in particular contexts, their inclusion in the definition of the clause was not considered necessary. As to the last quoted expression, supported by Schwarzenberger,¹⁵ it is believed that it means really the "standard of most-favoured-nation treatment".¹⁶

(5) When attempting to define the notion of most-favoured-nation clause the warning of McNair was kept in mind: "although it is customary to speak of *the* most-favoured-nation clause, there are many forms of the clause, so that any attempt to generalize upon the meaning and effect of such clauses must be made, and accepted, with caution."¹⁷ Expressed in other words: "Speaking strictly, there is no such thing as *the* most-favoured-nation clause: every treaty requires independent examination",¹⁸ and further there are innumerable most-favoured-nation clauses, but there is only *one* most-favoured-nation [treatment] standard.¹⁹ These considerations were taken into account when choosing that form of definition of the clause in which stress is laid upon most-favoured-nation treatment, the essence of the definition being that any treaty stipulation according most-favoured-nation treatment is a most-favoured-nation clause.

¹³ E. Usenko, "Formy regulirovaniia sotsialisticheskogo mezhdunarodnogo razdeleniia truda" [Forms of the regulation of the Socialist International Division of Labour], *Mezhdunarodnye otnosheniia* [International relations] (Moscow, 1965), p. 226 (German edition: *Sozialistische internationale Arbeitsteilung und ihre rechtliche Regelung* (Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1966), p. 191).

¹⁴ D. Vignes, "La clause de la nation la plus favorisée et sa pratique contemporaine", *Recueil des cours de l'Académie de droit international de La Haye, 1970-II* (Leyden, Sijthoff, 1971), vol. 130, p. 213.

¹⁵ G. Schwarzenberger, *International Law and Order* (London, Stevens, 1971), p. 129.

¹⁶ Schwarzenberger denominates other kinds of standard, such as those of "preferential treatment", "identical treatment" and "equitable treatment" (*ibid.*, pp. 156-157). [Italics supplied by the Special Rapporteur.]

¹⁷ A. D. McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961), p. 273.

¹⁸ D. Anzilotti and A. D. McNair, quoted in Schwarzenberger, *op. cit.*, p. 138.

¹⁹ *Ibid.*, p. 159.

(6) It follows from the definition given in article 2, paragraph 1 that the undertaking to accord most-favoured nation treatment is a constitutive element of a most-favoured-nation clause. Consequently, clauses not containing this element will fall outside the scope of the present study even if they aim at an effect similar to that of a most-favoured-nation clause. A case in point is article XVII, paragraph 2 of the General Agreement on Tariffs and Trade where "fair and equitable treatment" is demanded from the contracting parties with respect to imports of products for immediate governmental use.²⁰ Another example is article XIII, paragraph 1 of the General Agreement which requires that the administration of quantitative restrictions shall be "non-discriminatory";²¹ similarly article 23 of the Treaty establishing a Free-Trade Area and Instituting the Latin American Free-Trade Association ("Montevideo Treaty") of 18 February 1960.²² While a most-favoured-nation clause assures the beneficiary against discrimination, a clause promising non-discrimination will not necessarily yield the same advantages as a most-favoured-nation clause.²³ Whether a given treaty provision falls within the purview of a most-favoured-nation clause is a matter of interpretation.

(7) Article 2, paragraph 1 is intended to cover clauses inserted in both bilateral and multilateral treaties. It covers also the admittedly rare cases of "unilateral most-favoured-nation treatment grants" embodied in such treaties. This is believed to be advisable for a number of reasons. When it was stated in paragraph 8 of the Special Rapporteur's working paper of 19 June 1968 that "a clause containing a unilateral promise is only of historical significance"²⁴ it was the capitulations that the writer had in mind. The statement that "today the clause is never unilateral"²⁵ refers to the so-called "general most-favoured-nation clauses" usually embodied in commercial and establishment treaties. Indeed, a unilateral grant in treaties of this type would make the treaty clearly unequal and possibly void. One can also subscribe to the view that in such cases "it is a matter of interpretation of the . . . instrument concerned whether . . . a unilateral grant of m.f.n. treatment is intended to be legally binding. In any case, it may be revoked on reasonable notice."²⁶

A unilateral promise, or rather a *pactum de contrahendo* concerning future agreements on unilateral most-favoured-nation grants is stipulated in Annex F, Part II of the treaty concerning the establishment of the Republic

²⁰ United Nations, *Treaty Series*, vol. 55, p. 252. See also *Yearbook of the International Law Commission, 1970*, vol. II, p. 224, document A/CN.4/228 and Add.1, para. 162.

²¹ *Ibid.*, p. 223, document A/CN.4/228 and Add.1, para. 160.

²² United Nations, *Multilateral Economic Co-operation in Latin America*, vol. I, *Text and documents* (United Nations publication, Sales No. E.62.II.G.3), p. 60; see also *Yearbook of the International Law Commission, 1970*, vol. II, p. 224, document A/CN.4/228 and Add.1, para. 161.

²³ See para. 13 below.

²⁴ *Yearbook of the International Law Commission, 1968*, vol. II, p. 166, document A/CN.4/L.127, para. 8.

²⁵ *Ibid.*

²⁶ Schwarzenberger, *op. cit.*, p. 138.

of Cyprus, signed at Nicosia on 16 August 1960: "The Republic of Cyprus shall, by agreement on appropriate terms, accord most-favoured-nation treatment to the United Kingdom, Greece and Turkey in connexion with all agreements whatever their nature."²⁷

There are however, exceptional situations in which, in the nature of things, only one of the contracting parties is in the position to offer most-favoured-nation treatment in a "specialized most-favoured-nation clause", possibly against a different type of compensation. A case in point is the treaty of 13 October 1909 in which Switzerland granted unilaterally most-favoured-nation treatment to Germany and Italy regarding the use of the railway built on the Gotthard in Switzerland.²⁸ Such a unilateral clause can occur, for example, in a treaty by which most-favoured-nation treatment is accorded to the ships of a land-locked State in the ports and harbours of the granting State. The land-locked State not being in the position to reciprocate in kind, the clause remains unilateral; the same treaty may of course provide for another type of compensation for the granting of most-favoured-nation treatment. Thus in article 11 of the Treaty of Trade and Navigation between the Czechoslovak Republic and the German Democratic Republic of 25 November 1959, the latter State granted unilaterally most-favoured-nation treatment to "Czechoslovak merchant vessels and their cargoes... on entering and leaving, and while lying in, the ports of the German Democratic Republic."²⁹ A similar situation may arise if the treaty regulates specifically the trade and the customs tariff regarding one particular kind of product only (e.g., oranges) in respect of which there is but one-way traffic between the two contracting parties.

(8) It is obviously desirable that any definition of most-favoured-nation clauses embraces also those inserted in multilateral treaties. The topic under consideration by the Commission is not confined to bilateral treaties. Traditionally, most-favoured-nation clauses appear in bilateral treaties. With the increase of multilateralism in international relations such clauses have found their way into multilateral treaties.³⁰ Among the more recent

ones are the General Agreement on Tariffs and Trade, the Montevideo Treaty, the Convention relating to the Status of Refugees (Geneva, 28 July 1951)³¹ and the Convention relating to the Status of Stateless Persons (New York, 28 September 1954)³² In this connexion reference must be made to the important study recently undertaken on the most-favoured-nation clause in multilateral treaties by the Institute of International Law.³³

(9) Paragraph 2 of article 2 is intended merely to complete paragraph 1, and to elucidate the situation in cases where, as usual, obligations to grant most-favoured-nation treatment are undertaken by the contracting States reciprocally.

(10) In paragraph 1 of article 2, the adjective "equal" could have been used to denote the relation between the terms of the treatment enjoyed by any third State and those promised by the granting State to the beneficiary State. The word "equal", however, does not fit exactly. It is certainly not as rigid as "identical" and not as vague as "similar" and these are arguments in its favour. Against it, a number of considerations may be made: most-favoured-nation treatment does not exclude the possibility of the granting State according to the beneficiary State additional advantages beyond those conceded to the most-favoured third State. In other words, while most-favoured-nation treatment excludes preferential treatment of third States by the granting State it is fully compatible with preferential treatment of the beneficiary State by the granting State.³⁴ Thus, instead of qualifying the terms of the treatment due to the beneficiary State under a most-favoured-nation clause as "equal" to those of the treatment accorded to the third State, the expression "not less favourable" was found to be more adequate.

(11) Notwithstanding the foregoing considerations there are arguments militating in favour of the use of the word "equal". However true it may be that the beneficiary may be treated above the level of the treatment of the most-favoured third State, this is a rather remote, more theoretical than practical, possibility. On the other hand, "equality of treatment" seems to be particularly closely attached to the operation of the most-favoured-nation clause. It has been held that the clause represents, hand is the instrument of, the principle of equality of treatment in the field of foreign trade and that the clause is a means to an end: the application of the rule of equality of treatment in commercial relations.³⁵ It is submitted that this characteristic of the clause is not restricted to the field of commercial relations.

(12) Indeed, the International Court of Justice considered this feature of the clause a general one, stating that the intention of most-favoured-nation clauses is "to establish and to maintain at all times fundamental

²⁷ United Nations, *Treaty Series*, vol. 382, p. 144.

²⁸ Guggenheim, *op. cit.*, p. 207.

²⁹ United Nations, *Treaty Series*, vol. 374, p. 120.

³⁰ As the earliest examples of multilateral treaties embodying stipulations for most-favoured-nation treatment the following treaties are quoted by Schwarzenberger, *op. cit.*, p. 138: Protocol between Great Britain, Spain and Germany regarding the Sulu Archipelago of 11 March 1877, article 3 (*Hertslet's Commercial Treaties* (London, Butterworth, 1880), vol. XIV, pp. 515-516); Convention of 3 July 1880 between Austria-Hungary, Belgium, Great Britain, etc., for the Settlement of the Right of Diplomatic Protection in Morocco (*British and Foreign State Papers, 1879-1880* (London, H.M. Stationery Office, 1887), p. 644); Convention and Statute on the International Régime of Maritime Ports of 9 December 1923, articles 2 and 5 (League of Nations, *Treaty Series*, vol. LVIII, p. 301). Also, the Ouchy Convention on the Lowering of Economic Barriers of 18 July 1932, between Belgium, Luxembourg and the Netherlands, open to all States, provides in article 5: "The High Contracting Parties undertake to apply to their reciprocal exchanges the unconditional and unlimited régime of the most-favoured-nation." (M. O. Hudson, *International Legislation* (Washington, D.C., Carnegie Endowment for International Peace, 1932-1934), vol. VI, p. 98.) The last convention mentioned has not entered into force.

³¹ United Nations, *Treaty Series*, vol. 189, p. 150.

³² *Ibid.*, vol. 360, p. 130. See, however, para. 26 below.

³³ *Annuaire de l'Institut de droit international, 1969* (Basle), vol. 53 (1969), t. 1, pp. 1-292 (P. Pescatore, Rapporteur).

³⁴ Schwarzenberger, *op. cit.*, p. 129.

³⁵ See *Yearbook of the International Law Commission, 1970*, vol. II, p. 209, document A/CN.4/228 and Add.1, para. 55.

equality without discrimination among all of the countries concerned".³⁶ Also, a former chairman of the International Law Commission has stated:

Fundamentally, therefore, its effect is to generalize the advantages which one of the contracting Parties might grant, either generally or in certain particular respects, to a third State. Hence, it is an important means of achieving the purpose expressed in Article I, paragraph 2, of the Charter of the United Nations, viz. "To develop friendly relations among nations based on the respect for the principle of equal rights. . . of peoples".³⁷

(13) Another authority warns us against identifying the principle of most-favoured-nation treatment with the principle of non-discrimination. The latter is much more general in character and governs the political, economic, cultural and other relations of States. The principle of most-favoured-nation treatment is preponderantly confined to economic relations and notably to those in respect of which it has been conventionally stipulated. This means that States can expect equal treatment in their international relations from their partners, within a general, non-discriminatory régime. In the régime of the most-favoured-nation, that of the most advantageous conditions can be claimed only on the ground of appropriate treaty obligations. The existence of these two kinds of régimes can be best illustrated by that system of customs tariffs which applies one column of lower tariffs to imports from States enjoying most-favoured-nation treatment and a different one, of higher tariff, to imports from all others.³⁸ Incidentally, the International Law Commission has already had opportunities to pronounce itself on the general character of the principle of non-discrimination. It stated that the rule of non-discrimination "is a general rule which follows from the equality of States",³⁹ and that non-discrimination is "a general rule inherent in the sovereign equality of States."⁴⁰

(14) Because of the special nature of the most-favoured-nation clause (and particularly its unconditional form) it has been widely and perhaps generally recognized as the fundamental basis on which international trade should be conducted. This is expressed by General Principle Eight adopted at the first session of UNCTAD.⁴¹ However, a very important qualification was embodied in the text of the General Principle itself and explained elsewhere as follows: "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 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."⁴² A further elaboration on these problems has been omitted here.⁴³ It is intended to revert to them in connexion with the possible exceptions to the clause without going into the depths of the matter. These problems do not so much pertain to the legal aspects of the clause but rather to the vast question of the organization of international trade. These problems have been handled with restraint, in the belief that it was in conformity with the intentions of the Commission to "clarify the scope and effect of the clause as a legal institution without, however, entering into fields outside its [the Commission's] functions."⁴⁴

(15) In some definitions of the most-favoured-nation treatment it is stressed that it must be equal or not inferior to that which "has been or will in the future be granted" to any third State. While this is perfectly correct, the text proposed in article 3, paragraph 1, employs instead the word "accorded", believing that it covers the same idea without making the wording too heavy.

(16) The reference in article 3, paragraph 1 to "any third State" is without prejudice to any exceptions upon which the contracting States may agree. The problem of exceptions will be dealt with later.

(17) Article 3, paragraph 1, requires that the most-favoured-nation treatment be confined to "a defined sphere of international relations with respect to determined persons or things". This seems at first sight to be in contradiction with the idea that a most-favoured-nation clause should not necessarily be, as in most cases it is, a so-called "specialized" clause, i.e. one which clearly circumscribes the field of its application (e.g., commerce, navigation, establishment, etc.) and its object (e.g., goods imported from the beneficiary country, ships sailing under its flag, its nationals, etc.), but that it can be drafted also as a "general clause". The latter has been described as one whose field of application "is not restricted by any terms of the provisions".⁴⁵ It may be that in the past there have been clauses which corresponded to

³⁶ Case concerning Rights of Nationals of the United States of America in Morocco, Judgment of 27 August 1952, *I.C.J. Reports*, 1952, p. 192.

³⁷ Second report on consular intercourse and immunities by Mr. Jaroslav Zourek, Special Rapporteur. See *Yearbook of the International Law Commission*, 1960, vol. II, p. 19, document A/CN.4/131, part II, para. 3.

³⁸ E. Usenko, *op. cit.*, p. 238 (p. 200 of German edition).

³⁹ *Yearbook of the International Law Commission*, 1958, vol. II, p. 105, document A/3859, chap. III, draft articles on diplomatic intercourse and immunities, commentary to article 44.

⁴⁰ *Ibid.*, 1961, vol. II, p. 128, document A/4843, chap. II, draft articles on consular relations, commentary to article 70.

⁴¹ Adopted by a roll-call vote of 78 to 11, with 23 abstentions (*ibid.*, 1970, vol. II, p. 231, document A/CN.4/228 and Add.1, para. 188).

⁴² *Ibid.* The quotation is from a memorandum submitted by UNCTAD in reply to a circular letter of the Secretary-General. For more details on the views of UNCTAD on the most-favoured-nation clause in trade among developed countries and among developing countries, see *ibid.*, pp. 237-239, document A/CN.4/228 and Add.1, annex I.

⁴³ For a scholarly treatment of trade problems of developing countries, see K. Hyder (Hasan), *Equality of Treatment and Trade Discrimination in International Law* (The Hague, Nijhoff, 1968). See also H. Gros Espiell, "The most-favoured-nation clause: its present significance in GATT", *Journal of International Trade Law* (Twickenham), vol. 5, No. 1 (Jan.-Feb. 1971), p. 29.

⁴⁴ *Yearbook of the International Law Commission*, 1969, vol. II, p. 234, document A/7610/Rev.1, para. 87.

⁴⁵ Basdevant, *op. cit.*, para. 34.

this description.⁴⁶ Even such kinds of clauses are evidently limited by the object of the treaty itself (e.g., commerce, establishment, etc.).⁴⁷ When the Economic Committee of the League of Nations pleaded for a clause unrestricted, it did so under the heading "The most-favoured-nation clause in customs matters" and the essence of the plea was that the clause "must apply to the whole of the tariffs of the contracting countries".⁴⁸

(18) The Special Rapporteur tried to define the spheres of inter-nation relations where States may agree on most-favoured-nation treatment, in other words, to find a comprehensive expression for the fields in which most-favoured-nation clauses may be applied.⁴⁹ "Commerce is the principal sphere of most-favoured-nation clauses but that term has been liberally construed", states McNair,⁵⁰ and indeed the word "commerce" would be the closest to what is sought for, particularly if it could be given the meaning of the latin *commercium* which encompasses not only trade, but also intercourse, communication and all kinds of contact. It was felt, however, that the ordinary meaning of the word cannot be strained so far as to embrace all fields of international relations in which most-favoured-nation clauses have been included in treaties.

(19) In this connexion it should be noted that the present study is not based on exhaustive research on treaties containing most-favoured-nation clauses. Such research, comparable to Laokoon's struggle with the serpents, has been undertaken by R. C. Snyder in respect of 600 economic treaties published in the League of Nations *Treaty Series*.⁵¹ According to Pescatore, "With the exception of the agreements concluded within the framework of GATT, there can be found in the United Nations *Treaty Series* only some 30 international treaties which include the m.f.n.c. [most-favoured-nation clause]."⁵² Admitting that not necessarily all are registered with the United Nations Secretariat, he ascribes this decrease in the number of such treaties to the fact that States parties to the General Agreement on Tariffs and Trade have no need to conclude bilateral agreements on most-favoured-treatment with respect to customs tariffs as between themselves. Thirty seems to the Special Rapporteur a very low estimate. However it may be, the number of treaties published in the United Nations *Treaty Series* containing a most-favoured-nation clause is a fraction

of the number mentioned above in relation to the League of Nations *Treaty Series*, hence this smaller number would lend itself more easily to classification and research. It is believed that the United Nations *Treaty Series* is essentially a faithful reflexion of the treaty relations of States and that the conclusions drawn from its examination could be relied upon.

(20) The fields of application of the clause are extremely varied. Trade and particularly customs matters are the fields where the clause is most frequently applied. Some treaties contain a so-called "general clause" which stipulates most-favoured-nation treatment" in all matters relating to trade, navigation and all other economic relations . . ." ⁵³ In customs matters the "general clause" or article I, paragraph 1, of GATT is the best known example.⁵⁴ Clauses in this field are sometimes drafted in a negative form promising not the "most-favourable" but the "least unfavourable" treatment. Thus, in article 4 of the treaty between Czechoslovakia and the German Democratic Republic, quoted above, it is stated:

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

(21) Transport in general and navigation in particular are again important fields where the clause is applied. Articles 2 and 5 of the Convention and Statute on the International Régime of Maritime Ports of 9 December 1923 ⁵⁵ assure national treatment and most-favoured-nation treatment for the vessels of the contracting States in the ports of their treaty partners. The same treatment should apply to the vessels of land-locked States as regards access to seaports and the use of such ports of States situated between the sea and the land-locked State, according to the principle III embodied in the Preamble to the Convention on Transit Trade of Land-locked States of 8 July 1965.⁵⁶ The "transport of goods, passengers and baggage by domestic roads and waterways and by rail" can also be a field for a most-favoured-nation stipulation as included in the treaty between Czechoslovakia-the German Democratic Republic quoted above, "in all matters relating to the acceptance of consignments for transport, to the type and means of transport, and to transport costs and charges" (article 15).

(22) With respect to treatment of aliens, the Treaty of Friendship, Commerce and Navigation between the United States of America and Nicaragua ⁵⁷ has been quoted by a French author ⁵⁸ to demonstrate the variety

⁴⁶ Thus the *Dictionnaire diplomatique* of the Académie diplomatique internationale (published under the direction of A.-F. Frangulis (Paris, 1933), vol. I), at p. 470 quotes the following provision from an 1881 treaty concluded between the United States and Serbia: "Also every favour or immunity which shall be later granted to a third Power shall be immediately extended and without condition, and by this very fact to the other Contracting Party."

⁴⁷ "The object of the clause is here confused with that of the treaty which contains it" (P. Level, *op. cit.*, p. 333, para. 6).

⁴⁸ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 176, document A/CN.4/213, annex I.

⁴⁹ *Ibid.*, 1968, vol. II, p. 167, document A/CN.4/L.127, sect. VII.

⁵⁰ A. D. McNair, *op. cit.*, p. 273.

⁵¹ R. C. Snyder, *op. cit.*

⁵² *Annuaire de l'Institut de droit international*, vol. 53 (1969), t. 1, p. 16.

⁵³ Treaty of Trade and Navigation between Czechoslovakia and the German Democratic Republic, signed at Berlin on 25 November 1959 (United Nations, *Treaty Series*, vol. 374, p. 101), article 2.

⁵⁴ For the text of the paragraph and the explanation concerning it, see *Yearbook of the International Law Commission, 1970*, vol. II, pp. 220-221, document A/CN.4/228 and Add.1, para. 144.

⁵⁵ For reference, see foot-note 30.

⁵⁶ United Nations, *Treaty Series*, vol. 597, p. 3.

⁵⁷ *Ibid.*, vol. 367, p. 3.

⁵⁸ E. Sauvignon, *La clause de la nation la plus favorisée* (Grenoble, Presses Universitaires de Grenoble, 1972), p. 29, note 7.

of situations to which most-favoured-nation clauses are applied, i.e. the resourcefulness of treaty-drafters in finding fields for such stipulations. Most-favoured-nation treatment is accorded by the parties to this treaty reciprocally (often combined with national treatment) to nationals and companies of either party with respect to access to the courts of justice and to administrative tribunals and agencies in all degrees of jurisdiction, both in pursuit and in defence of their rights (article V), with respect to conditions regarding official searches and examinations of dwellings, offices and other premises of nationals and companies (article VI, paragraph 2), with respect to conditions of expropriation of property and of the taking of privately-owned enterprises into public ownership and to the placing of enterprises under public control (article VI, paragraphs 4-5), with respect to engaging in scientific, educational, religious and philanthropic activities (article VIII), with respect to rights in trademarks, trade names, trade labels and industrial property of every kind (article X), with respect to payments, remittances and transfers of funds or financial instruments (article XII), with respect to commercial travellers, upon their entry into and departure from the territory of the parties and during their sojourn therein concerning customs, taxes and charges applicable to them and regulations governing the exercise of their functions (article XIII).

(23) Some treaties stipulate most-favoured-nation treatment regarding military service of aliens. Thus Japan and Yugoslavia in their Treaty of Commerce and Navigation of 28 February 1959, agreed that "With respect to the . . . exemption [from any military service in the National Guard or Militia and from all taxes and military charges in replacement of such personal services] and all forced war-loans and any military exaction, requisition or compulsory billeting, nationals of either High Contracting Party shall be accorded treatment no less favourable than that accorded to nationals of any third country."⁵⁹

(24) As to most-favoured-nation clauses regarding literary and artistic rights and, in some cases, to rights in industrial property, the author of a useful recent publication⁶⁰ lists 28 treaties containing such clauses. Of these, 11 were concluded in the nineteenth century and 17 in the present century, the most recent being dated 1937. The study of these treaties yields interesting results, particularly when they are compared with the multilateral treaties in the field.

(25) In respect of most-favoured-nation clauses in treaties on consular intercourse and immunities, the report by Mr. Zourek⁶¹ provides a useful source.

(26) In the field of treatment of aliens, the clauses appearing on the 1951 Convention relating to the Status of Refugees⁶² and those in the 1954 Convention relating to the Status of Stateless Persons, borrowed largely from the former, deserve special attention. The contracting

States in the first named Convention accord to a refugee "treatment as favourable as possible and in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property" (article 13).⁶³ Refugees are accorded "the most favourable treatment accorded to nationals of a foreign country" as regards non-political and non-profit-making associations and trade unions (article 15)⁶⁴ and as regards the right to engage in wage earning employment (article 17). They receive "treatment . . . not less favourable than that accorded to aliens generally in the same circumstances as regards the right to engage on [their] own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies" (article 18),⁶⁵ as regards the practising of a liberal profession by refugees holding diplomas recognized by the receiving State (article 19), as regards "housing . . . in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities" (article 21) and finally "with respect to education other than elementary education and, in particular, as regards access to studies, recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships" (article 22).⁶⁶ The particular feature of these clauses consists not in the designation of the fields in which the treatment in question is due to refugees and stateless persons respectively, but in the construction of the clauses. The beneficiary of the clauses is not one particular State to which the person in question belongs by the tie of nationality but all States in treaty relationship with the granting State. The *tertium comparationis*, the treatment to which the treatment of the object of the clause is compared, is not that accorded to a third State (except in articles 15 and 17 where *nationals of a foreign country* are mentioned) but to *aliens* who need not be nationals of any country (if they are stateless persons). Hence these clauses are not covered by the definition given in article 2 if this definition is strictly interpreted.

Article 4. — Legal basis of most-favoured-nation treatment

A State may claim most-favoured-nation treatment from another State solely on the ground of a most-favoured-nation clause in force between them.

COMMENTARY

(1) This is a generally accepted and well established rule.⁶⁷ While article 2 provides that there is no most-favoured-nation clause without a promise of most-favoured-nation treatment, the rule set out in article 4 means that

⁵⁹ United Nations, *Treaty Series*, vol. 341, p. 182.

⁶⁰ F. Majoros, *Les arrangements bilatéraux en matière de droit d'auteur* (Paris, Pedone, 1971).

⁶¹ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 19-26, document A/CN.4/131, part II.

⁶² For reference, see foot-note 31.

⁶³ Italics supplied by the Special Rapporteur.

⁶⁴ *Idem*.

⁶⁵ *Idem*.

⁶⁶ The corresponding articles of the Convention relating to the Status of Stateless Persons (for reference, see foot-note 32), bear the same numbers.

⁶⁷ Usenko, *op. cit.*, p. 238 (German edition, p. 200); Vignes, *op. cit.*, p. 224; E. Sauvignon, *op. cit.*, p. 2; K. Hyder, *op. cit.*, p. 33.

States have no right to claim most-favoured-nation treatment without being entitled to it by a most-favoured-nation clause.

(2) The question whether States can claim most-favoured-nation treatment from each other as a right was discussed in the Economic Committee of the League of Nations but only with respect to customs tariffs.⁶⁸ The Economic Committee did not reach agreement in the matter except that it declared that "... the grant of most-favoured-nation treatment ought to be the normal...". Although the grant of most-favoured-nation treatment is frequent in commercial treaties, evidence is lacking that this has developed into a rule of customary international law. Hence only treaties are the foundation of most-favoured-nation treatment.⁶⁹

(3) In fields other than trade the question whether States can claim most-favoured-nation treatment from each other in the absence of a treaty stipulation has never been raised.

(4) Of a different order (and wider in scope than that dealt with in the article) is the question whether States under the general rule of non-discrimination are not bound to treat their partners on an equal footing or, in other words, whether a State granting most-favoured-nation treatment to most of its partners in a certain field and refusing to make similar agreements with others would not violate its international obligations under the general prohibition of discrimination.⁷⁰

Article 5. — The source of the right of the beneficiary State

The right of the beneficiary State to claim the advantages accorded by the granting State to a third State under a collateral treaty or by autonomous action arises from the most-favoured-nation clause: the treaty containing the clause creates the legal bond between the granting State and the beneficiary State.

COMMENTARY

(1) Where no collateral treaty between the granting State and the third State exists and where the beneficiary State claims from the granting State favours which the latter has accorded to the third State by autonomous legislative act or mere practice, the truth of the statement of article 5 is obvious. There being no other treaty among the parties than the one containing the most-favoured-nation clause, the right of the beneficiary to claim the advantages extended to the third State by the granting State cannot originate from any other source but from that treaty i.e. from its provision which entitles the beneficiary State to most-favoured-nation treatment.

(2) A problem arises only in cases where a treaty has come into being between the granting State and a third State (a collateral treaty), according certain rights to the third State, rights which the beneficiary State is automati-

cally entitled to claim on the basis of the most-favoured-nation clause. In cases of this kind two treaties coexist among the three parties and the question can be raised: which of the two treaties creates the right of the beneficiary State to demand from the granting State the favours it accorded to the third State.

(3) Two opposing views came into conflict on this question before and within the International Court of Justice in the Anglo-Iranian Oil Company Case (Jurisdiction) (1952). One view (as presented by the British party) was that:

A most-favoured-nation clause is in essence by itself a clause without content; it is a contingent clause. If the country granting most-favoured-nation treatment has no treaty relations at all with any third State, the most-favoured-nation clause remains without content. It acquires its content only when the grantor State enters into relations with a third State, and its content increases whenever fresh favours are granted to third States.⁷¹

According to the opposite view (held by the Iranian party), the most-favoured-nation clause:

... involves a commitment whose object is real. True, it is not determined and is liable to vary in extent according to the treaties concluded later, but that is enough to make it determinable. Thus the rôle 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.⁷²

(4) The majority of the members of the Court—as is well known—upheld this latter view. In the words of the Court:

The treaty containing the most-favoured-nation clause is the basic treaty... It is this treaty which establishes the juridical link between the United Kingdom [i.e. the beneficiary State] and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom [the beneficiary State] and Iran [the granting State]: it is *res inter alios acta*.⁷³

(5) The minority view was forcefully expressed in the dissenting opinion of Judge Hackworth who held that the most-favoured-nation clauses in question:

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... [The] 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.⁷⁴

(6) The same line of thought was expounded by Judge Levi Carneiro. The relevant part of his dissenting opinion reads as follows:

The manner in which a most-favoured-nation clause operates is well known. It does not take effect by itself alone; it operates in due course upon the later treaty which grants some advantage

⁶⁸ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 175, document A/CN.4/213, annex I.

⁶⁹ Cf. G. Schwarzenberger, *op. cit.*, p. 138.

⁷⁰ See p. 166 above, para. 13 of the commentary to articles 2 and 3, and *Yearbook of the International Law Commission, 1969*, vol. I, p. 245, 1036th meeting, para. 69.

⁷¹ Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), *I.C.J. Pleadings*, p. 533.

⁷² *Ibid.*, p. 616.

⁷³ *I.C.J. Reports, 1952*, p. 109.

⁷⁴ *Ibid.*, pp. 140-141.

to another nation, and it immediately extends the same advantage to the favoured nation.

The effect of the clause is, therefore, as Visser has said, complementary (Ito, *La clause de la nation la plus favorisée*, p. 36). By itself it confers no rights; it can have no application and remains useless. Rights or advantages granted to a third State do not exist, either for the benefit of that State itself or for that of the favoured State before they are expressly conceded. Again, the rights or advantages do not subsist for the favoured State if the concession made to another State should be abrogated (Raphael A. Farra, *Les effets de la clause*, etc. p. 67; Josef Ebner, *La clause de la nation*, etc. pp. 149-150; Marcel Sibert, *Traité de droit international public*, II, p. 255). That is, the clause does not have any permanent effect—its effect is merely contingent and is dependent on the continued existence of another treaty the scope of which it enlarges.

Oppenheim considers it a legal rule, “but a legal rule the content of which is uncertain, because dependent upon a future event, namely concessions to be granted to third States” (*La clause de la nation*, etc. p. 26). The clause is merely a conditional guarantee of a future concession, a promise or an engagement to grant to a State or to its nationals the same advantages as are granted or may be granted to other States and to the nationals of other States.⁷⁵

(7) While the contingent character of the clause is beyond doubt and not contested by anyone, the conclusions drawn from this by the dissenting judges do not seem to have been accepted by legal writers. Literature seems unanimous in endorsing the findings of the majority of the members of the Court.⁷⁶

(8) The solution given by the judgement of the Court seems to be in concordance with the rules of the law of treaties relating to the effect of treaties on States not parties to a particular treaty.

The view that the third party (the treaty by which the granting State accords favours to a third State) is the origin of the rights of the beneficiary of the clause (a State not party to the “third party treaty”) runs counter to the rule embodied in article 36, paragraph 1 of the Vienna Convention on the Law of Treaties. As explained in paragraph 7 of the Commission’s Commentary to article 32 of the 1966 draft (which, with insignificant drafting changes, has become article 36 of the Convention): *Paragraph 1* lays down that a right may arise for a State from a provision of a treaty to which it is not a party under two conditions. First, the parties must intend the provision to accord the right either to the particular State in question, or to a group of States to which it belongs, or to States generally. *The intention to accord the right is of cardinal importance*, since it is only when the parties have such an intention that a legal right, as distinct from a mere benefit, may arise from the provision.⁷⁷

It seems to be evident that the parties to a “third party treaty” do not have such an intention. They may be aware of the fact that their agreement can have an indirect effect through the operation of the most-favoured-nation clause (to the profit of the State beneficiary of the clause)

⁷⁵ *Ibid.*, pp. 157-158.

⁷⁶ See e.g., P. Guggenheim, *op. cit.*, vol. I, pp. 208 and 209; E. Sauvignon, *op. cit.*, p. 80; G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957), vol. 1, p. 243.

⁷⁷ *Yearbook of the International Law Commission, 1966*, vol. II, p. 229, document A/7309/Rev.1, part II, chap. II. [Italics supplied by the Special Rapporteur.]

but their intention is never to achieve this side effect. It follows that the right of the beneficiary State to a certain advantageous treatment does not derive from the treaty concluded between the granting State and the third State and that the provision of article 36 of the Vienna Convention is not applicable to that treaty. Hence the beneficiary State cannot base its claim against the granting State but on the treaty containing the clause.⁷⁸

(9) This is the same conclusion which was reached well before the Anglo-Iranian Oil Company case by Sibert, who explained the situation as follows:

... ultimately, we see the effects of a treaty between one State (State C) and one of the stipulators of the clause (State A) benefit the other State signatory to the clause, State B, which is a *third party vis-à-vis* A and C. Does this not infringe the principle that treaties produce their effects only between the contracting parties? To affirm this would be a serious error. Let us apply the hypothesis: if the advantages granted to State C by one of the stipulators of the clause, State A, are extended to the other beneficiary of the clause, State B, this is by no means because C and A have agreed to confine themselves to the establishment of a certain régime applicable *solely* to relations between C and A. On the other hand, *vis-à-vis* State B and State A, the signatories to the clause, the agreement by which A has granted certain advantages to C is nothing more than an *act applying a condition*. The supervision of this act is the element—and only the element—through which the wishes freely agreed between the two signatories to the clause, State A and State B, can be made effective: if the act applying the condition is performed, the convention between A and B will produce its effects: B will benefit from the favours granted to C, but only because this was the common wish of A and B. The agreement between A and C creating obligations in their mutual relations does not create obligations in the relations between A and B...⁷⁹ [Translation by the United Nations Secretariat.]

(10) The Special Rapporteur, who has been advised to give careful consideration to the point in question,⁸⁰ believes that the reasons put forward in the commentary sufficiently warrant his proposal to adopt the proposed article 5.

⁷⁸ See Sauvignon, *op. cit.*, p. 117.

⁷⁹ ... on voit, en fin de compte, les effets d'un traité entre un Etat (Etat C) et l'un des stipulants de la clause (Etat A) profiter à l'autre Etat signataire de la clause, l'Etat B, lequel est un tiers vis-à-vis de A et de C. N'y aurait-il pas là atteinte au principe d'après lequel les traités ne produisent leurs conséquences qu'entre parties contractantes? L'admettre constituerait une erreur grave. Appliquons l'hypothèse: si les avantages concédés à l'Etat C par l'un des stipulants de la clause, l'Etat A, sont étendus à l'autre bénéficiaire de cette clause, l'Etat B, ce n'est pas du tout parce que les volontés concordantes de l'Etat C et de l'Etat A ont entendu qu'il en fût ainsi. Les volontés concordantes de C et A se sont bornées à établir un certain régime valable pour les seuls rapports de C et de A. Par contre, vis-à-vis de l'Etat B et de l'Etat A, signataires de la clause, l'accord par lequel A a concédé à C certains avantages n'est rien de plus qu'un acte-condition. La survenance de cet acte-condition est l'élément—et n'est que l'élément—grâce auquel il pourra être donné efficacité aux volontés librement échangées entre les deux signataires de la clause, l'Etat A et l'Etat B [...]; si l'acte-condition se réalise, la convention entre A et B sortira ses conséquences: B bénéficiera des faveurs accordées à C, mais uniquement parce que telle aura été la volonté commune de A et de B. L'accord entre A et C qui crée des obligations dans leurs rapports mutuels n'en crée pas dans les relations de A avec B... (M. Sibert, *Traité de droit international public* (Paris, Dalloz, 1951), vol. II, pp. 254-255.)

⁸⁰ *Yearbook of the International Law Commission, 1968*, vol. I, p. 186, 976th meeting, para. 12.