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**Fourth report on the most-favoured-nation clause, by Mr. Endre Ustor, Special Rapporteur -  
draft articles (article 6-8) with commentaries (continued)**

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# MOST-FAVOURED NATION CLAUSE

[Agenda item 6]

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

*Draft articles with commentaries (continued) \**

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## ABBREVIATIONS

GATT	General Agreement on Tariffs and Trade
I.C.J.	International Courts 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

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\* For draft articles 1-5, see the third report.

*Article 6. Presumption of unconditional character of the clause*

Except when in appropriate cases most-favoured-nation treatment is accorded under the condition of material reciprocity, the most-favoured-nation clause is unconditional, i.e., the granting State is obliged to accord and the beneficiary State is entitled to receive most-favoured-nation treatment irrespective of whether the favours accorded by the granting State to any third State are accorded gratuitously or against compensation.

COMMENTARY

(1) Different scholars have shown great skill in classifying the diverse types of the clause. For the present purposes it seems enough to retain three basic types: the conditional clause; the unconditional clause; and the clause conditional upon material reciprocity, which is a variety of the first.

(a) *The unconditional and the conditional form*

(2) With regard to the notion and history of the "conditional" most-favoured-nation clause, the reader is referred first to the relevant passages in the working paper on the most-favoured-nation clause in the law of treaties prepared by the Special Rapporteur,<sup>1</sup> and in his first<sup>2</sup> and second<sup>3</sup> reports. The views of the League of Nations Economic Committee are reproduced in an annex to the first report.<sup>4</sup> The paragraphs which follow provide further explanation.

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

... Under the most-favoured-nation clause in a bilateral treaty or agreement concerning commerce, each of the parties undertakes to extend to the goods of the country of the other party treatment no less favorable than the treatment which it accords to like goods originating in any third country. The unconditional form of the most-favoured-nation clause provides that any advantage, favor, privilege, or immunity which one of the parties may accord to the goods of any third country shall be extended immediately and unconditionally to the like goods originating in the country of the other party. In this form only does the clause provide for complete and continuous nondiscriminatory treatment. Under the conditional form of the clause, neither party is obligated to extend immediately and unconditionally to the like products of the other party the advantages which it may accord to products of third countries in return for reciprocal concessions; it is obligated to extend such advantages only if and when the other party grants concessions "equivalent" to the concessions made by such third countries...<sup>5</sup>

<sup>1</sup> *Yearbook* ... 1968, vol. II, p. 167, document A/CN.4/L.127, paras. 9-10.

<sup>2</sup> *Yearbook* ... 1969, vol. II, pp. 161-162 and 171, document A/CN.4/213, paras. 25-27 and 84.

<sup>3</sup> *Yearbook* ... 1970, vol. II, p. 208, document A/CN.4/228 and Add.1, paras. 51-53.

<sup>4</sup> *Yearbook* ... 1969, vol. II, p. 175, document A/CN.4/213, annex I.

<sup>5</sup> United States of America, Department of State, *Bulletin* No. 58 of 3 August 1940, quoted in M. Whiteman, *Digest of International Law*, vol. 14 (Washington, D.C., U.S. Government Printing Office, 1970), p. 751.

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

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

While we were persevering in the following of the policy of conditional most-favored-nation treatment, the leading commercial countries of Europe, and in fact most of the countries of the world, adopted and pursued the policy of unconditional most-favored-nation treatment: Each concession which one country made to another became generalized in favor of all countries to which the country making the concession was obligated by treaty to extend most-favored-nation treatment... As we seek pledges from other foreign countries that they will refrain from practicing discrimination, we must be ready to give such pledges, and history has shown that these pledges can be made adequate only in terms of unconditional most-favored-nation treatment.<sup>6</sup>

(5) Stated simply, the conditional clause served the purposes of the United States so long as it was a net importer and its primary aim was to protect a growing industrial system. When the position of the United States in the world economy changed after the First World War, the conditional clause was inadequate. The essential condition for a successful penetration of international markets, that is, the elimination of discrimination against American products, could only be achieved through the unconditional clause.<sup>7</sup>

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

There is one apparent misapprehension which I should like to remove. It may be argued that by the most-favored-nation clauses in the pending treaty with Germany we would automatically extend privileges given to Germany to other Powers without obtaining the advantages which the treaty with Germany gives to us. This is a mistake. We give to Germany explicitly the unconditional most-favored-nation treatment which she gives to us. We do not give unconditional most-favored-nation treatment to other Powers unless they are willing to make with us the same treaty, in substance, that

<sup>6</sup> G. H. Hackworth, *Digest of International Law*, vol. V (Washington, D.C., U.S. Government Printing Office, 1943), p. 273.

<sup>7</sup> 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. 243; and E. T. Usenko, chapter on commercial treaties in *State Institute of Law of the Soviet Academy of Sciences* [F.I. Kozhevnikov et al. eds.], *Kurs mezhdunarodnogo prava*, vol. IV (Moscow, Nauka, 1968), p. 251.

Germany has made. Most-favored-nation treatment would be given to other Powers only by virtue of our treaties with them, and these treaties, so far as we have them, do not embrace unconditional most-favoured-nation treatment. We cannot make treaties with all the Powers at the same moment, but if the Senate approves the treaty which we have made with Germany we shall endeavor to negotiate similar treaties with other Powers and such other Powers will not obtain unconditional most-favored-nation treatment unless they conclude with us treaties similar to the one with Germany.<sup>8</sup>

(7) Ten years later, however, Secretary of State Hull took the less rigid position that the according of a benefit to a country pursuant to an unconditional most-favoured-nation clause constitutes according it freely within the terms of a conditional most-favoured-nation clause, with the result that the benefit should be accorded immediately and without compensation pursuant to the conditional clause. Consistent with this interpretation, when in 1946 the United States sought waivers from most-favoured-nation clauses in existing treaties, for tariff preferences to be accorded on the basis of reciprocity to most Philippine products following Philippine independence, such waivers were sought from countries with which the United States had treaties containing such clauses which were conditional as well as from those the treaties with which contained clauses which were unconditional.<sup>9</sup>

(8) The use of the conditional clause, as practised until 1923 by the United States, completely disappeared from the international scene. The reasons for this are stated by Virally as follows:

... the elimination of automatism from the most-favoured-nation clause, ostensibly better to ensure reciprocity, fails to achieve its aim and renders the clause itself completely useless. That fact, together with the trend towards trade expansion which currently characterizes the trade policy of all States, explains why the conditional clause has generally been abandoned in recent treaty practice.<sup>10</sup>

(9) Because of its general abandonment the conditional form of the clause is now of historical significance only. All available sources agree that this form of the clause has definitely fallen into disuse.<sup>11</sup>

(b) *The clause and reciprocity*

(10) When speaking of reciprocity in relation to the most-favoured-nation clause we have to keep in mind that normally most-favoured-nation clauses are granted on a reciprocal basis, i.e., both parties to a bilateral treaty or all parties to a multilateral treaty accord each other most-favoured-nation treatment in a defined sphere of relations. This formal reciprocity is a normal feature of the unconditional most-favoured-nation clause—one

<sup>8</sup> M. Whiteman, *op. cit.*, p. 754.

<sup>9</sup> *Ibid.*, p. 753.

<sup>10</sup> M. Virally, "Le principe de réciprocité en droit international contemporain", *Recueil des cours de l'Académie de droit international de La Haye, 1967-III* (Leyden, Sijthoff, 1969), vol. 122, p. 74.

<sup>11</sup> R. C. Snyder, *op. cit.*, p. 56. See also G. Jaenicke, "Meistbegünstigungsklausel" in K. Strupp, *Wörterbuch des Völkerrechts*, 2nd ed. [Schlochauer], vpl. II (Berlin, de Gruyter, 1961), p. 498; P. Level, "Clause de la nation la plus favorisée", in *Encyclopédie Dalloz—Droit international* (Paris, Dalloz, 1968), vol. I, p. 333, para. 5; E. Sauvignon, *La clause de la nation la plus favorisée* (Grenoble, Presses Universitaires de Grenoble, 1972), p. 23.

could say it is its essential ingredient. Unilateral most-favoured-nation clauses occur only exceptionally at the present time.<sup>12</sup> Unilateral most-favoured-nation clauses, coupled with formal reciprocity, were included in the Peace Treaties which the Allied and Associated Powers concluded in 1947 with Bulgaria<sup>13</sup> (article 29); Hungary<sup>14</sup> (article 33); Romania<sup>15</sup> (article 31); Finland<sup>16</sup> (article 30); and Italy<sup>17</sup> (article 82). The same clause was included in the State Treaty for the re-establishment of an independent and democratic Austria (article 29).<sup>18</sup> By the mere stipulation of formal reciprocity a unilateral clause does not become bilateral (as seen by the Rapporteur of the Institute of International Law<sup>19</sup>). This can be illustrated by the following quotation from article 33 of the Hungarian Peace Treaty.

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

(a) In all that concerns duties and charges on ... the United Nations shall be granted unconditional most-favoured-nation treatment; ...<sup>20</sup>

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

(c) *The clause combined with material reciprocity* (réciprocité trait pour trait)

(11) While the American form of the conditional clause can now be deemed to have virtually disappeared, the most-favoured-nation clause, coupled with the condition of material reciprocity still exists. It is to be noted, however, that the application of this form of the clause is restricted to certain fields, such as consular immunities and functions, matters of private international law and those matters customarily dealt with by establishment treaties.

(12) It was indicated by Mr. Richard Kearney, at the twentieth session of the International Law Commission,<sup>21</sup> that the shift in the policy of the United States from conditional to unconditional most-favoured-nation treatment with regard to commercial matters in the early 1920s had not been accompanied by a shift in relation to consular rights and privileges, with respect to which the use of the conditional clause continued. This situation is illustrated by the following excerpt from a letter dated

<sup>12</sup> See *Yearbook ... 1972*, vol. II, p. 164, document A/CN.4/257 and Add.1, para. 7 of the commentary to articles 2 and 3.

<sup>13</sup> United Nations, *Treaty Series*, vol. 41, p. 21.

<sup>14</sup> *Ibid.*, p. 135.

<sup>15</sup> *Ibid.*, vol. 42, p. 3.

<sup>16</sup> *Ibid.*, vol. 48, p. 203.

<sup>17</sup> *Ibid.*, vol. 49, p. 3.

<sup>18</sup> *Ibid.*, vol. 217, p. 223.

<sup>19</sup> P. Pescatore, "La clause de la nation la plus favorisée dans les conventions multilatérales", *Annuaire de l'Institut de droit international, 1969* (Basle), vol. 53, t. 1, p. 204, foot-note 3.

<sup>20</sup> United Nations, *Treaty Series*, vol. 41, p. 204.

<sup>21</sup> *Yearbook ... 1968*, vol. I, p. 186, 976th meeting, para. 8.

20 January 1967 from the Department of State to the Senate Foreign Relations Committee in regard to a provision in the Consular Convention with the USSR,<sup>22</sup> then before the Committee, relating to immunity in criminal cases for consular officers:

The United States has thirty-five agreements presently in force with other states requiring this country to afford most-favoured-nation treatment to consular officers and, occasionally, to consular employees of those States. A list of these thirty-five States is given as an enclosure to this letter. Based upon a recent survey, twenty-seven of those States have consular establishments in the United States, and include approximately 577 entitled consular personnel. A list of these States is also given as an enclosure to this letter. The criminal immunity provision contained in article 19 of the US-USSR consular convention would be applicable to those personnel should the sending State concerned agree to give reciprocal treatment to American consular officers and employees assigned there. Our Embassies in those twenty-seven States were requested to give their assessment as to whether most-favoured-nation treatment would actually be sought on a reciprocal basis. The replies indicated that at most eleven States would probably request such treatment, and that approximately 290 of their foreign consular officers and employees in the United States would be affected.<sup>23</sup>

The provision of the Consular Convention of 1 June 1964 with the USSR, under consideration was article 19, paragraph 2, which reads as follows:

Consular officers and employees of the consular establishment who are nationals of the sending state shall enjoy immunity from the criminal jurisdiction of the receiving state.<sup>24</sup>

(13) No detailed research could be made as to the 35 agreements mentioned in the quoted letter, to the most-favoured-nation clauses of those treaties, or to the phraseology involved. It can be safely assumed, however, that most if not all of them are conditional only upon the granting of material reciprocity (either expressly stipulated or construed in this sense). This kind of conditional clause is clearly different from the traditional American form of the conditional clause ("freely", "if the concession was freely made . . ." etc.) and its survival is not limited to treaties concluded by the United States<sup>25</sup> or to consular treaties. Examples such as the Hungarian-Turkish Convention regarding conditions of residence of 20 December 1926,<sup>26</sup> (article 3), and the Finland-Turkey Convention of commerce and navigation of 2 June 1926,<sup>27</sup> (articles 2 and 10 (in section I on conditions of residence and business)) are given by Suzanne Basdevant in an article on the most-favoured-nation clause.<sup>28</sup>

(14) A more recent instance of such a provision is the first paragraph of article 3 of the Convention on conditions of residence and navigation between the Kingdom of

<sup>22</sup> United Nations, *Treaty Series*, vol. 655, p. 213.

<sup>23</sup> M. Whiteman, *op. cit.*, pp. 752-753. (Italics supplied by the Special Rapporteur.)

<sup>24</sup> United Nations, *Treaty Series*, vol. 655, p. 233.

<sup>25</sup> *Yearbook . . . 1969*, vol. II, pp. 166-167, document A/CN.4/213, paras. 56-58.

<sup>26</sup> League of Nations, *Treaty Series*, vol. LXXII, p. 245.

<sup>27</sup> *Ibid.*, vol. LXX, p. 329.

<sup>28</sup> S. Basdevant, "Clause de la nation la plus favorisée" in A. G. de Lapradelle and J.-P. Niboyet, *Répertoire de droit international* (Paris, Sirey, 1929), vol. III, p. 480.

Sweden and the French Republic signed at Paris on 16 February 1954:<sup>29</sup>

Subject to the effective application of reciprocity, the nationals of each of the High Contracting Parties residing in the territory of the other Contracting Party shall have the right, in the territory of the other Contracting Party, under the same conditions as nationals of the most-favoured-nation, to engage in any commerce or industry, as well as in any trade or profession, that is not reserved for nationals.<sup>30</sup>

(15) Another recent example can be found in the Consular Convention between the Polish People's Republic and the Federal People's Republic of Yugoslavia, signed at Belgrade on 17 November 1958,<sup>31</sup> article 46 of which reads as follows:

Each Contracting Party undertakes to accord the other Contracting Party most-favoured-nation treatment in all matters relating to the privileges, immunities, rights and functions of consuls and consular staff. However, neither Contracting Party may invoke the most-favoured-nation clause for the purpose of requesting privileges, immunities and rights other or more extensive than those which it itself accords to the consuls and consular staff of the other Contracting Party.<sup>32</sup>

(16) The clause conditional upon material reciprocity can be considered a simplified form of the traditional conditional clause.<sup>33</sup>

According to Alice Piot:

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

...

From the purely logical point of view, this is quite satisfying intellectually, but not very satisfactory in practice. Quite apart from the difficulties which the interpretation of reciprocity always entails, this system has the disadvantage of reducing the benefits, if any, of the most-favoured-nation clause, without eliminating the resulting disadvantages for the granting State. Of course, the beneficiary State cannot bring the clause into operation without offering the very advantages which it claims, but the unilateral nature of that step will almost always mean that the reciprocal benefits, although theoretically equivalent, will be very different in practice: . . .<sup>34</sup>

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

<sup>29</sup> United Nations, *Treaty Series*, vol. 228, p. 137.

<sup>30</sup> *Ibid.*, p. 141.

<sup>31</sup> *Ibid.*, vol. 432, p. 267.

<sup>32</sup> *Ibid.*, p. 332.

<sup>33</sup> *Yearbook . . . 1969*, vol. II, pp. 166-167, document A/CN.4/213, para. 58.

<sup>34</sup> A. Piot, "La clause de la nation la plus favorisée", *Revue critique de droit international privé* (Paris), vol. 45 (January-March 1956), No. 1, pp. 9-10 (translation from French).

each other's nationals. Hence the view of Level: "... The most-favoured-nation clause combined with the condition of reciprocity does not seem to be conducive to the unification and simplification of international relations, a fact which deprives the clause of the few merits formerly attributed to it."<sup>35</sup>

(d) *Doctrine*

(18) In the last century and in the first decades of the present one, international doctrine and practice was divided on the interpretation of a most-favoured-nation clause which does not explicitly state whether it is conditional or unconditional.<sup>36</sup> The division was due to the then constant practice of the United States according to which even if the character of the clause was not spelled out explicitly it was construed as conditional.<sup>37</sup> The American position can be traced as far back as 1817 when it was stated by Secretary of State Adams:

The eighth article of the treaty of cession [the Louisiana Purchase of 30 April 1803] stipulates that the ships of France shall be treated upon the footing of the most-favored-nations in the ports of the ceded territory; but it does not say, and can not be understood to mean, that France should enjoy as a free gift that which is conceded to other nations for a full equivalent.<sup>38</sup>

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

... The basis of the American theory is to be found in the Anglo-Saxon system of contracts and the requirement that advantages must be reciprocal for the formation of a contract (consideration). However, this application of the theory is not justified here, for the nation which has acquired equal treatment has paid in advance for the third-party rights which it may thus acquire, since it has granted to the other contracting party the same equal treatment and the right to receive the advantages of third parties... The search for "equivalents" designed to pay for the third-party right by conventional means imposed on the contracting parties is tantamount to stating that the most-favoured-nation clause in itself has absolutely no effect. Lastly, from the customs point of view the American system leads to a preferential system based on favours granted to some nations and refused to others, for States which have amended their tariffs no longer have any equivalents to offer.<sup>39</sup>

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

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

Consequently, in matters of commerce and navigation, the clause confers upon the nationals, goods and ships of the contracting

countries, as a matter of right and without compensation, the regime enjoyed by any third country.<sup>40</sup>

Other sources state this rule in general terms not restricted to the fields of commerce:

If there is any doubt, the most-favoured-nation clause should be considered unconditional.<sup>41</sup>

Since it is liable to limit the application of the clause, the condition cannot be implied.<sup>42</sup>

The clause is, in principle, unconditional... Although the high contracting parties have the option of stating that the clause is conditional, its conditional nature is not presumed and is thus not an essential feature of the clause...<sup>43</sup>

... If it is not expressly stated that the clause is conditional, it is agreed... that it shall be considered unconditional.<sup>44</sup>

In the commercial treaty practice of the Soviet Union and other socialist countries the most-favoured-nation clause is always applied in its unconditional and gratuitous form. This is expressly provided for in many treaties but even without express provision to this effect most-favoured-nation clauses are understood to grant m.f.n. treatment unconditionally and without compensation. This follows from the fact that the treaties in question do not contain any reservation concerning compensation or countervalue.<sup>45</sup>

In principle, m.f.n. clauses ought to be interpreted unconditionally... "those clauses have the same meaning whether that word [unconditionally] be inserted or not".<sup>46</sup>

The same writer adds:

This rule of interpretation must, however, be qualified by the exception that it cannot be applied against a country which, as a matter of common knowledge, has adopted the conditional type of m.f.n. clause as part and parcel of its national treaty policy.<sup>47</sup>

On that matter a more balanced view was taken before the International Court of Justice by the representative of the United States in the *Case concerning the Rights of Nationals of the United States of America in Morocco (1952)*:

<sup>40</sup> *Yearbook*... 1969, vol. II, pp. 180-181, document A/CN.4/213, annex II.

<sup>41</sup> P. Guggenheim, *Traité de droit international public*, 2nd ed., rev. and augmented (Geneva, Georg, 1967), vol. I, p. 211.

<sup>42</sup> P. Level, *op. cit.*, p. 333, para. 5, citing the North Atlantic Coast Fisheries Case of 7 September 1910 before the Permanent Court of Arbitration (see United Nations, *Reports of International Arbitral Awards*, vol. XI (United Nations publication, Sales No. 61.V.4), p. 167), and J. Basdevant, "L'affaire des pêcheries des côtes septentrionales de l'Atlantique", *Revue générale de droit international public* (Paris) vol. XIX (1912), pp. 538 *et seq.*

<sup>43</sup> P. Level, *op. cit.*, p. 338, para. 35.

<sup>44</sup> 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. 219, who quotes in support of this view also D. P. O'Connell, *International Law* (London, Stevens, 1965), vol. I, p. 268 and J. Dehaussy, *Juris-classeur de droit international*, Fasc. 12-B, *Sources du droit international—Les traités (Effets: Situation des Etats tiers et de leurs ressortissants)* (Paris, Editions techniques, 1959), vol. 5, p. 7, para. 15.

<sup>45</sup> See State Institute of Law of the Soviet Academy of Sciences, *Kurs*... (*op. cit.*), p. 251.

<sup>46</sup> G. Schwarzenberger, *International Law and Order* (London, Stevens, 1971), p. 137, quoting *British and Foreign State Papers, 1885-1886*, vol. 77 (London, Ridgway, 1893), p. 796.

<sup>47</sup> *Ibid.*

<sup>35</sup> P. Level, *op. cit.*, p. 338, para. 37 (translation from French).

<sup>36</sup> S. Basdevant, *loc. cit.*, p. 479, para. 73.

<sup>37</sup> See C. C. Hyde, "Concerning the interpretation of treaties", *American Journal of International Law* (Washington, D.C.), vol. 3, No. 1 (January, 1909), p. 57.

<sup>38</sup> *Ibid.*, note 16. See also S. Basdevant, *loc. cit.*, p. 479, para. 75 and *Yearbook*... 1969, vol. II, p. 162, document A/CN.4/213, para. 27.

<sup>39</sup> S. Basdevant, *loc. cit.*, pp. 479-480, para. 77, quoting, *inter alia*, P. L. E. Pradier-Fodéré, *Traité de droit international public européen et américain, suivant les progrès de la science et de la pratique contemporaines* (Paris, Durand et Pédone-Lauriel, 1888), vol. IV, p. 394.

The United States is entirely in agreement that the meaning of the clause should be determined by reference to the intent of the parties at the time. The only difference that we have with our distinguished opponents is that they would construe the clause as conditional by referring only to the practice of the United States in interpreting *other* treaties signed under *other* circumstances, and not by what the United States and Morocco intended when they signed the treaties which are in issue before this Court.<sup>48</sup>

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

It is proper to advert to the fact that the so-called most-favoured-nation clause does not bear an invariable form. In two instances during the past twenty-five years the United States has been obliged to yield its interpretation when confronted with documentary proof that the most-favoured-nation clauses then in question were, during the negotiation of the particular treaties, expressly understood and agreed to have the wider effect claimed by the other contracting parties.<sup>49</sup>

(21) The rule proposed in article 6 does not state simply that unless otherwise agreed a most-favoured-nation clause is unconditional. The drafting wishes to give expression to the fact that because of the complete disappearance of the traditional conditional clause (the American form) only two forms of the clause exist: the unconditional clause and the clause conditional upon material reciprocity. The rule states that in case of doubt the presumption militates for the unconditionality of the clause. Indeed one could spell out explicitly that in matters of trade and particularly in those of customs duties and the like, the clause is always unconditional; whereas in matters of private international law, immunities and the like the condition of reciprocity may be stipulated but in the absence of such stipulation the clause is unconditional in such cases as well. The Commission may choose to employ this kind of the drafting of the rule. The expression "appropriate cases" in the article is meant to refer to cases of private international law, *cautio iudicatum solvi*, consular immunities, etc.

(22) The question arises whether the presumption works also in cases where the internal law of a country prescribes for certain matters reciprocity as a rule. Thus article 11 of the French Civil Code provides as follows:

An alien shall enjoy in France the same civil rights as those which are now or shall in the future be granted to French nationals by treaties of the nation of which the alien in question is a national.<sup>50</sup>

On the basis of this and upon a varying practice in French courts Guggenheim concludes:

... If a rule of internal law makes the application of the clause dependent on the granting of reciprocity, the clause is considered to have been granted conditionally.<sup>51</sup>

<sup>48</sup> Rejoinder of 26 July 1952 (*I.C.J. Pleadings, Morocco Case (France v. U.S.A.)*, vol. II, p. 318. For a fuller reference, see *Yearbook*... 1970, vol. II, p. 208, document A/CN.4/228 and Add.1, para. 52.

<sup>49</sup> G. Hackworth, *op. cit.*, p. 279.

<sup>50</sup> *Code civil* (Paris, Dalloz, 1972-1973), p. 13.

<sup>51</sup> P. Guggenheim, *op. cit.*, pp. 211-212.

Other sources, like the 1936 Resolution of the Institute of International Law (paragraph 2)<sup>52</sup> and particularly Sauvignon<sup>53</sup> hold the view that a provision of internal law cannot prevail over treaty obligations of a State. This view is shared.

(23) The conditions of reciprocity in a most-favoured-nation clause can give rise to serious questions of interpretation mainly if the relevant rules of the interested countries differ substantially from each other.<sup>54</sup> This inherent difficulty, however, does not alter the validity of the rule.

#### Article 7. *The ejusdem generis rule*

**Under a most-favoured-nation clause the beneficiary State cannot claim any other rights than those relating to the subject-matter of the clause and falling within the scope of the clause.**

#### COMMENTARY

(1) The *ejusdem generis* rule is generally recognized and affirmed by the jurisprudence of international tribunals and national courts and by diplomatic practice. The essence of the rule is explained by McNair in the following graphic way:

Suppose that a most-favoured-nation clause in a commercial treaty between State A and State B entitled State A to claim from State B the treatment which State B gives to any other State, that would not entitle State A to claim from State B the extradition of an alleged criminal on the ground that State B has agreed to extradite alleged criminals of the same kind to State C, or voluntarily does so. The reason, which seems to rest on the common intention of the parties, is that the clause can only operate in regard to the subject-matter which the two States had in mind when they inserted the clause in their treaty.<sup>55</sup>

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

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

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

<sup>52</sup> *Yearbook*... 1969, vol. II, p. 181, document A/CN.4/213, annex II.

<sup>53</sup> E. Sauvignon, *op. cit.*, p. 25.

<sup>54</sup> H. Batiffol, *Droit international privé*, 4th ed. (Paris, Librairie générale de droit et de jurisprudence, 1967), pp. 213-214, No. 188.

<sup>55</sup> A. D. McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961), p. 287.

of its Treaty with Iran, it is because that Treaty is subsequent to the ratification of the Iranian Declaration. This cannot give rise to any question relating to most-favoured-nation treatment.<sup>56</sup>

(3) The conclusions reached as to the operation of the rule in the *Ambatielos Case*<sup>57</sup> were referred to in the Special Rapporteur's second report.<sup>58</sup> A somewhat fuller quotation of the relevant part of the award of 6 March 1956 of the Commission of Arbitration seems to be in place here.

With respect to the interpretation of article X (most-favoured-nation clause) of the Anglo-Greek Treaty of Commerce and Navigation of 1886, the Arbitration Commission stated:

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.

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

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

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

It is true that "the administration of justice", when viewed in isolation, is a subject-matter other than "commerce and navigation", but this is not necessarily so when it is viewed in 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". The question can only be determined

<sup>56</sup> Anglo-Iranian Oil Co. Case (Jurisdiction), Judgment of July 22nd 1952 (*I.C.J. Reports 1952*, p. 93). For the facts and other aspects of the case, see *Yearbook . . . 1970*, vol. II, pp. 202-205, document A/CN.4/228 and Add.1, paras. 10-30.

<sup>57</sup> The *Ambatielos Case* (merits: obligation to arbitrate), Judgment of 19 May 1953 (*I.C.J. Reports 1953*, p. 10).

<sup>58</sup> *Yearbook . . . 1970*, vol. II, pp. 209-211, document A/CN.4/228 and Add.1, paras. 66-73.

in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty.<sup>59</sup>

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

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

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

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

(4) that the object of these provisions corresponds with that of Article XV of the Anglo-Greek Treaty of 1886, and that the only question which arises is, accordingly, whether they include more extensive "privileges", "favours" and "immunities" than those resulting from the said Article XV;

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

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

The Commission is therefore of opinion that the provisions contained in other Treaties relied upon by the Greek Government do not provide for any "privileges, favours or immunities" more extensive than those resulting from the said Article XV, and that accordingly the most-favoured-nation clause contained in Article X has no bearing on the present dispute. . . .<sup>60</sup>

(4) Decisions of national courts also testify to the general recognition of the *ejusdem generis* rule.

In an early French case (1913), the French Court of Cassation had to decide whether certain procedural requirements for bringing suit as provided in a French-Swiss Convention on jurisdiction and execution of judgement applied also to German nationals as a result of a most-favoured-nation clause in a Franco-German Commercial Treaty signed at Frankfurt on 10 May 1871. "The Franco-German Treaty guaranteed most-favoured-nation treatment in their commercial relations including the 'admission and treatment of subjects of the two nations'." The decision of the Court was based in part on the following propositions: that "these provisions pertain exclusively to the commercial relations between France and Germany, considered from the viewpoint of the rights under international law, but they do not

<sup>59</sup> United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations, publication, Sales No. 63.V.3), pp. 106-107. (Italics supplied by the Special Rapporteur.)

<sup>60</sup> *Ibid.*, pp. 109-110.



concern, either expressly or implicitly, the rights under civil law, particularly, the rules governing jurisdiction and procedure that are applicable to any disputes that develop in commercial relations between the subjects of the two States"; and that further: "The most-favoured-nation clause may be invoked only if the subject of the treaty stipulating it is the same as that of the particularly favourable treaty the benefit of which is claimed."<sup>61</sup>

(5) In *Lloyds Bank v. De Ricqlès and De Gaillard* before the Commercial Tribunal of the Seine, Lloyds Bank, which as the plaintiff had been ordered to give security for costs (*cautio judicatum solvi*) invoked article I of an Anglo-French Convention of 28 February 1882.<sup>62</sup> That Convention intended—according to its Preamble—"to regulate the commercial and maritime relations between the two countries, as well as the status of their subjects", and article I provided, with an exception not relevant here, that:

... each of the High Contracting Parties engages to give the other immediately and unconditionally the benefit of every favour, immunity or privilege in matters of commerce or industry which have been or may be conceded by one of the High Contracting Parties to any third nation whatsoever, whether within or beyond Europe.<sup>63</sup>

On the basis of that article Lloyds Bank claimed the benefit of the provisions of a Franco-Swiss Treaty of 15 June 1889, which gave Swiss nationals the right to sue in France without being required to give security for costs. The court rejected this claim, holding that a party to a convention of a general character such as the Anglo-French Convention regulating the commercial and maritime relations of the two countries could not claim under the most-favoured-nation treatment clause the benefits of a special Convention such as the Franco-Swiss Convention, which dealt with one particular subject, namely freedom from the obligation to give security for costs.<sup>64</sup>

(6) The comparison between these two French judgments on the one hand and the award of the Commission of Arbitration for the *Ambatielos* Case on the other reveals that while the *ejusdem generis* rule is recognized by all, there is a large difference between the liberal construction of the Arbitration Commission and the strict interpretation of the French courts. This leads to the question whether in the process of codification of the *ejusdem generis* rule there should not be an effort

made to propose a more detailed regulation, particularly with regard to the relation between a fairly general clause (e.g. in all matters of commerce and navigation) and a particular claim (e.g. administration of justice or *cautio judicatum solvi*). The question is provisionally answered in the negative by proposing the general rule and leaving the details to treaty interpretation. Drafters of a most-favoured-nation clause are always confronted with the dilemma of either drafting the clause in too general terms, risking thereby the loss of its effectiveness through a rigid interpretation of the *ejusdem generis* rule or drafting it too explicitly, enumerating its specific domains, in which case the risk consists in the possible incompleteness of the enumeration.

(7) The *ejusdem generis* rule is observed also in the extra-judicial practice of States as shown by the case concerning the Commercial Agreement of 25 May 1935 between the United States of America and Sweden.<sup>65</sup> Article I provided as follows:

Sweden and the United States of America will grant each other unconditional and unrestricted most-favoured-nation treatment in all matters concerning the Customs duties and subsidiary charges of every kind and in the method of levying duties, and, further, in all matters concerning the rules, formalities and charges imposed in connection with the clearing of goods through the Customs, and with respect to all laws or regulations affecting the sale or use of imported goods within the country.<sup>66</sup>

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

Since the most-favored-nation provision in the Reciprocal Trade Agreement between the United States and Sweden signed in 1935 is designed only to prevent discrimination between imports from and exports to Sweden as compared with imports from and exports to other countries, I regret that this Department would be unable to send to the New York Liquor Authority a letter such as you suggest to the effect that the Agreement accords to Swedish *nationals* the same treatment as is accorded to the nationals of other countries.

All of the countries listed in the enclosure to your letter (countries, nationals of which are held by the New York State Liquor Authority to be entitled to liquor licences) have treaties with the United States which grant either national or most-favored-nation rights as to engaging in trade to nationals of those countries. Thus existence of the trade agreements to which you refer in addition to these treaties, is irrelevant...<sup>67</sup>

(8) In the following examples the question of the application of the rule arose under extraordinary circumstances. In the case of *Nyugat-Swiss Corporation Société Anonyme Maritime et Commerciale v. State* (Kingdom of the Netherlands) the facts were as follows:

On 13 April 1941, the steamship *Nyugat* was sailing outside territorial waters of the former Dutch East Indies. She sailed under the Hungarian flag. The Netherlands destroyer *Kortenaer* stopped her, searched her and took

<sup>61</sup> M. Whiteman, *op. cit.*, pp. 755-756, quoting the decision of the French Court of Cassation, 22 December 1913, in the case of *Braunkohlen Briquet Verkaufsverein Gesellschaft c. Goffart, ès qualités*. The decision is also quoted by P. Level, *op. cit.*, p. 338, para. 38, and H. Batiffol, *op. cit.*, p. 216, No. 189.

<sup>62</sup> *British and Foreign State Papers, 1881-1882*, vol. 73 (London, Ridgway, 1889), p. 22.

<sup>63</sup> *Ibid.*, pp. 23-24.

<sup>64</sup> H. Lauterpacht, ed., *Annual Digest of Public International Law Cases 1929-30* (London), vol. 5 (1935), Case No. 252, p. 404; *Journal du droit international* (Paris), 58th year (1931), p. 1018, digested by A. D. McNair, *op. cit.*, p. 287. Other cases before French courts based on the *ejusdem generis* rule are cited by A.-Ch. Kiss, "La convention européenne d'établissement et la clause de la nation la plus favorisée", *Annuaire français de droit international*, 1957 (Paris), vol. III, p. 478; cases before American courts by G. H. Hackworth, *op. cit.*, pp. 292-293.

<sup>65</sup> League of Nations, *Treaty Series*, vol. CLXI, p. 109.

<sup>66</sup> *Ibid.*, p. 111.

<sup>67</sup> Legal Adviser Fisher, Department of State, 3 November 1949, MS. Department of State, quoted by M. Whiteman, *op. cit.*, p. 760.

her into Surabaya, where she was sunk in 1942. The plaintiffs claimed that the action taken with regard to the *Nyugat* was illegal. The vessel was Swiss property. She had formerly belonged to a Hungarian company, but the Swiss corporation became the ship's owner in 1941, when it already held all shares in the Hungarian company. The Hungarian flag was a neutral flag. Defendant relied upon the fact that on 9 April 1941, diplomatic relations between the Netherlands and Hungary were severed, that on 11 April 1941, Hungary, as an ally of Germany, attacked Yugoslavia and that consequently on the basis of certain relevant Dutch decrees the capture of the ship was legal. Plaintiffs contended that these decrees were in conflict with the Treaty of Friendship, Establishment and Commerce, concluded with Switzerland at Berne on 19 August 1875<sup>68</sup> and with the Treaty of Commerce, concluded with Hungary on 9 December 1924,<sup>69</sup> and notably the most-favoured-nation clause contained in these treaties. Plaintiffs referred to the Treaty of Friendship, Navigation and Commerce signed on 1 May 1829, with the Republic of Colombia, providing that "if at any time unfortunately a rupture of the ties of friendship should take place" the subjects of the one party residing in the territory of the other party "will enjoy the privilege of residing there and of continuing their business . . . as long as they behave peacefully and do not violate the laws; their property . . . will not be subject to seizure and attachment."<sup>70</sup> The Court held:

The invoking of this provision fails, since it is unacceptable that a rupture of friendly relations, as understood in the year 1829, can be assimilated to a severance of diplomatic relations as it occurred during the Second World War; in the present case the determination of the flag was also based upon the assumption by Hungary of an attitude contrary to the interests of the Kingdom by collaborating in the German attack against Yugoslavia. This case surely does not fit in the provisions of the 1829 Treaty. From the preceding it follows that shipowners are wrong in their opinion that the Court should not apply the Decrees as being contrary to international provisions.<sup>71</sup>

(9) The Italian-Swiss Permanent Conciliation Commission, provided for in the Treaty of Conciliation and Judicial Settlement between Italy and Switzerland concluded in 1924,<sup>72</sup> was seized of a dispute between the two parties concerning the application to Swiss nationals of a certain Italian special capital levy duty.

The Swiss Government contended that this special levy should not apply to the property of Swiss nationals. Their contention was based on the most-favoured-nation clause in article 5 of the Italian-Swiss Establishment and Consular Convention of 22 July 1868, which, it was argued, operated to oblige Italy to exempt from the special levy those Swiss nationals who belonged to the same categories as the nationals of the United Nations

who were exempt from the levy by virtue of article 78, paragraph 6, of the 1947 Treaty of Peace with Italy.<sup>73</sup>

The relevant part of the text of article V of the 1868 treaty is as follows:

In time of peace as in time of war, there may not, in any circumstances, be imposed or exacted on the property of a national of one of the two States in the territory of the other, taxes, dues, contributions or charges, other than or heavier than shall be imposed or exacted on the same property if it belonged to a national of the State or to a national of the most favoured nation. It is further agreed that there will not be collected or demanded from a national of one of the two States who is in the territory of the other, any tax whatsoever, other than or heavier than those which may be imposed or levied on a national of the State or of the most favoured nation.<sup>74</sup>

The Italian Government maintained that this most-favoured-nation clause which, it is to be noted contains also a national treatment pledge, could not be invoked in this way. They based their argument on the common intention of the Parties at the time of the conclusion of the Establishment Convention of 1868, alleging that they contemplated the regulation of normal peaceful relations and did not intend the most-favoured-nation clause to apply to circumstances of war and the peace treaties that followed. It was also submitted that a peace treaty fell into a special category and resembled an imposed settlement rather than a contractual agreement.

The Commission held, on 9 October 1956, that the Swiss claim must be rejected. Excerpts from its opinion are as follows:

. . . From the fact that the conditions of the Peace Treaty were imposed on Italy, and from the fact that the determination of the conditions was not made the object of free negotiations between the Parties to the Treaty, it has been deduced [by the Italian Party] that the exemption of the nationals of the Allied Powers rests upon mere unilateral decisions of these Powers. Therefore, it has been alleged on the Italian side, the non-contractual advantage which arose for these nationals should be considered as outside the scope of the most-favoured-nation clause. The Commission does not share this opinion. Although it may have been motivated by compulsion, the will of the defeated State nevertheless enters into a Treaty of Peace, into each and every one of the clauses which it contains. If it were not so, then the very character of a treaty would have to be denied to any Treaty of Peace bringing to an end a victorious war.

. . .

In order to extend the operation of the most-favoured-nation clause to the provisions of article 78, paragraph 6, of the Paris Peace Treaty of February 10, 1947, the absolute form of Article 5 of the Establishment Convention of July 22, 1868, has been relied upon: [by the Swiss Party] "in time of peace as in time of war, there may not, in any circumstances . . .". It is recognized that the first formula ("in time of peace as in time of war") has a purely temporal meaning. The second ("in any circumstances") cannot itself attribute an extravagant function to the clause and one which would be in contradiction to its well known role in international life, which is the role of ensuring equality of treatment to the nationals of different States in normal legal relations. Now, the extension claimed here on the basis of the most-favoured-nation clause would have the effect of extending the exceptional inequality provided for by Article 78 of the Treaty of February 10, 1947.

. . .

<sup>68</sup> Netherlands, *Staatsblad van het Koninkrijk der Nederlanden*, No. 137, 1878, Decree of 19 September 1878.

<sup>69</sup> *Ibid.*, No. 36, 1926, Decree of 3 March 1926.

<sup>70</sup> *British and Foreign State Papers, 1829-1830* (London, Ridgway, 1832), p. 902.

<sup>71</sup> Judgement of 6 March 1959 by the Supreme Court of the Netherlands (*Nederlandse Jurisprudentie 1962*, No. 2, pp. 18-19) (original text: Dutch).

<sup>72</sup> League of Nations, *Treaty Series*, vol. XXXIII, p. 91.

<sup>73</sup> For reference, see above, note 17.

<sup>74</sup> Quoted in E. Lauterpacht, ed., *International Law Reports (1958-1)* (London), vol. 25 (1963), pp. 316-317.

... The relations which gave rise to the Treaty of February 10, 1947, between Italy and the Allied Powers were the relations of belligerency and post-belligerency, of conqueror and conquered, and which alone could serve to justify the exemption from the special tax on capital contained in Article 78, paragraph 6, of this Peace Treaty. The absence of similar relations between Italy and Switzerland excludes the operation of the most-favoured-nation clause for the benefit of the latter.

...  
It is equally of little relevance that the clause of Article 5 of the Italian-Swiss Establishment Convention of 1868 is aimed at substantially the same taxes and, duties as those from which Article 78, paragraph 6, of the Peace Treaty of February 10, 1947, has provided exemption in favour of nationals of the Allied Nations. Similar identity would indeed allow Switzerland to invoke the benefit of the clause if the exemption from similar fiscal dues granted by Italy for the benefit of nationals of third States tended to favour economic relations of the same kind as those which exist between Switzerland and Italy.<sup>75</sup>

The Commission which had "endeavoured to arrive at an equitable settlement of the dispute", while rejecting the Swiss claim based on the most-favoured-nation clause, found that Switzerland was entitled to national treatment under the terms of the clause of the 1868 Treaty, quoted above. In this way, it seems that the claimant Swiss Government has very nearly reached its original goal; although the Swiss corporations were not exempted completely from the special levy in question, they gained treatment equal to that enjoyed by the Italian corporations bearing a tax varying from 2 per cent to 4 per cent, instead of being assimilated to other foreign corporations subjected to a levy on a maximum rate of 15 per cent of the total amount of their capital invested in Italy. It was against this background that Switzerland accepted the proposal of the Conciliation Commission and agreed to the settlement of the dispute. It is to be noted also that according to the treaty on the basis of which the Conciliation Commission proceeded

The task of the Permanent Conciliation Commission shall be to further the settlement of disputes by an impartial and conscientious examination of the facts and by formulating proposals with a view to settling the case.<sup>76</sup>

and

... The Commission's report shall not be in the nature of an arbitral award, as regards either the statement of facts or the legal considerations.<sup>77</sup>

(10) According to McNair, "some authority exists" for the view that rights and privileges obtained in the course of a territorial and political arrangement or a peace treaty "cannot be claimed under a most-favoured-nation clause." "The reason", he believes, "presumably is that such concessions are not commercial, while most-favoured-nation clauses are usually concerned with trade and commerce."<sup>78</sup> He quotes an opinion of a law officer

<sup>75</sup> Italy, Ministry of Foreign Affairs, *Atti Relativi alla Vertenza per l'Applicazione ai Cittadini Svizzeri dell'Imposta Straordinaria Italiana sul Patrimonio* (Rome, 1960), quoted in E. Lauterpacht, ed. *International Law Reports*, vol. 25 (*op. cit.*), pp. 313 *et seq.*

<sup>76</sup> Treaty of Conciliation and Judicial Settlement between Italy and Switzerland, signed at Rome on 20 September 1924, article 5. (League of Nations, *Treaty Series*, vol. XXXIII, p. 93.)

<sup>77</sup> *Ibid.*, article 12, p. 97.

<sup>78</sup> A. D. McNair, *op. cit.*, p. 302.

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

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

I consider that these privileges were conceded to France and the United States of America as part of a Territorial and Political Arrangement *extorted* from Great Britain at the termination of a War which had been successfully carried on against her by those Nations.<sup>79</sup>

(11) There is no writer who would deny the validity of the *ejusdem generis* rule which derives from the very nature of the most-favoured-nation clause. It is generally admitted that a clause conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can only attract the rights conferred by other treaties (or unilateral acts) in regard to the same matter or class of matter.<sup>80</sup>

(12) The effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another. Unless this process is strictly confined to cases where there is a substantial identity between the subject-matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting State obligations it never contemplated.<sup>81</sup> Thus the rule follows clearly from the principle of sovereignty and independence of States. They cannot be regarded as being bound beyond the obligations they have expressly undertaken.

(13) Recently a quite novel theory has been developed by a distinguished judge of the Court of Justice of the European Communities, Mr. Pierre Pescatore, in the course of his studies undertaken for the Institute of International Law. His reasoning runs as follows:

The *ejusdem generis* rule was originally developed to express the requirement that the subjects of the advantages to be granted under the clause should be identical or at least similar. The rule is expressed in this way in the provisions of the General Agreement on Tariffs and Trade, article I of which provides that tariff reductions shall be granted to "the like product".

But this requirement does not stop there. The similitude must also exist with regard to *the nature* of the measure whose extension is claimed in application of the clause and even with regard to *the legal context* of that measure, in other words, framework within which it occurs.

Hence, as we have explained above, a State cannot, by virtue of the clause—whose purpose is to ensure the most favourable treatment granted to aliens—claim the benefit of the treatment granted

<sup>79</sup> *Ibid.*, p. 303 (italics supplied by the Special Rapporteur).

<sup>80</sup> See *Yearbook* . . . 1970, vol. II, p. 210, document A/CN.4/228 and Add.1, para. 68.

<sup>81</sup> *Ibid.*, p. 211, document A/CN.4/228 and Add.1, para. 72.

to nationals. As we have already said, the national treatment clause is essentially different in scope from the most-favoured-nation clause; it is thus not *ejusdem generis* in relation to the latter and its benefits cannot therefore be acquired through the m.f.n.c.

As for the "legal context", reference was made in paragraph 133 of the provisional report to an example drawn from arbitral practice [this is the case dealt with by the Swiss-Italian Conciliation Commission] which shows that the most-favoured-nation clause inserted in an establishment treaty cannot ensure the enjoyment of advantages granted under a treaty of a quite different kind, namely a peace treaty. What is involved here is not the intrinsic nature of the clause, but rather the legal context: the benefit of the clause cannot be wider in scope than the subject of the treaty in which it is inserted. Now, to confine ourselves to the example mentioned, the purpose of a peace treaty is very different from that of an establishment treaty. The argument has been transposed to the question of the effect of the m.f.n.c., embodied in a commercial treaty, with regard to advantages granted within the context of an economic integration system. In the Rapporteur's view, there is no common measure between a treaty designed simply to facilitate international trade and the much more ambitious and fundamental objective of a treaty designed to bring about economic integration in the form of a free-trade area, a customs union or an economic union. It has thus been concluded that the "commercial" m.f.n.c. has no effect with regard to advantages granted within the framework of an integration system.

The primordial importance of the *ejusdem generis* rule for both the State granting the m.f.n.c. and for the beneficiary States thus becomes clear. It is in fact this rule which indicates to the former the extent of its commitments and to the latter the limits of the claims they may legitimately submit.

To sum up, we may say that the clause has no effect unless three conditions are met with regard to the advantage claimed under it:

The subject must be identical or at least similar;

The nature of the standard of reference envisaged under the clause and of the advantage granted must be the same; and lastly

The legal context of the clause and the framework within which the advantage is claimed must be the same.

A more detailed statement of the *ejusdem generis* rule will probably make it possible to define the scope of the clause more exactly and thus settle a number of differences of opinion which have arisen concerning its effect.<sup>82</sup>

(14) The Special Rapporteur is unable to subscribe to this view. It is sustained neither by theory nor by practice. It is built upon one single precedent (the Swiss-Italian case, to which the Special Rapporteur adds the Portuguese-English case) and it constitutes an undue generalization from two isolated instances. The conclusions of the Conciliation Commission and those of Pescatore are rightly criticized by Sauvignon in the following way:

The drawback of the reasoning of the Commission and the Rapporteur of the Institute of International Law is that it has the result of transforming an unconditional clause into a conditional clause: the clause will not become operative unless the most favourable treatment is of a certain kind, and the relationship between the granting State and the third State and the granting State and the beneficiary State are identical or equivalent, which may, moreover, be very difficult to determine.<sup>83</sup>

The same writer concludes that:

... in the case considered by the Commission the legal solution seems to lie in the reference to a custom eliminating conventions of a political nature from the field of application of the clause.<sup>84</sup>

This conclusion is, however not sustained by anything but a reference to the Portuguese-English case and to the remark of McNair, quoted above.<sup>85</sup> Two cases obviously do not prove the existence of a binding custom. Still, what are the conclusions which could be drawn from these cases? If we accept the rule stated in article 5 that the source of the rights of the beneficiary (and of the corresponding obligations of the granting State) is the treaty containing the clause then it is there that we have to search for a solution to the Italian-Swiss case. The clause contains the promise of the granting State to accord to the beneficiary State the same treatment it accords (of its free will, of course) to any other State. It promises not to discriminate as between States to the detriment of the beneficiary of the clause. The Swiss claim, however, aimed at the extension of the most-favoured-nation promise to treatment which the granting State was obliged to accord on the basis of a Peace Treaty which, in the words of the law officer of 1851, was extorted by other States. The Italian party referred in its contentions to the fact that the Peace Treaty was imposed on Italy. The Conciliation Commission rejected this argument. "Although it may have been motivated by compulsion",<sup>86</sup> the Commission stated, the Peace Treaty is a treaty concluded also on the will of the defendant State (*jamenetsi coactus voluit, attamen voluit*). It is perfectly true that the 1947 Peace Treaty is a binding treaty—with an element of compulsion in it. That element is not enough to invalidate the Treaty, but it is the factor which prevents the favours it grants to the Allies from being granted to Switzerland. The most-favoured-nation pledge promised Switzerland equality of treatment in the field of application of the clause wherever the granting State was free to distribute its favours on its own consideration of policy among its State partners. The members of the Conciliation Commission found, however—on the basis of equity—that the pledge should not extend to favours accorded under the said special circumstances where the grant of Italy was based upon a treaty—a treaty tinged with an element of compulsion. The Italian-Swiss Permanent Conciliation Commission's ruling, if it were not an isolated case supported by one single other instance, could perhaps permit the inference that a most-favoured-nation clause ordinarily does not attract advantages stipulated in a peace treaty. To make the generalization, however, that for the operation of a most-favoured-nation clause not only the subject-matter but also the relation between the granting State and the beneficiary, and the granting State and the third State, must be similar or identical, is not, it is submitted, an *approfondissement* of the *ejusdem generis* rule, but a stretching of it beyond acceptable limits.

<sup>84</sup> *Ibid.*

<sup>85</sup> See above, para. 10 of this commentary.

<sup>86</sup> E. Lauterpacht, ed., *International Law Reports*, vol. 25 (*op. cit.*), p. 317.

<sup>82</sup> P. Pescatore, *loc. cit.*, pp. 207-209.

<sup>83</sup> E. Sauvignon, *op. cit.*, pp. 73-74.

(15) The essence of the rule is that the beneficiary of a most-favoured-nation clause cannot claim from the granting State advantages of a kind other than that stipulated in the clause. Bluntly, if the most-favoured-nation clause promises most-favoured-nation treatment solely for fish, such treatment cannot be claimed under the same clause for meat.<sup>87</sup> The granting State cannot evade its obligations, unless an express reservation so provides, on the ground that the relations between itself and the third country are friendlier or “not similar” to those existing between it and the beneficiary (as in the *dictum* of the Swiss-Italian Conciliation Commission). It is only the subject matter of the clause which must belong to the same category, the *idem genus*, and not the *relation* between the granting State and the third State on the one hand and the relation between the granting State and the beneficiary State on the other. It is also not proper to say that the *treaty* including the clause must be of the same category (*ejusdem generis*) as that of the benefits which are claimed under the clause.<sup>88</sup> To hold otherwise would seriously diminish the value of a most-favoured-nation clause.

(16) The question of the effect of most-favoured-nation clauses on advantages accorded by multilateral treaties (*inter alia* “treaties of integration”) and on advantages granted as “national treatment”, topics touched in Mr. Pescatore’s quoted passage<sup>89</sup> will be discussed later.

#### *Article 8. Acquired rights of the beneficiary State*

**An agreement between the granting State and one or more third States confining certain benefits to their mutual relations does not affect the rights of the beneficiary State against the granting State under a most-favoured-nation clause unless the beneficiary State expressly consents to the restriction of its right in writing.**

#### COMMENTARY

(1) If State A grants most-favoured-nation treatment to State B (and, in case of a multilateral treaty, also to States B1, B2, B3 . . . Bx), it is obliged to extend to State B (B1, B2, B3 . . . Bx) all favours it accords to any other State: to State C in a bilateral agreement (or to States C1, C2, C3 . . . Cx) in a multilateral agreement.

<sup>87</sup> In connexion with the problem of “like products”, see the relevant passage in the excerpts from the conclusions of the Economic Committee of the League of Nations in regard to the most-favoured-nation clause annexed to the Special Rapporteur’s first report (*Yearbook . . . 1969*, vol. II, p. 178, document A/CN.4/213, annex I); and articles I, II and XIII of the General Agreement on Tariffs and Trade (United Nations, *Treaty Series*, vol. 55, pp. 196-200, 204-208 and 234-238; *ibid.*, vol. 62, pp. 82-86 and 90; *ibid.*, vol. 138, p. 336). Notable efforts are being made to facilitate the identification and comparison of products by setting up uniform standards for the purpose—these efforts include the Brussels Convention of 15 December 1950 establishing a Customs Co-operation Council (*ibid.*, vol. 157, p. 129) and the Convention on the Nomenclature for the Classification of Goods in Customs Tariffs of 15 December 1950 (*ibid.*, vol. 347, p. 127).

<sup>88</sup> D. Vignes, *op. cit.*, p. 282.

<sup>89</sup> See above, para. 13 of this commentary.

Should States A and C (C1, C2, C3 . . . Cx) agree to accord each other special benefits but withhold the same from others, such agreement cannot affect the right of B (B1, B2, B3 . . . Bx) to claim from A the favours granted to C (C1, C2, C3 . . . Cx).

(2) The rule clearly follows from the general rule regarding third States of the Vienna Convention on the Law of Treaties<sup>90</sup> (articles 34-35) and also from the nature of the most-favoured-nation clause itself. The statement of the rule is, however, warranted by the fact that there exist a number of agreements aiming more or less clearly at a result of the kind referred to in the article, notwithstanding the doubts about the effect of such agreements upon the right of third States, beneficiaries of a most-favoured-nation clause. Such agreements can take the form of treaty provisions (“*clauses réservées*” in French) or they may purportedly be implied in certain multilateral treaties.

(3) The rule proposed in the article applies to most-favoured-nation clauses irrespective of whether they belong to the unconditional type or take the form of a clause conditional upon material reciprocity.<sup>91</sup> The rule was formulated in paragraph 2 of the resolution adopted by the Institute of International Law at its fortieth session, in 1936, as follows:

This régime of unconditional equality [established by the operation of an unconditional most-favoured-nation clause] cannot be affected by the contrary provisions of . . . conventions establishing relations with third States.<sup>92</sup>

#### (a) *The “clause réservée”*

(4) In the League of Nations Economic Committee there was a discussion of the question, originally raised at the Diplomatic Conference held at Geneva to draw up an International Convention on the Abolition of Import and Export Prohibitions and Restrictions, whether States not parties to the proposed Convention could, by virtue of bilateral agreements based on the most-favoured-nation clause, claim the benefit of any advantages mutually conceded by the signatories of the International Convention. At the Conference

it was soon realized, however, that this question could not be answered in the Convention, which could not affect the contents of bilateral agreements based on the most-favoured-nation clause.

In the Economic Committee, a proposal was made to adopt a provision designed to restrict the stipulations of the Convention to the contracting parties.<sup>93</sup>

(5) The first paragraph of article 6 of the International Convention for the Unification of Certain Rules Relating

<sup>90</sup> *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.

<sup>91</sup> See above, article 6 and commentary.

<sup>92</sup> *Yearbook . . . 1969*, vol. II, p. 181, document A/CN.4/213, annex II.

<sup>93</sup> *Ibid.*, pp. 179-180, document A/CN.4/213, annex I, under the heading “Relations between bilateral agreements based on the most-favoured-nation clause and economic plurilateral conventions”.

to the Immunity of State-owned Vessels, signed at Brussels on 10 April 1926 reads as follows:

The provisions of this Convention shall be applied in each contracting State, with the reservation that its benefits may not be extended to non-contracting States and their nationals, and that its application may be conditioned on reciprocity.<sup>94</sup>

The following remark is made concerning this provision by Vignes:

Such a provision has the disadvantage of failing to release contracting States from their obligations under previous clauses, of having the status of *res inter alios acta* for the other States which are parties to those clauses and thus placing the States which subscribe to it in the position of being potential violators of the clause.<sup>95</sup>

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

(6) A somewhat milder version of the clause has been inserted in the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages signed at Brussels also on 10 April 1926.<sup>96</sup> Article 14 of the Convention reads as follows:

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

Nevertheless the principle formulated in the preceding paragraph does not affect the right of the contracting States not to apply the provisions of this convention in favor of the nationals of a non-contracting state.

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

Nothing in this Charter shall be interpreted to require a Member to accord to non-Member countries treatment as favourable as that which it accords to Member countries under the provisions of the Charter, and failure to accord such treatment shall not be regarded as inconsistent with the terms or the spirit of the Charter.<sup>97</sup>

The nature of this provision, which is not a "*clause réservée*" in the strictest sense of the expression, and its criticism by the representative of the Soviet Union in the Economic and Social Council, were discussed in the Special Rapporteur's second report.<sup>98</sup> The provision was not included in the General Agreement on Tariffs and Trade.

(8) The drafters of the Treaty Instituting the European Coal and Steel Community<sup>99</sup> did not adopt a "*clause réservée*"; they did include, however, an important

provision in the "Convention containing the transitional provisions" signed at Paris on 18 April 1951:

#### EXCEPTION TO THE MOST-FAVOURLED-NATION CLAUSE

##### Section 20

With regard to those countries benefiting from the most-favoured-nation clause through the application of Article 1 of the General Agreement on Tariffs and Trade, the member States shall take joint action towards the Contracting Parties to the above-mentioned Agreement in order to exempt the provisions of the present Treaty from the application of the article in question. If necessary, a special session of the Contracting Parties to the G.A.T.T. shall be requested for this purpose.

As concerns those countries which, while not parties to the General Agreement on Tariffs and Trade, nevertheless benefit from the most-favoured-nation clause by virtue of bilateral agreements in effect, negotiations shall be undertaken upon the signature of the Treaty. In the absence of consent on the part of the interested countries, such commitments shall be modified or denounced in accordance with the terms thereof.

Should a country refuse its consent to the member States or to any one of them, the other member States agree to lend effective assistance, which may even extend to denunciation by all of the member States of the agreements concluded with the country in question.<sup>100</sup>

While the provision in the third paragraph can justly be criticized from the economic or political point of view as too "radical" or "threatening",<sup>101</sup> from the strictly legal point of view it clearly demonstrates that the commitment of the granting State under a most-favoured-nation clause cannot be terminated or modified by means other than those offered by the law of treaties.

(9) The treaty establishing the European Economic Community signed at Rome on 25 March 1957 contains the following provision:

##### Article 234

The rights and obligations resulting from conventions concluded prior to the entry into force of this Treaty between one or more Member States, on the one hand, and one or more third countries, on the other hand, shall not be affected by the provisions of this Treaty.

In so far as such conventions are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate any incompatibility found to exist. Member States shall, if necessary, assist each other in order to achieve this purpose and shall, where appropriate, adopt a common attitude.

Member States shall, in the application of the conventions referred to in the first paragraph, take due account of the fact that the advantages granted under this Treaty by each Member State form an integral part of the establishment of the Community and are therefore inseparably linked with the creation of common institutions, the conferring of competences upon such institutions and the granting of the same advantages by all other Member States.<sup>102</sup>

Paragraphs 1 and 2 voice the same ideas as those included in section 20 of the Convention containing the transitional provisions to the treaty instituting the European Coal and Steel Community quoted above. Paragraph 3 is closer to a "*clause réservée*" but it avoids

<sup>94</sup> League of Nations, *Treaty Series*, vol. CLXXVI, p. 209.

<sup>95</sup> D. Vignes, *op. cit.*, p. 291.

<sup>96</sup> League of Nations, *Treaty Series*, vol. CXX, p. 209.

<sup>97</sup> *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.

<sup>98</sup> *Yearbook . . . 1970*, vol. II, p. 230, document A/CN.4/228 and Add.1, paras. 183 *et seq.*

<sup>99</sup> United Nations, *Treaty Series*, vol. 261, p. 140.

<sup>100</sup> *Ibid.*, pp. 299 and 301.

<sup>101</sup> A.-Ch. Kiss, *op. cit.*, p. 485.

<sup>102</sup> United Nations, *Treaty Series*, vol. 298, p. 91.

affecting directly the rights of outsider States. Vignes calls the provision of paragraph 3 "an explanatory and incitant provision."<sup>103</sup>

This "incitant element" is viewed more seriously by the Soviet international law textbook according to which the somewhat obscure formulation of Art. 234 cannot conceal its meaning which lies in obliging every party to the Treaty to deny third countries the extension, in accordance with previously concluded agreements, of the same privileges as are enjoyed by members of the bloc.<sup>104</sup>

The approach of a French writer, Thiébaud Flory, is different:

How can the Member States of EEC reconcile the commitments resulting for them from the signing of the Treaty of Rome with the obligations which they had assumed previously by signing multilateral agreements such as GATT? Under article 234 of the Treaty of Rome, the principle of fidelity to prior commitments should predominate. By submitting the Treaty of Rome for consideration by GATT and exhibiting a conciliatory attitude towards the contracting parties, the Six have respected that principle.<sup>105</sup>

The two views quoted last, however contradictory at first sight, are not irreconcilable. The first sees in the provision its "incitant" element, the second appreciates that in article 234, taken as a whole, the contracting parties implicitly recognize the validity of their previous pledges.

(10) The European Convention on Establishment signed at Paris on 13 December 1955 does not contain any "clause réservée" either. According to Vignes:

... when [this] Convention was drawn up ... [the drafters first thought] of inserting an express provision excluding non-signatories of the Convention from its benefits, but that idea was discarded because such a provision would have been *res inter alios acta*. The drafters then confined themselves to inserting in the preamble of the Convention a declaratory sentence stating (and seeking to convince non-Member States of the fact) that the advantages to be granted to each other by the signatories of the Convention were conceded solely by virtue of the closeness of their association.

However, it appears that even the signatories of the Convention were not convinced of the merits of their method and that certain delays in ratifying the Convention were due to a desire to ensure that third States would not claim its benefits.<sup>106</sup>

The text of the Preamble, which is relevant in this connexion, reads as follows:

The Governments signatory hereto, being Members of the Council of Europe,

Considering that the aim of the Council of Europe is to safeguard and to realise the ideals and principles which are the common heritage of its Members and to facilitate their economic and social progress;

Recognising the special character of the links between the member countries of the Council of Europe as affirmed in conventions and agreements already concluded within the framework of the Council ...;

<sup>103</sup> D. Vignes, *op. cit.*, p. 293.

<sup>104</sup> State Institute of Law of the Soviet Academy of Sciences, *Kurs* ... (*op. cit.*), p. 269.

<sup>105</sup> T. Flory, *Le GATT, droit international et commerce mondial* (Paris, Librairie générale de droit et de jurisprudence, 1968), p. 124.

<sup>106</sup> D. Vignes, *op. cit.*, pp. 283-284; see also A. Ch. Kiss, *op. cit.*, pp. 478-484.

Being convinced that, by the conclusion of a regional convention, the establishment of common rules for the treatment accorded to nationals of each Member State in the territory of the others may further the achievement of greater unity;

Affirming that the rights and privileges which they grant to each others' nationals are conceded solely by virtue of the close association uniting the member countries of the Council of Europe by means of its Statute;

Noting that the general plan of the Convention fits into the framework of the organisation of the Council of Europe,

Have agreed as follows: ...<sup>107</sup>

(11) An inverted *clause réservée*, i.e. a clause expressly allowing the granting of the benefits of the multilateral treaty to outsiders can be found in article III of the Agreement of 15 July 1949 for facilitating the international circulation of visual and auditory materials of an educational, scientific, and cultural character:

...

4. Nothing in this Agreement shall require any contracting State to deny the treatment provided for in this article to like material of an educational, scientific, or cultural character originating in any State not a party to this Agreement in any case in which the denial of such treatment would be contrary to an international obligation or to the commercial policy of such contracting State.<sup>108</sup>

(12) The Convention on Transit Trade of Land-Locked States of 8 July 1965 contains the following provision (article 10) on the relation to the most-favoured-nation clause:

1. The Contracting States agree that the facilities and special rights accorded by this Convention to land-locked States in view of their special geographical position are excluded from the operation of the most-favoured-nation clause. A land-locked State which is not a Party to this Convention may claim the facilities and special rights accorded to land-locked States under this Convention only on the basis of the most-favoured-nation clause of a treaty between that land-locked State and the Contracting State granting such facilities and special rights.

2. If a Contracting State grants to a land-locked State facilities or special rights greater than those provided for in this Convention, such facilities or special rights may be limited to that land-locked State, except in so far as the withholding of such greater facilities or special rights from any other land-locked State contravenes the most-favoured-nation provision of a treaty between such other land-locked State and the Contracting State granting such facilities or special rights.<sup>109</sup>

The preamble of the 1965 Convention reaffirms principle VII relating to transit trade of land-locked countries adopted by the United Nations Conference on Trade and Development:

The facilities and special rights accorded to land-locked countries in view of their special geographical position are excluded from the operation of the most-favoured-nation clause.<sup>110</sup>

This principle stems from a proposal for an article on exclusion of the application of the most-favoured-nation clause included in a set of draft articles on access to the sea of land-locked countries submitted by Czecho-

<sup>107</sup> United Nations, *Treaty Series*, vol. 529, pp. 142 and 144.

<sup>108</sup> *Ibid.*, vol. 197, p. 6.

<sup>109</sup> *Ibid.*, vol. 597, p. 42.

<sup>110</sup> *Ibid.*, p. 46.



slovakia to the Preliminary Conference of Land-locked States in February 1958. The proposal was explained as follows:

The fundamental right of a land-locked State to free access to the sea, derived from the principle of the freedom of the high seas, constitutes a special right of such a State, based on its natural geographical position. It is natural that this fundamental right belonging only to a land-locked State cannot be claimed, in view of its nature, by any third State by virtue of the most-favoured-nation clause. The exclusion from the effects of the most-favoured-nation clause of agreements concluded between land-locked States and countries of transit on the conditions of transit is fully warranted by the fact that such agreements are derived precisely from the said fundamental right.<sup>111</sup>

It was this principle VII on which the drafters of the Convention relied and article 10 is seemingly nothing else but the translation of the principle into practical measures. Hence the question of the validity of article 10 vis-à-vis States not parties to the Convention turns on the nature of the "principle" on which it relies. Is it a principle derived from existing positive law or a principle derived from a conceptual postulate? Does the consensus expressed in UNCTAD suffice to establish the principle as customary law or is the principle no more than an inchoate rule of law, "a 'stage' in the progressive development and codification of the principles of international law", which needs to be made concrete in the practice of individual States before it can acquire the character of a fully fledged rule of international law?<sup>112</sup>

(13) There is no authority expressly denying the rule proposed in article 8.

... The validity of the "clause réservée" is difficult to assess. Since the "clause réservée" is *res inter alios acta* as far as the beneficiary State entitled to claim most-favoured-nation treatment is concerned, it is hard to see how that clause, to which the State in question has not acceded, can reduce the scope of the commitments assumed towards it by the granting State.<sup>113</sup>

The same writer tries to distinguish between two situations:

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

after the most-favoured-nation clauses, the granting State, which has not attached to the latter clauses any accompanying provision limiting their scope, cannot, *a posteriori*, avoid their application by virtue of a commitment entered into with the favoured State to which the granting State has not been a party...<sup>114</sup>

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

... We know the solution... given by the International Court of Justice [in the *Anglo-Iranian Oil Co. case*]. The legal basis for most-favoured-nation treatment lies in the treaty which provides for such treatment, and the advantages accorded to the third State apply to the beneficiary State only by reference. Consequently, the "clause réservée" cannot be invoked against the State which is a beneficiary of the most-favoured-nation clause, since the rights of that State do not derive from the treaty containing the "clause réservée"...<sup>115</sup>

#### (b) *Multilateral treaties*

(14) It seems to follow from the foregoing that a *clause réservée*, i.e. a treaty stipulation whereby a granting State and one or more "third States" expressly exclude the operation of a most-favoured-nation clause, does not affect the treaty rights of the State beneficiary of that clause. Hence, treaty relations between the granting State and third States without an express stipulation in the sense mentioned can even less affect the rights of the beneficiary State. Still there is a certain amount of controversy concerning the question whether, in a defined sphere of relations between States, certain types of agreement should be excepted from the operation of the most-favoured-nation clause. Here we come to the topic of "Plurilateral treaties", and the reader is referred to the Special Rapporteur's first report, an annex to which gives a brief summary of a digested report prepared by the League of Nations Secretariat in 1933.<sup>116</sup> The matter was briefly raised in the course of the Commission's deliberations<sup>117</sup> and therefore the presentation of a somewhat more detailed background material would seem to be appropriate in order to elucidate the question. Without dealing with the antecedents,<sup>118</sup> it will be recalled that the question of plurilateral agreements played a prominent role in the 1933 World Monetary and Economic Conference. A Preparatory Commission of Experts prepared for the Conference a draft annotated agenda, the relevant section of which reads as follows:

A suggestion which has been strongly pressed in various quarters is that States should admit an exception to the most-favoured-nation clause whereby advantages derived from plurilateral agreements should be limited to the contracting States and to such States

<sup>114</sup> *Ibid.*, para. 21 (original text: French).

<sup>115</sup> *Ibid.*

<sup>116</sup> *Yearbook*... 1969, vol. II, pp. 179-180, document A/CN.4/213, annex I, section on relations between bilateral agreements based on the most-favoured-nation clause and economic plurilateral conventions.

<sup>117</sup> See *Yearbook*... 1968, vol. I, p. 186, 976th meeting, para. 11.

<sup>118</sup> See J. Viner, *The Customs Union Issue* (Studies in the administration of international law and organization, No. 10; New York, Carnegie Endowment for International Peace, 1950), pp. 22 *et seq.*

<sup>111</sup> *Official Records of the United Nations Conference on the Law of the Sea*, vol. VII, Fifth Committee (*Question of Free Access to the Sea of Land-locked Countries*) (United Nations publication, Sales No. 58.V.4, vol. VII), p. 77, document A/CONF.13/C.5/L.1, annex 6, commentary to article 8. See also the report of the Working Party to the Fifth Committee (*ibid.*, p. 84, document A/CONF.13/C.5/L.16, para. 13).

<sup>112</sup> See M. Virally, "Le rôle des 'principes' dans le développement du droit international" and S. Bastid, "Observations sur une 'étape' dans le développement progressif et la codification des principes du droit international", in *Faculté de droit de l'Université de Genève and Institut universitaire de hautes études internationales, Genève, Recueil d'études de droit international: en hommage à Paul Guggenheim* (Geneva, Imprimerie de la Tribune de Genève, 1968), pp. 531 and 132 (original text: French).

<sup>113</sup> P. Level, *op. cit.*, p. 336, para. 20 (original text: French).



as may voluntarily grant equivalent advantages. This proposal (which has already been adopted in certain bilateral treaties) should certainly be most carefully studied. It has been argued, in support of this proposal, that, in the absence of an exception of this kind, the conclusion of collective conventions would encounter insuperable difficulties, since the application of the clause would, in such circumstances, place a premium on abstention. On the other hand, it has to be borne in mind that the circumstances of various countries differ considerably, so that in many cases they could not adhere to a plurilateral agreement when they are unaware of the concrete cases to which its provisions might later be applied and of the possible consequences which its application might involve for themselves. Moreover, there would be a danger of provoking the formation of mutually opposed groups of countries, thus aggravating the very evils which it is sought to mitigate. Finally, it has been emphasized that care must be taken to avoid prejudicing the rights of third parties.

In any case, these exceptions must be subject to the conditions that agreements of this kind be open to the adhesion of all interested States and that their aim should be in harmony with the general interest. Amongst the conditions that might be considered for this purpose, mention may be made of a proviso that these agreements shall have been concluded under the auspices of the League of Nations or of organisations dependent on the League. Further, these agreements must not involve new hindrances to international trade vis-à-vis countries having most-favoured-nation rights. Finally, "collective agreements" can only be regarded as such when they comply with certain conditions to be determined, as to the number of the participating States.

The Conference should endeavour to find a solution for the whole of this question which will reconcile the interests of all.<sup>119</sup>

(15) In the era preceding the 1933 Conference, proposals for reaching agreement as to preferred status for collective arrangements came from Europe and were intended in some form or another to cope with American competition in foreign trade on the European market.<sup>120</sup> Such proposals met with strong opposition from the United States. The situation changed somewhat at the 1933 Conference, where the United States Secretary of State Mr. Cordell Hull, outlined the conditions under which the United States would be willing to accept the exception of multilateral arrangements from most-favoured-nation commitments.

The provision proposed by Mr. Hull for adoption by the Conference read as follows:

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

"(a) Include a trade area of substantial size;

"(b) Call for reductions that are made by uniform percentages of all tariff rates or by some other formula of equally broad applicability;

"(c) Are open to the accession of all countries;

"(d) Give the benefit of the reductions to all countries which in fact make the concessions stipulated and;

<sup>119</sup> League of Nations, Monetary and Economic Conference, *Draft Annotated Agenda Submitted by the Preparatory Commission of Experts*, document C.48.M.18.1933.II [Conf.M.E.I]. (Ser. L.o.N.P. 1933. II. Spec. 1).

<sup>120</sup> See details in J. Viner, *op. cit.*, pp. 22 *et seq.*

"(e) When the countries party to the plurilateral agreement do not, during the term of the plurilateral treaty, materially increase trade barriers against imports from countries outside of such agreement."<sup>121</sup>

The London Conference, however, "... was not only fated to be an addition to the already long list of abortive international economic conferences but, as the result of President Roosevelt's famous message blasting the currency stabilization proposals before the Conference, it was destined to collapse without even the standard amount of pretense that it had succeeded in accomplishing anything of consequence."<sup>122</sup> Later in 1933, at the Seventh International Conference of American States, held at Montevideo, Secretary Hull submitted and obtained the adoption in principle of a draft agreement having much in common with the proposal he had submitted to the London Conference.

(16) The United States proposal led to the opening for signature on 15 July 1934 of an Agreement concerning non-application of the most-favoured-nation clause to certain multilateral economic conventions.<sup>123</sup> The substantive provisions of the Agreement provide:

#### Article I

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

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

#### Article II

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

Notwithstanding the statement of Secretary Hull quoted in the Commission,<sup>124</sup> this Agreement can hardly be interpreted otherwise than as an expression of the view that a most-favoured pledge, unless otherwise provided, extends the benefits granted under a multilateral agreement. (It seems that the position taken by the United States at the time is similarly interpreted by

<sup>121</sup> League of Nations, Monetary and Economic Conference, *Reports Approved by the Conference on July 27th, 1933, and Resolutions Adopted by the Bureau and the Executive Committee*, document C.435.M.220.1933.II [Conf. M.E.22(1)], p. 43.

<sup>122</sup> J. Viner, *op. cit.*, p. 36.

<sup>123</sup> Agreement between the United States of America, Economic Union of Belgium and Luxembourg, Colombia, Cuba, Greece, Guatemala, Nicaragua and Panama to refrain from invoking the Obligations of the Most-favoured-nation clause for the purpose of obtaining the Advantages or Benefits established by Certain Economic Multilateral Conventions (League of Nations, *Treaty Series*, vol. CLXV, p. 9).

<sup>124</sup> For reference, see foot-note 117.

Whiteman.<sup>125</sup>) The intention of the Agreement obviously was to create by common consent a conventional and if possible widely accepted, exception to the general rule. The experiment failed because only three States (and not two as indicated in the first report<sup>126</sup>) became parties to the Agreement: Cuba, Greece and the United States. Little significance can be attributed to the fact that when signing the Agreement, *ad referendum*, the Belgian Ambassador took the attitude that it did not constitute a new rule but merely stated that which was already international law.<sup>127</sup> What the Belgian Ambassador considered settled law in 1935 was put forward by the Belgian Premier in 1938 as a proposal. M. van Zeeland in his report submitted upon the request of the British and French Governments recommended that

Exceptions to M.F.N. to be admitted in order to allow the formation of group agreements aimed at lowering tariff barriers, provided these are open to the accession of other States.<sup>128</sup>

The idea that the most-favoured-nation clause should not attract benefits resulting from provisions of multilateral trade conventions open for all States found its way into the resolution adopted by the Institute of International Law at its fortieth session (Brussels, 1936).<sup>129</sup>

(17) In the field of theory it was a Japanese writer who proposed that a distinction be made in the field of international trade and customs tariffs between "collective treaties of special interest" and "collective treaties of general interest".<sup>130</sup> Most-favoured-nation clauses embodied in bilateral treaties would attract the benefits stipulated in the former but would not give the right to advantages promised in treaties of the latter types because, the argument went, these treaties being open to all States their advantages can be easily acquired by accession. In this way acceding States assume also the obligations imposed by the treaty and put themselves in a position of equality with the other parties to it, whereas through the operation of a most-favoured-nation clause they would claim only the advantages of the multilateral treaty without submitting to its obligations.<sup>131</sup>

Ito's theory received scathing criticism from E. Allix. Referring to the argument based on the openness of the multilateral treaties in question he wrote:

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

<sup>125</sup> *Op. cit.*, p. 765.

<sup>126</sup> *Yearbook . . . 1969*, vol. II, p. 175, document A/CN.4/213, para. 105.

<sup>127</sup> G. H. Hackworth, *op cit.*, p. 293.

<sup>128</sup> League of Nations, *Commercial Policy in the Interwar Period: International Proposals and National Policies* (Ser. L.o.N.P. 1942. II. A.6), p. 84.

<sup>129</sup> See para. 7 of the resolution (*Yearbook . . . 1969*, vol. II, pp. 180-181, document A/CN.4/213, annex II).

<sup>130</sup> N. Ito, *La clause de la nation la plus favorisée* (Paris, Les Editions internationales, 1930).

<sup>131</sup> Similarly: G. Scelle, *Précis de droit des gens: Principes et systématique* (Paris, Sirey, 1934), vol. II, p. 390.

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

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

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

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

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

We are thus led to conclude that the most-favoured-nation clause is indeed an obstacle to the negotiation of plurilateral treaties and that that obstacle can be removed only by an express reservation in the instrument embodying the clause or by the amicable agreement of the States beneficiaries of the clause.<sup>132</sup>

The views of Allix have received support from Rousseau, who writes:

. . . whatever the arguments in favour of the opportuneness of excluding [from the advantages of a collective treaty] the State party to the bilateral treaty, such exclusion is difficult to reconcile with the most-favoured-nation clause and clearly contradicts the guarantees of equality previously given to the State which is the beneficiary of that clause. While the ostensible purpose of such action would be to thwart the selfish designs of a State wishing to obtain tariff advantages cheaply, would it not be even more immoral to deny a co-contractor the application of a clause whose benefits it had previously been promised.<sup>133</sup>

Rousseau shares the conclusions of Allix:

It must be recognized that, from the point of view of legal technique, the latter solution [an express reservation or the amicable agreement of the States beneficiaries of the clause] was more correct, since it shows greater concern to respect the concordance of the wills of States, which is the only sound basis for positive law . . .<sup>134</sup>

<sup>132</sup> E. Allix, "Les aspects juridiques de la clause de la nation la plus favorisée", *Revue politique et parlementaire* (Paris), vol. 148, July-September 1931, pp. 231-232. (Italics supplied by the Special Rapporteur.)

<sup>133</sup> Ch. Rousseau, *Principes généraux du droit international public* (Paris, Pédone, 1944), vol. I, p. 777.

<sup>134</sup> *Ibid.*, p. 778.

(18) Practice also showed that the problem of conflict between plurilateral arrangements and most-favoured-nation obligations cannot be solved on the line of Ito's theory. Under the Convention, negotiated at Ouchy but signed at Geneva, on 18 July 1932, by Belgium, Luxembourg, and the Netherlands, the parties agreed, *inter alia*, that there should be no increases in existing duties or application of new duties on imports from each other; that existing duties on imports from each other should be reduced by 10 per cent per annum until the total reduction reached 50 per cent; that there should be no new barriers other than import duties on imports from each other; and that there should be open entry to the convention on the part of other countries and extension of its benefits to non-entering countries if they in fact carried out its terms. Belgium and the Netherlands, however, both had commercial treaties containing the most-favoured-nation clause with the United Kingdom and other countries, and the Ouchy Convention provided that it should not come into effect until such countries had waived their rights. Great Britain refused to waive its rights, the Ottawa Conference held in the same year passed a resolution declaring that regional agreements could not be allowed to override most-favoured-nation obligations and the United States made no reply to the request for a waiver. The Convention, in consequence, lapsed without ever coming into operation.<sup>135</sup> The Hague Convention of 28 May 1937 was signed by the Ouchy Convention countries plus Norway, Sweden, Denmark and Finland. The Hague Convention provided for specified "bindings" of tariff rates, and for removals of specified existing quantitative restrictions on imports from participating countries and undertakings not to introduce new ones on commodities not already subject to them. All non-participating States were declared eligible to adhere to the Convention in conformity with terms to be negotiated between them and the countries already parties thereto. The Hague Convention came into actual operation, but the Netherlands declined to renew it at the end of its first year of operation, and the other parties to it thereupon allowed it to lapse. Again the cause of the failure was that other countries, especially the United Kingdom, insisted on the most-favoured-nation right.<sup>136</sup>

(c) *GATT and non-member States*

(19) The General Agreement on Tariffs and Trade does not include a provision on the lines of article 98, paragraph 4 of the Havana Charter.<sup>137</sup> The corner-stone of the General Agreement is an unconditional most-favoured-nation clause. The agreement is open to accession by all States, at least this is how certain authors<sup>138</sup> interpret the text of article XXXIII, which reads as follows:

A government not party to this Agreement . . . may accede to this Agreement . . . on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING

PARTIES under this paragraph shall be taken by a two-thirds majority.<sup>139</sup>

What is the position of third States, not members of GATT? Can they claim under bilateral most-favoured-nation clauses GATT treatment from members? There is no reason for a negative answer to this question. That some treaties do expressly except GATT favours from the operation of the clause does not contradict but rather supports this view.<sup>140</sup>

The Working Group on organizational and functional questions of GATT considered in 1955 the question of the extension by contracting parties to non-contracting parties of the benefits of the Agreement by means of bilateral agreements. It was pointed out in the discussion that non-contracting parties frequently received all the benefits of the Agreement without having to undertake its corresponding obligations. Despite some dissatisfaction with this situation, the majority consensus was that the attitude which the contracting party wished to adopt in this respect was a matter for each contracting party to decide.<sup>141</sup> According to the Soviet textbook of international law, Austria, after its accession to the GATT, did not immediately extend GATT rates of customs duties to the Soviet Union notwithstanding the most-favoured-nation treaty in force between the two countries. The extension of such rates took place only upon the express demand of the USSR. Other Western European countries having most-favoured-nation treaties with the Soviet Union extended GATT benefits to Soviet products automatically.<sup>142</sup>

(20) In *C. Tennant, Sons and Co., of New York v. Dill*<sup>143</sup> before the District Court for the Southern District of New York the claimants invoked a trade agreement between the United States and Paraguay providing for most-favoured-nation treatment as to duties and customs formalities.<sup>144</sup> They were seeking to obtain on the ground of the clause the benefits of the "en route" exception to quota restrictions which is provided for in GATT (article XIII, paragraph 3 (b).)<sup>145</sup> This exception allows goods en route at the time of the proclamation of quota restrictions to enter the country applying the restrictions. Paraguay was not a party to GATT, and the plaintiffs relied on the grant of most-favoured-nation treatment in the bilateral agreement. The Court, in 1957, rejected the claim but only on the ground that the "most-favoured-nation" clause contained in article I of the Paraguayan trade agreement, drafted with clarity and particularity extended to customs duties and other matters, but did

<sup>139</sup> United Nations, *Treaty Series*, vol. 62, p. 34.

<sup>140</sup> E. Sauvignon, *op. cit.*, p. 267.

<sup>141</sup> GATT document L/327, quoted in K. Hyder (Hasan), *Equality of Treatment and Trade Discrimination in international Law* (The Hague, Nijhoff, 1968), p. 78, foot-note 2. See also *Yearbook . . . 1970*, vol. II, p. 230, document A/CN.4/228 and Add.1, para. 187.

<sup>142</sup> State Institute of Law of the Soviet Academy of Sciences, *Kurs . . . (op. cit.)*, p. 270.

<sup>143</sup> 158 F. Supp. 63, 67-68 (S.D.N.Y. 1957), quoted in M. Whiteman, *op. cit.*, pp. 760-762.

<sup>144</sup> Agreement of 12 September 1946, relating to reciprocal trade (United Nations, *Treaty Series*, vol. 125, p. 179).

<sup>145</sup> *Ibid.*, vol. 55, p. 238.

<sup>135</sup> J. Viner, *op. cit.*, pp. 30-31.

<sup>136</sup> *Ibid.*

<sup>137</sup> See above, para. 7.

<sup>138</sup> E. Sauvignon, *op. cit.*, p. 266.

not contain language from which its applicability to import restrictions involving the fixing of quotas could be implied:

It seems clear, therefore, that the "most-favored-nation" clause contained in the Trade Agreement with Paraguay is not sufficiently broad to entitle Paraguay, and, hence, the plaintiff, to the benefits of the en route provision of GATT.<sup>146</sup>

Thus the judgement implicitly acknowledged that the benefits of GATT (if *ejusdem generis*) can be claimed under a bilateral clause.

(d) *Other open multilateral agreements and States not parties*

(21) Before the United States became a party to the Agreement on the importation of educational, scientific and cultural materials of 22 November 1950 (Florence Agreement),<sup>147</sup> it claimed, under most-favoured-nation clauses, for United States products the same treatment as was accorded by a party to the Agreement to the products of another party. Thus, on 12 June 1963, the Department of State instructed the United States Embassy at Rome:

In view of the disadvantageous competitive position in which U.S. exports of scientific equipment have been put by the Italian Government's action, it is suggested that the Embassy take the matter up informally with the proper Italian authorities. The objective of such discussions should be to obtain duty-free treatment of such equipment if imported from the United States for sale to approved institutions. In its approach to the Italian Government, the Embassy might point out that article XIV-1 of our FCN Treaty with Italy<sup>148</sup> and article I:1 of GATT<sup>149</sup> provide for unconditional most-favored-nation treatment of U.S. products. Although such treatment is subject to specified exceptions, the Florence Agreement does not appear to fall within any of these exceptions. If Italy accords duty-free treatment under certain circumstances to scientific equipment of any other country, then it must accord the same treatment to imports of U.S. scientific equipment.<sup>150</sup>

In connexion with its presentation to Congress of proposed implementation legislation of the United States for this Agreement, the Executive prepared an affirmative reply to the question whether a country not a party to the Agreement would "be entitled under the most-favoured-nation clause to the duty-free treatment accorded by a party to the Agreement to another such party", and it was explained that "the United States considers that legally a country not a party to the agreement would be entitled to such treatment pursuant to an unconditional most-favoured-nation clause with a party thereto", although it was recognized that some parties to the agreement might give a negative answer to the question.<sup>151</sup>

In a discussion on 21 October 1957, at a Meeting of Governmental Experts on the Agreement on the Import-

ation of Educational, Scientific and Cultural Materials (held at Geneva, 21-29 October 1957), the following was reported regarding a statement by the French representative:

Mr. ROISIN (France) recalled that the provisions of paragraph 1 of Article I were applicable only to materials mentioned in Annexes A, B, C, D and E of the Agreement which were the products of another Contracting State. France, however, granted duty-free entry for such materials, irrespective of the country of origin or exportation, for it considered that, by virtue of the unconditional "most-favoured-nation" clause included in the trade agreements which it had concluded with most countries, and having regard to the obligations mentioned in Article IV, subparagraph (a), of the Agreement, no distinction as to country of origin or exportation should be made with regard to the materials concerned. The French Government wished to know whether such an interpretation was accepted by the other Contracting States.<sup>152</sup>

Article IV (a) of the Florence Agreement, referred to above, states that the parties "undertake that they will as far as possible . . . continue their common efforts to promote by every means the free circulation" of the materials to which the agreement relates, "and abolish or reduce any restrictions to that free circulation which are not referred to in this Agreement".<sup>153</sup>

(e) *Closed multilateral treaties*

(22) The material presented in the foregoing seems to prove sufficiently that the rule proposed in article 8, being concordant with the general law of treaties, is valid, and an agreement—express or implied—between the granting State and any third State cannot divest the beneficiary State of rights to which it is entitled under the clause. The study carried out in this domain was based mostly if not exclusively upon practice and doctrine in relation to so-called open multilateral treaties concluded in the field of international trade. With regard to treaties of this kind, there were some arguments adduced based upon the misunderstanding of the nature of the unconditional most-favoured-nation clause, and reference was made to a certain practice purporting to establish an exception to the operation of the most-favoured-nation clause. After a careful examination of practice and doctrine, however, "it . . . [was] not possible to discern in . . . [the practice of States] any constant and uniform usage, accepted as law . . ." <sup>154</sup> which would warrant the proposal of a rule excepting open-ended multilateral treaties, i.e. the favours resulting from such treaties, from the operation of most-favoured-nation clauses. The arguments for excepting the favours of certain multilateral commercial treaties from the operation of the clause were based upon the openness of such treaties, i.e. on the faculty of the beneficiary State to accede to such treaties and share in its benefits as a participant. The examination and rejection of this argument leads *a fortiori* to the result that any derogation from the operation of a most-favoured-nation clause in

<sup>146</sup> See M. Whiteman, *op. cit.*, pp. 761-762.

<sup>147</sup> United Nations, *Treaty Series*, vol. 131, p. 25.

<sup>148</sup> Article XIV, para. 1 of the Treaty of Friendship, Commerce and Navigation signed at Rome on 2 February 1948 (*ibid.*, vol. 79, pp. 190 and 192).

<sup>149</sup> *Ibid.*, vol. 55, p. 196 and vol. 138, p. 336.

<sup>150</sup> See M. Whiteman, *op. cit.*, pp. 766-767.

<sup>151</sup> *Ibid.*, p. 767.

<sup>152</sup> UNESCO/MC/34/SR.I-II, p. 9, as quoted by M. Whiteman, *op. cit.*, p. 768.

<sup>153</sup> United Nations, *Treaty Series*, vol. 131, p. 30.

<sup>154</sup> *Colombian-Peruvian asylum case, Judgement of November 20th, 1950, I.C.J. Reports 1950, p. 277.*

respect of treaties not open to accession is out of the question. Still this topic needs further study owing mainly to the fact that the question of the exception from the operation of the clause of favours granted within certain types of closed economic groupings of States is raised from time to time and different theories are advanced to promote the recognition of such exceptions. Suffice it to refer here briefly to paragraph 7 of the 1936 resolution of the Institute of International Law<sup>155</sup> and to the resolution adopted at Edinburgh on 10 September 1969.<sup>156</sup> As to the 1936 resolution it has been rightly pointed out by Vignes that it goes much further than originally contemplated by Nolde, the Rapporteur, and that the exception of regional arrangements ("mutual and exclusive agreements between States, implying the organization of regional or continental economic régimes") was adopted by only 19 votes to 14.<sup>157</sup> Vignes, while believing that the resolution had a "progressive character", writes:

The merits of such exceptions may be questioned. They are formulated in very broad terms and do not appear to have been recognized in subsequent practice, at least not universally.<sup>158</sup>

Reference is made also to the text of the 1969 resolution of the Institute. Without touching upon the most important matter dealt with in paragraph 2 (a) it can be safely stated that the importance of its paragraph 2 (b) is limited, first, because it is restricted to most-favoured-nations clauses in multilateral conventions on international trade and, second, "because there is no indication that the exception is a matter of right".<sup>159</sup> That provision's purpose does not seem to be so much the establishment of a general legal principle as the laying down of a guideline for such unsolved problems as the compatibility of the Treaty of Rome establishing the European Economic Community<sup>160</sup> with the rules of the General Agreement on Tariffs and Trade. The contemplated further study will obviously need to extend to controversial issues such as the "famous problem of the customs union and free trade area . . . a problem which is very complicated and always of current interest"<sup>161</sup> and it will also have to examine the relation of the proposed rule of article 8 to the conventional and customary exceptions to the most-favoured-nations clause.

<sup>155</sup> See *Yearbook . . . 1969*, vol. II, p. 181, document A/CN.4/213, annex II, and P. Pescatore, *loc. cit.*, pp. 1-159.

<sup>156</sup> See annex below.

<sup>157</sup> *Annuaire de l'Institut de droit international 1936*, vol. 39 (Paris), t. II, p. 83.

<sup>158</sup> D. Vignes, *op. cit.*, p. 270.

<sup>159</sup> *Ibid.*, p. 280.

<sup>160</sup> United Nations, *Treaty Series*, vol. 298, p. 11.

<sup>161</sup> M. Virally, "Le principe de réciprocité . . ." (*loc. cit.*), p. 76.

## ANNEX

Resolution adopted on 10 September 1969 by the Institute of International Law at its Edinburgh session (4-13 September 1969)<sup>a</sup>

### II. THE MOST FAVOURED NATION CLAUSE IN MULTILATERAL CONVENTIONS (Fourth Commission)

The Institute of International Law,

*Having in mind* the Resolution passed at its 40th Session (1936) on "the Effects of the Most Favoured Nation Clause in Matters of Trade and Navigation", especially as regards the unconditional nature of the clause, the automaticity and extent of its effects, as well as the observation of the principle of good faith in the application thereof,

*Considering* the need to review the problems of application and interpretation of the clause as a result of the profound changes in international relations which have been caused, since then, by the introduction of multilateral and institutional methods in the field of economic relations, both at world and regional level, and taking into account the various economic systems of States, together with the requirements of an economic policy in support of developing countries,

*Having examined* the thorough report by Mr. Pierre Pescatore, Rapporteur of the Fourth Commission, on the Most Favoured Nation Clause in Multilateral Conventions, and the comments of the Members of that Commission,

*Recognizing* the greater efficiency of the clause through the incorporation of the most favoured nation treatment in multilateral institutional systems,

*Taking into consideration* that the investigation of the subject matter, if it were to lead to exhaustive conclusions, would require the Institute to take up a position on various problems which are still controversial and widely open to discussion and which, to be solved, mainly require political decisions:

1. Takes note of the Report and of its conclusions in thanking the Rapporteur and the Members of the Commission for their contribution to the study of the problem considered;

2. Emphasizes in particular, as regards the most favoured nation clause in multilateral conventions on international trade, the following points contained in the Report:

(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.

(b) States to which the clause is applied should 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.

(c) Derogations from the clause should be linked with appropriate institutional and procedural guarantees such as those provided by multilateral systems.

<sup>a</sup> *Annuaire de l'Institut de droit international, 1969*, vol. 53 (Basle), t. II, pp. 378-379.