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**Fifth report on the Most-Favoured-Nation Clause by Mr. Endre Ustor, Special Rapporteur -
draft articles with commentaries (continued)**

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MOST-FAVOURED-NATION CLAUSE

[Agenda item 6]

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*Draft articles with commentaries**

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CONTENTS

	<i>Page</i>
<i>Abbreviations</i>	117
Article 6 <i>bis</i> Effect of an unconditional most-favoured-nations clause	118
Article 6 <i>ter</i> Effect of a most-favoured-nation clause conditional on material reciprocity	118
Commentary on articles 6 <i>bis</i> and 6 <i>ter</i>	118
Article 6 <i>quater</i> Observance of the laws and regulations of the granting State	121
Commentary	121
Article 7 <i>bis</i> The scope of the most-favoured-nation clause regarding persons and things	122
Commentary	122
Article 9 National treatment clause	124
Article 10 National treatment	124
Commentary on articles 9 and 10	124
Article 10 <i>bis</i> National treatment in federal States	125
Commentary	126
Article 11 Effect of an unconditional national treatment clause	126
Article 12 Effect of a national treatment clause conditional on material reciprocity	126
Commentary on articles 11 and 12	126
Article 13 The right of the beneficiary State under a most-favoured-nation clause to national treatment	126
Commentary	126
Article 14 Cumulation of national treatment and most-favoured-nation treatment	128
Commentary	128
Article 15 The commencement of the functioning of a most-favoured-nation clause	129
Commentary	130
Article 16 Termination or suspension of the functioning of a most-favoured-nation clause	132
Commentary	132

ABBREVIATIONS

GATT	General Agreement on Tariffs and Trade
I.C.J.	International Court of Justice
<i>I.C.J. Reports</i>	I.C.J., Reports of Judgments, Advisory Opinions and Orders

* For the text of draft articles 1 to 8, see the third and fourth reports.

Article 6 bis. Effect of an unconditional most-favoured-nation clause

1. Under an unconditional most-favoured-nation clause the beneficiary State acquires the right to treatment not less favourable than that accorded by the granting State to a third State, without the obligation to reciprocate the same treatment in kind to the granting State.

2. Paragraph 1 applies irrespective of whether the treatment in question has been accorded by the granting State to a third State gratuitously, or subject to material reciprocity or against any other compensation.

Article 6 ter. Effect of a most-favoured-nation clause conditional on material reciprocity

1. Under a most-favoured-nation clause conditional on material reciprocity the beneficiary State acquires the right to treatment not less favourable than that accorded by the granting State to a third State only against reciprocating the same treatment in kind to the granting State.

2. Paragraph 1 applies irrespective of whether the treatment in question has been accorded by the granting State to a third State gratuitously or subject to material reciprocity or against any other compensation.

COMMENTARY TO ARTICLES 6 bis AND 6 ter

(1) Articles 6 bis and 6 ter are an elaboration on the rule proposed in article 6.¹ In case of their adoption the wording of article 6 could be reduced to its first phrase: "Except when in appropriate cases most-favoured-nation treatment is accorded under the condition of material reciprocity, the most-favoured-nation clause is unconditional".

(2) Article 6 states first a simple presumption which clearly follows from the general rules of interpretation but it also implies that for the purpose of the codification of the living rules of international law pertaining to the clause we have to deal with two kinds of clause only: the unconditional one and the one coupled with the proviso that the beneficiary State can claim the benefits accorded by the granting State to a third State only if it (the beneficiary State) reciprocates in kind, i.e., if it accords the same favours to the granting State (material reciprocity).²

(3) The purpose of article 6 bis is to explain the functioning, the operation of an unconditional most-favoured-nation clause. This explanation is useful also because definition is not very simple. Indeed, the promise of most-favoured-treatment is in most cases bilateral or multilateral. Hence it is in fact tied to a reciprocal grant. However, the promise to accord most-favoured-treatment does not become conditional by the mere fact that it is coupled with a counter-promise of the beneficiary to treat the grantor equally on a most-favoured-nation basis, i.e. by the establishment of a formal reciprocity. What makes a most-favoured-nation clause conditional (condi-

tional on material reciprocity) is the coupling of the reciprocal promises of most-favoured-nation treatment with the proviso that such treatment is due only if the respective beneficiary States will not only formally but materially reciprocate, i.e., they will grant each other (their respective nationals etc.) the same favours as they (their nationals etc.) expect to enjoy from the other. What is promised by and expected from an unconditional clause is the same treatment in relation to the treatment of others. In the case of a clause conditional upon material reciprocity the promise of the grantor is also treatment on the same level as that accorded to any other third State but only on the condition that the granting State (its nationals etc.) will receive materially the same favours from the beneficiary as the latter (its nationals etc.) expect to enjoy from the granting State.

(4) Article 6 bis—as all other articles—is based on the assumption that in all most-favoured-nation clauses of treaties—except the relatively rare unilateral grants—each party is at the same time granting State and beneficiary State, i.e., that, in the case of a bilateral treaty, there are at least two reciprocal promises.³ It follows that in the case of a bilateral clause the grant of unconditional most-favoured-nation treatment against a promise of a similar grant in turn is not considered to be a "condition" in this context, although it may actually have that effect. (If it is withdrawn, the reciprocal grant may be terminated in retaliation.) A clause becomes conditional only if the promise of most-favoured-nation treatment is bound to some other condition than a counter-promise of (unconditional) most-favoured-nation treatment. This other condition could be in principle anything, any event or any grant (prestation) from the beneficiary. The practical case is, however, that the condition to which the promise is bound is a materially identical or similar treatment to be accorded by the beneficiary to the granting State. Hence article 6 bis, paragraph 1 may not be satisfactory from the point of principle. From that point of view the last phrase of the sentence "without the obligation to reciprocate . . ." would be better substituted by the words "without any conditions". However, to avoid a rule suffering from the defect of an *idem per idem* definition and because of practical considerations,⁴ the Special Rapporteur decided to submit tentatively the text as drafted in article 6 bis, paragraph 1.

(5) Not only the clauses but also the favours accorded by the granting State to third States can be classified in a similar manner: they can be granted unilaterally as a gift—in theory at least—or they can be accorded against some kind of compensation. For example, State X reduces its tariffs on oranges imported from State Y against the reduction by State Y of its tariff on textiles imported from X. If State X has made a most-favoured-nation pledge to State A, it has to concede the same reduced rate of tariffs on the oranges imported from that State as it has conceded to State Y, and it has no right to claim from State A a reduction of its tariffs on textiles or any other concession in turn.

¹ See *Yearbook . . . 1973*, vol. II, p. 98, document A/CN.4/266.

² *Ibid.*, pp. 99-101 and 102, paras. 11-17 and 21 of the commentary to article. 6.

³ *Ibid.*, p. 214, document A/9010/Rev.1, chap. IV, B, para. 4 of the commentary to article 2.

⁴ See para. 2 above.

(6) The deal between State X (the granting State) and State Y (a third State) described above—the reciprocal tariff-reduction on oranges and textiles—can of course be called material, in the sense that it may be based on a precise calculation of the mutual advantages accruing therefrom for each party. This is, however, not the stipulation of material reciprocity as understood for the purpose of the present report. To explain this notion we have to depart from the field of commerce and customs duties, where the absolute identity of the mutual grants is relatively unusual: two contracting States rarely export and import the same goods or commodities to and from each other. Material or effective reciprocity (*réciprocité trait pour trait*) appears—the reader is reminded—in treaties on consular immunities and functions, on matters of private international law, on establishment, etc. Here the contracting parties grant each other the same immunity for their nationals, the same facilities concerning access to courts and the same exemption from depositing a *cautio judicatum solvi*, etc.

(7) Seen from this angle and simplified for the present purposes, the possible cases which have to be dealt with fall in the following four categories:

(a) an unconditional most-favoured-nation clause and favours granted to a third State not conditional on material reciprocity or not conditional on any other compensation;

(b) an unconditional most-favoured-nation clause and favours accorded to a third State on condition of effective reciprocity or on condition of other compensation;

(c) a most-favoured-nation clause conditional on material reciprocity and favours accorded to a third State not conditional upon material reciprocity or on any other compensation; and

(d) a most-favoured-nation clause as under (c) and favours accorded to a third State conditional on material reciprocity or against other compensation.

(a) and (b) are the cases dealt with by article 6 *bis*, and (c) and (d) by article 6 *ter*.

(8) The situation is relatively simple if in the case of an unconditional most-favoured-nation clause the favours in question, i.e. those accorded by the granting State to a third State, are not themselves coupled with the condition of material reciprocity (case (a)). If they are, then the question arises: will an unconditional most-favoured-nation clause attract benefits granted subject to material reciprocity, without compensation, i.e., can a State beneficiary of an unconditional most-favoured-nation clause claim the favours accorded by the granting State to a third State on condition of material reciprocity, even if the beneficiary State itself does not offer material reciprocity to the granting State for the favours it claims?

(9) There is a contradictory practice regarding the question just posed. In certain cases the courts reached conclusions different from that proposed in article 6 *bis*. Thus the highest court of Argentina rejected in 1919 an appeal against a decision of the High Court of Santa Fé and ruled:

... that neither the appellant's invocation of the powers conferred upon consuls under the treaties concluded with the United Kingdom

in 1825 (article 13) and with the Kingdom of Prussia and the States of the German Customs Union in 1857 (article 9), which he claims extend to consuls of the Kingdom of Italy by virtue of the most-favoured-nation clause inserted in the agreements concluded with that Kingdom, nor precedent—if any— would affect the settlement of the point at issue under federal law. In the first place, since these were concessions granted subject to reciprocity, it would have been necessary to show that the Italian Government granted, or was prepared to grant, those same concessions to consuls of Argentina ...⁵

(10) A German court in 1922 rejected an appeal by a French plaintiff against an order to deposit security for costs in an action brought by him against a German subject. Section 110 of the German Code of Civil Procedure laid down that aliens appearing as plaintiffs before German courts must at the defendant's request deposit a security for costs. This provision did not apply to aliens whose own State did not demand security for costs from Germans appearing as plaintiffs. In article 291 (I) of the Treaty of Versailles Germany undertook to secure to the Allied and Associated Powers, and to the officials and nationals of the said Powers, the enjoyment of all the rights and advantages of any kind which she may have granted to Austria, Hungary, Bulgaria or Turkey, or to the officials and nationals of these States by treaties, conventions or arrangements concluded before August 1, 1914, so long as those treaties, conventions or arrangements remain in force.

There existed between Germany and Bulgaria a treaty providing for the exemption, on the basis of reciprocity, from the duty to deposit security for costs. In a note, communicated to Germany in April 1921, the French Government informed the German Government that it wished to avail itself of the relevant provisions of the Treaty between Germany and Bulgaria. The plaintiff did not prove that in France subjects were exempt from depositing security for costs in actions brought against French subjects. The Upper District Court held that the appeal must be dismissed. Article 291 of the Treaty of Versailles, according to the court, did not oblige Germany to grant to French subjects wider privileges than those granted to the subjects of the former Central Power. The court said that the treaty with Bulgaria was based on reciprocity and that, as France did not grant such reciprocal treatment, her subjects were not entitled to an exemption from the duty to deposit security for costs.⁶

(11) The practice of the French courts seems to differ from the above-quoted Argentine and German decisions. The following instance, although coloured with references to French internal legislation, reveals the French thinking on the problem at issue. The brothers Betsou, Greek subjects, in 1917 leased certain premises in Paris for commercial use. The lease expired in 1926. The lessors refused to renew the lease, whereupon the plaintiffs claimed 200,000 francs as damages for eviction. Their claim was based on the provisions of the Law of 30 June 1926, which granted certain privileges to those engaged in business activities. In support of their claim to the privileges of this law in spite of their foreign nationality, they cited the Franco-Greek Convention of 8 September 1926, and through the operation of the most-

⁵ See *Yearbook* ... 1973, vol. II, p. 117, document A/CN.4/269, foot-note 2.

⁶ *Ibid.*, p. 128, document A/CN.4/269, paras. 24-25.

favoured-nation clause, the Franco-Danish convention of 9 February 1910, Denmark being in this regard the most-favoured-nation. Article 19 of the Law of 1926 provided that aliens should be entitled to its privileges only subject to reciprocity. The Civil Tribunal of the Seine held for the plaintiffs and said that through the operation of the most-favoured-nation clause, Greek subjects in France enjoyed the same privileges in commerce and industry as Danish subjects. The Franco-Danish Convention stipulated that in the exercise of their commercial activities Danes enjoyed all the privileges granted to French nationals by subsequent legislation. The Law of 30 June 1926 undoubtedly conferred privileges upon those who were engaged in commerce. Although the terms of article 19 of the Convention required reciprocity in legislation as an absolute and imperative rule, and although there was no legislation on commercial property in Denmark, the French law should be interpreted in accordance with the Franco-Danish convention. Danish subjects could not be deprived of their rights and privileges by subsequent French legislation. The Tribunal said:

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

The Court of Appeal of Paris, reversing the decision of the Tribunal of the Seine, held that the brothers Betsou could not claim a right to the renewal of their lease. The Law of 30 June 1926 clearly showed that it construed the right of commercial property as *un droit civil stricto sensu*, that is to say, as a right subject to the provision of article 11 of the Civil Code which made the enjoyment of rights by foreigners dependent upon the reciprocal treatment of French subjects abroad. In the Franco-Danish treaty it had been carefully stated that the nationals of the two States would only enjoy the rights and privileges stipulated in so far as those rights and privileges were compatible with the existing legislation of the two States, and Danish legislation did not recognize the rights of foreigners to hold commercial property in Denmark.⁷

(12) An important French source finds the solution of the lower court, the Civil Tribunal of the Seine, justified. According to this source, "reciprocity (whether that of article 11 of the Civil Code or that deriving from a reciprocity clause) is concrete reciprocity. On the other hand, the most-favoured-nation clause, when it is bilateral, establishes a kind of abstract reciprocity."⁸

(13) A convincing motivation for the solution proposed in article 6 *bis* can be found in a Greek decision reported as follows: The Convention concerning Establishment and Judicial Protection concluded between Greece and Switzerland on 1 December 1927 provides in article 9 that in no case shall the nationals of either of the Contracting Parties be subjected on the territory of the other Contracting Party to charges, customs duties, taxes, dues or contributions of any nature different from or higher than those which are or will be imposed on subjects of the most-favoured-nation.

⁷ *Ibid.*, p. 129, document A/CN.4/269, paras. 28-30.

⁸ P. Level, "Clause de la nation la plus favorisée" in *Encyclopédie Dalloz—Droit international* (Paris, Dalloz, 1968), vol. I, p. 338.

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

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

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

Whereas, in economic treaties in particular, the purpose of the most-favoured-nation clause is to avoid the danger that the subjects of Contracting States might possibly be placed in an unfavourable position compared with subjects of other States in the context of international economic competition. Through the operation of that clause, each of the two Contracting States grants to the other the favours which it has already granted to a third State and undertakes to grant it any favour which it may grant to a third State in future, for the duration of the treaty. Provided that there is no stipulation to the contrary in the agreement, such latter favour accrue *ipso jure* to the beneficiary of the clause, which does not have to furnish any additional compensation, even where the concessions granted to the third State are not unilateral but are subject to reciprocity. When interpreted in that sense, the clause achieves the purpose for which it was designed, namely, assimilation in each of the two States, in respect of the matters to which the clause relates, of the subjects or enterprises of the other State to the subjects or enterprises of a third and favoured country.

Whereas, in the current case, the most-favoured-nation clause embodied in the convention between Greece and Switzerland is simply stated without restriction or onerous conditions, and as such confers upon Swiss enterprises operating in Greece the right to fiscal exemption under the conditions under which the same exemption is granted to British enterprises, even if Greek enterprises do not enjoy in Switzerland the favour which they enjoy in Great Britain. Consequently, the impugned decision . . . should for that reason be set aside.⁹

(14) Article 6 *ter* does not need a lengthy explanation. It elucidates simply the operation of the clause conditional on material reciprocity without going into a detailed consideration of the difficulties of interpretation involved.¹⁰ As to paragraph 2 of article 6 *ter*, it is believed that it follows from the foregoing that from the point of view of the operation of a clause conditional on material reciprocity it is also irrelevant whether or not the favour accorded by the granting State to the third State is granted against material reciprocity.

⁹ *Yearbook . . . 1973*, vol. II, p. 138, document A/CN.4/269, paras. 58-59.

¹⁰ *Ibid.*, p. 100, document A/CN.4/266, para. 16 of the commentary to article 6. See also H. Batiffol, *Droit international privé*, 4th ed. (Paris, Librairie Générale de droit et de jurisprudence, 1967), pp. 213-216.

Article 6 quater. Observance of the laws and regulations of the granting State

Without prejudice to the right to most-favoured-nation treatment acquired by the beneficiary State under a most-favoured-nation clause the persons and things enjoying the favours deriving from that treatment are subject to the laws and regulations of the granting State.

COMMENTARY

(1) An unconditional most-favoured-nation clause entitles the beneficiary State to the exercise or the enjoyment of the rights indicated in the clause without compensation and without any conditions. These rights are exercised or enjoyed in ordinary cases by the nationals, ships, products, etc. of the beneficiary State. The meaning of the expression "without any conditions" in this context is that the right of the beneficiary State and the right of its nationals, ships, products, etc. derived therefrom cannot be made dependent on the right exercised or enjoyed by the granting State (its nationals, ships, products, etc.) in the beneficiary State. The element of unconditionality, however, cannot be stretched so wide as to absolve the beneficiary State, i.e. its nationals, ships, products, etc. from the duty of respecting the internal laws and regulations of the granting State and to comply with them inasmuch as such compliance is expected and exerted from a third State, i.e. from its nationals, products, etc.

(2) The following case of recent vintage, decided by the French Court of Cassation explains fully the underlying idea of article 6 quater.

The appellant, an Italian citizen, was convicted under article 1 of the Decree of 12 November 1938 for having failed, as an alien, to obtain a trader's permit. He maintained that he was not required to be in possession of a trader's permit because by virtue of the most-favoured-nation clause contained in the Franco-Italian agreement of 17 May 1946 he was entitled to rely on the Franco-Spanish treaty of 7 January 1862, which gave Spanish citizens the right to carry on trade in France. The Public Prosecutor contended that the Franco-Spanish treaty did not exempt Spanish citizens from the requirements of obtaining a trader's permit, and that a letter of the French Minister for Foreign Affairs dated 15 April 1957 which stated that foreign nationals entitled to rely on treaties conferring the right to trade in France were not exempt from the requirement of obtaining traders' permits, was binding on the courts. The appeal was dismissed. The Court said:

The judgement under appeal, in view of the letter of the Minister for Foreign Affairs dated April 15, 1957, finds that the exercise of the right to trade in France which is granted to foreign nationals by international agreements does not exempt foreign nationals from the need to satisfy the necessary—as well as sufficient—requirement, namely, to be in possession of a traders' permit, and that this applies in particular to Italian nationals by virtue of the Franco-Italian Agreement of May 17, 1946.

The judgement under appeal thus arrived at a correct decision, without violating any of the provisions referred to in the notice of appeal.

Notwithstanding that international agreements can only be interpreted by the Contracting Parties, the interpretation thereof,

as far as France is concerned, is within the competence of the French Government, which alone is entitled to lay down the meaning and scope of a diplomatic document. The Franco-Italian agreement of May 17, 1946, provides that Italian nationals are entitled to the benefit of the most-favoured-nation clause, and the Treaty of January 7, 1862, between France and Spain, on which the appellant relies and which applies to Italian nationals with regard to the exercise of trading activities must, according to the interpretation given by the Minister for Foreign Affairs, be understood as follows: Although the provisions which are applicable to foreign nationals must not, if they are not to violate the provisions of the international agreements, result in restricting the enjoyment of the rights which the Treaty confers on Spanish nationals, the duty imposed upon a Spanish trader to be in possession of a special trader's permit does not affect the enjoyment of those rights but only the conditions of their exercise. To be in possession of a trader's permit is therefore a necessary as well as sufficient condition, which must be satisfied where a foreign national is to be entitled to rights which are granted to French nationals.¹¹

(3) In some cases the clause itself contains a reference to the laws of the granting State and expressly stipulates that the rights in question must be exercised "conformably with the laws" of that State. Such a case has been dealt with in the following instance:

The decedent was at the time of his death a resident of New York State. He died intestate. He was a citizen and subject of the Kingdom of Italy, and all of his next of kin were residents of Italy. He left no next of kin residing in the State of New York, and it was alleged in the petition that there were no creditors. The petitioner was the Consul-General of the Kingdom of Italy. The public administrator, though duly cited, made default. The petitioner asserted a right to administration without giving any security, and in preference to the public administrator, and based his claim on the facts as to treaty provisions in the consular treaty of 1878 between the United States and Italy. The letters of administration were granted. The Court said:

Conceding that, under the "most-favored-nation" clause in the provision of the treaty with Italy relating to the rights, prerogatives, immunities, and privileges of consuls general, the stipulation contained in the treaty of July 27, 1853 with the Argentine Republic¹² becomes a part of the treaty with Italy, I do not find in that stipulation any justification for the conclusion sought. A right to intervene "conformably with the laws" of the state of New York is something different from a right to set aside the laws of the state, and take from a person who, by those laws, is the officer entrusted with the administration of estates of persons domiciled here, and who leave no next of kin within the jurisdiction, the right and duty of administering their assets. And, when the laws of the state required an administrator to give a bond to be measured by the value of assets, nothing in the treaty provisions grants to the consul an immunity from this requirement to be obtained merely by asserting, in substance, that he has no knowledge of the existence

¹¹ *Yearbook . . . 1973*, vol. II, pp. 139-140, document A/CN.4/269, para. 63.

¹² Article IX of the treaty between the United States of America and Argentina reads:

"If any citizen of the 2 contracting parties shall die without will or testament in any of the territories of the other, the consul-general or consul of the nation to which the deceased belonged, or the representative of such consul-general or consul in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

of any debts... Therefore, the petitioner may have letters on giving the usual security, but that this is done pursuant to our local law, and because the public administrator has refused to act.¹³

(4) In other cases the duty of respecting the internal laws of the granting State is laid down in a separate provision of the treaty containing the most-favoured-nation clause. Thus, e.g., the Long-term Trade Agreement of 1962 between the Union of Soviet Socialist Republics and the United Arab Republic contained the following provision (article 6):

The circulation of goods between the USSR and the United Arab Republic shall take place in accordance with the provisions of this Agreement and with the import laws and regulations in force in the two countries provided that these laws and regulations are applied to all countries.¹⁴

(5) The rule proposed in article 6 *quater* is expressed by a German source in this way:

The conditions attaching to the grant of a specific type of more favourable treatment claimed under the most-favoured-nation clause are not to be confused with the conditional form of the most-favoured-nation clause. What is involved here is not reciprocal treatment within the meaning of the conditional form of the most-favoured-nation clause but requirements relating to the factual content of the more favourable treatment itself (e.g. a certificate of qualification as a requirement for the licensing of an alien to engage in a particular trade, certificates of origin or of analysis for purposes of proof of origin and customs classification of goods). Such factual requirements must, however, be objectively related to the advantage which is to be granted and must not be used for the purpose of engaging in concealed discrimination.¹⁵

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

(6) Although the commentaries and precedents refer to cases of unconditional most-favoured-nation clauses it seems to be self-evident that the rule proposed applies also to cases where the most-favoured-nation clause is coupled with the requirement of material reciprocity. The rule proposed therefore is kept in general language and does not differentiate between the two types of clause.

(7) The rule proposed in article 6 *quater* is in a certain relationship with article 41 of the Vienna Convention on Diplomatic Relations,¹⁶ article 55 of the Vienna Convention on Consular Relations¹⁷ and article 47 of the Convention on Special Missions.¹⁸ Its roots, however, can be traced further and ultimately to the principle of sovereignty and equality of States. Obviously beyond the limits of the privileges granted by the State, its laws and regulations must be generally observed on its territory.

Article 7 bis. The scope of the most-favoured-nation clause regarding persons and things

1. The scope of the persons or things to whose most-favoured-nation treatment the right of the beneficiary

¹³ Yearbook... 1973, vol. II, p. 149, document A/CN.4/269, para. 89.

¹⁴ United Nations, *Treaty Series*, vol. 472, p. 74.

¹⁵ G. Jaenicke, in K. Strupp, *Wörterbuch des Völkerrechts*, 2nd ed. [Schlochauer] (Berlin, de Gruyter, 1961), vol. II, p. 499.

¹⁶ United Nations, *Treaty Series*, vol. 500, p. 95.

¹⁷ *Ibid.*, vol. 596, p. 261.

¹⁸ General Assembly resolution 2530 (XXIV), annex.

State extends under a most-favoured-nation clause is confined to the class of persons or things expressly specified in the clause or in the treaty containing it or implicitly indicated by the agreed sphere of relations where the clause applies.

2. From among the persons or things falling within the scope of paragraph 1 the beneficiary State may claim actual most-favoured-nation treatment for those

(a) belonging to the same class of persons or things as the class of persons or things that are accorded favours under the right of a third State by the granting State and

(b) being in the same relationship with the beneficiary State as the latter are with a third State.

COMMENTARY

(1) It would have been simpler if the title of this article had referred only to the "personal scope"¹⁹ of the clause. For the sake of completeness a somewhat more elaborate title was chosen.

(2) This article is a corollary to the *ejusdem generis* rule and its validity is believed to be self-evident. As to the question whether the rule of article 7 *bis* is not covered by the *ejusdem generis* rule as stated in article 7, the Special Rapporteur's view is in the negative. While the *ejusdem generis* rule settles the material scope of the clause, article 7 *bis* intends to clarify the scope of the persons and things on behalf of which the beneficiary State may claim most-favoured-nation treatment. (It was felt that no special drafting was needed to cover the infrequent case where the treatment was due to the beneficiary State itself, e.g., to its embassies.)

(3) What is the *ejusdem generis* rule saying? One may refer to draft article 7 contained in the Special Rapporteur's fourth report²⁰ or to the definition of Fitzmaurice quoted in his second report:

... clauses conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can only attract the rights conferred by other treaties in regard to the same matter or class of matter".²¹

Hence in respect of the subject-matter the right of the beneficiary State deriving from a most-favoured-nation clause is restricted in two ways: first by the clause itself which always refers to a certain matter²² and second by the right conferred by the granting State on the third State.

(4) The situation is similar, though not identical, in respect of the subjects in the interest of which the beneficiary State is entitled to claim most-favoured-nation

¹⁹ This expression is used by G. Schwarzenberger in "The Most-Favoured-Nation Standard in British Practice", *The British Year Book of International Law*, 1945 (London), vol. 27, p. 107.

²⁰ See Yearbook... 1973, vol. II, p. 102, document A/CN.4/266.

²¹ Yearbook... 1970, vol. II, p. 210, document A/CN.4/228 and Add. 1, para. 68.

²² With very few exceptions, there is no clause in modern times which would not be restricted to a certain sphere of relations, e.g., commerce, establishment and shipping. See Yearbook... 1973, vol. II, p. 217, document A/9010/Rev.1, chap. IV, B, paras. 14 and 15 of the commentary to article 4.

treatment. The clause itself may indicate the scope of those persons, ships, products, etc., but it does not necessarily do so. The clause may simply state that the beneficiary State is accorded most-favoured-nation treatment in respect of customs duties, or in the field of commerce, shipping, establishment etc., without specifying the persons or the things that will be given most-favoured treatment. In such cases the indications of the field of operation of the clause implicitly denotes the class of persons and things in whose interest the beneficiary may exercise its rights. This is stated in paragraph 1.

(5) Paragraph 2 makes an attempt to unfold further the operation of the clause. Sub-paragraph (a) tries to explain that the beneficiary State cannot claim most-favoured-nation treatment but for that class of persons or things (merchants, commercial travellers, persons taken into custody, companies, vessels, distressed or wrecked vessels, products, goods, textiles, wheat, sugar, etc.) which receives or is entitled to receive certain treatment, certain favours under the right of a third State. And further sub-paragraph (b) would require that the persons and things in respect of which most-favoured-nation treatment is claimed must be in the same relationship with the beneficiary State as are the comparable persons and things with the third State. (Nationals, resident nationals, companies having their seat in the country, companies established under the law of the country, companies controlled by nationals, imported goods, goods manufactured in the country, products originating in the country, etc.)²³

(6) The following French case can serve as an illustration of the proposed rule:

Alexander Serebriakoff, a Russian subject, brought an action against Mme d'Oldenburg, also a Russian subject, alleging the nullity of a will under which she was a beneficiary. The defendant, after having obtained French citizenship by naturalization obtained an *ex parte* decision from the Court of Appeal of Paris ordering Serebriakoff to furnish 100,000 francs security. Against this *ex parte* decision Serebriakoff appealed, claiming *inter alia* that he was exempt from furnishing security by the terms of the Franco-Russian agreement of 11 January 1934. The Court held that the appeal must be dismissed. The Court said:

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

merchants and manufacturers, being natural or legal persons under French law, shall be not less favourably treated . . . than nationals of the most-favoured-nation . . ."²⁴

(7) In another case the Tribunal de grande instance de la Seine held that the most-favoured-nation clause embodied in the Franco-British Convention of 28 February 1882 as supplement by an exchange of letters of interpretation of 21 and 25 May 1929, a clause that would entitle British subjects to rely on treaties stipulating the assimilation of foreigners to nationals applied solely to British subjects settled in France. The Tribunal said:

. . . a British national domiciled in Switzerland, may not rely on a treaty of establishment which grants the benefit of the most-favoured-nation clause only to British nationals established in France and therefore entitled to carry on a remunerative activity there on a permanent basis.²⁵

(8) The proposed rule of article 7 *bis* is drafted with the intention of implicitly stating the rule regarding the controversial notion of "like articles" or "like products". It is not uncommon for commercial treaties to state explicitly that in respect to customs duties or other charges the products, goods, articles etc., of the beneficiary State will be accorded any favours accorded to like products etc. of the third State.²⁶ Obviously, even in the absence of such an explicit statement, the beneficiary State may not claim most-favoured-nation treatment for but the goods specified in the clause or belonging to the same category as the goods enjoying favoured treatment by the third State. This is what rule of article 7 *bis* attempts—among other things—to convey.

(9) It is not proposed that the Commission delve into all the intricacies of the notion of "like products". The following brief account is for information only: As to exactly what is meant by this expression as it appears in commercial treaties Hawkins has this to say:

One test in such cases is a comparison of the intrinsic characteristics of the goods concerned. Such a test would prevent the classification of articles on the basis of external characteristics. If products are intrinsically alike, they should be considered to be like products, and differing rates of duty on them would contravene the most-favoured-nation clause. For example, in the Swiss cow case cited earlier the question arises whether a cow raised at a certain elevation is "like" a cow raised at a lower level. Applying the intrinsic-characteristics test gives a simple answer to the question. The cows are intrinsically alike, and a tariff classification based on such an extraneous consideration as the place where the cows are raised is clearly designed to discriminate in favour of a particular country.²⁷

In other situations the application of the intrinsic characteristic test would show clearly that a classification was *not* objectionable. To invent such a case: under the tariff law of the United States, apples are dutiable and bananas are free of duty. If Canada and the

²⁴ *Ibid.*, p. 132, document A/CN.4/169, para. 40.

²⁵ *Ibid.*, p. 145, document A/CN.4/169, para. 78.

²⁶ See article I of the GATT, quoted in the Special Rapporteur's second report (*Yearbook . . . 1970*, vol. II, p. 220, document A/CN.4/228 and Add.1, para. 144).

²⁷ With reference to the Swiss cow case, see *Yearbook . . . 1968*, vol. II, p. 170, document A/CN.4/L.127, para. 31, but cf. also the critical remarks of FAO quoted in the second report (*Yearbook . . . 1970*, vol. II, pp. 221-222, document A/CN.4/228 and Add.1, para. 148).

²³ *Ibid.*, pp. 218-219, document A/9010/Rev.1, para. 3 of the commentary to article 5.

United States have a treaty providing that products of either party will be accorded treatment no less favourable than that accorded to "like articles" of any third country, Canada might argue that apples should be free of duty. Any such claim would have to be based on the argument that since both bananas and apples are used for the same purpose (eating), they are "like articles". Applying the test of intrinsic characteristics in this case would promptly settle the question, since apples and bananas are intrinsically different products.²⁸

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

... the United States said:

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

This lack of definition, however, in the view of the British delegate, "has not prevented commercial teaties from functioning, and I think it would, not prevent our Charter from functioning until such time as the ITO [International Trade Organization] is able to go into this matter and make a proper study of it. I do not think we could suspend other action pending that study."

and Australia further noted:

"All who have had any familiarity with customs administration know how this question of 'like products' tends to sort itself out. It is really adjusted through a system of tariff classification, and from time disputes do arise as to whether the classification that is placed on a thing is really a correct classification. I think while you have provision for complaints procedure through the Organization you would find that this issue would be self-solving".²⁹

Article 9. National treatment clause

"National treatment clause" means a treaty provision whereby a State undertakes to accord national treatment to another State in an agreed sphere of relations.

Article 10. National treatment

"National treatment" means treatment by the granting State of persons or things in a determined relationship with the beneficiary State, not less favourable than treatment of persons or things in the same relationship with itself.

COMMENTARY TO ARTICLES 9 AND 10

(1) There is a close relationship between a most-favoured-nation clause and a national treatment clause. Such clauses often appear in treaties side by side and sometimes in combination.³⁰ Because of that and in

²⁸ H. C. Hawkins, *Commercial Treaties and Agreements: Principles and Practice* (New York, Rinehart and Cor., 1951), pp. 93-94.

²⁹ John H. Jackson, *World Trade and the Law of GATT (A Legal Analysis of the General Agreement on Tariffs and Trade)* (Indianapolis, Bobbs-Merrill, 1969), pp. 260-261. Excerpts from the reports of the Economic Committee of the League of Nations are annexed to the Special Rapporteur's first report (see *Yearbook* ... 1969, vol. II, p. 175, document A/CN.4/213, annex I).

³⁰ See para. 11 below.

order to be able to deal with important questions arising from the cumulation of the two,³¹ the Special Rapporteur ventures to submit these and the following articles.

(2) National treatment means, according to Wickersham, that the nationals of one of the contracting parties shall be treated in the respects agreed to, in the territory of the other contracting party, just as if they were nationals of the second contracting party. That is, it prevents discrimination against the nationals of the contracting parties in any way, in regard to the points stipulated in the treaty.³²

(3) The main field where national treatment is usually applied is the treatment of aliens. Right to practise religion, to engage in commercial, industrial, financial and other activities for gain, to acquire, to lease or dispose of property, protection of literary, artistic and scientific works, aspects of social security, taxation, right of access to courts, exemption from *cautio judicatum solvi* are but examples in respect of which national treatment may be—but not necessarily is—stipulated.

(4) National treatment clauses are also used in treaties concluded in the economic field where they are usually not restricted to treatment of natural persons. They may deal with treatment of legal persons, companies, goods, products, etc. A national treatment clause of the General Agreement on Tariffs and Trade (Art. III, para. 4) runs as follows:

The products of the territory of any contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use...³³

(5) National treatment would not apply to customs duties on imports and exports because national products are of course not imported³⁴ and foreign goods are not exported.³⁵ On the other hand, because vessels enter both their own and foreign ports in the same manner as, and in competition with, vessels of other countries, national treatment clauses in this field are widespread.

(6) Both national treatment, or "inland parity", and most-favoured-nation treatment, or "foreign parity", are antidiscriminatory, i.e., both guarantee equality. The difference between them lies in the choice of base upon which equality is to be measured. By granting inland parity, a nation places the citizens of a foreign

³¹ See articles 13 and 14.

³² G. W. Wickersham's report to the League of Nations Committee of Experts for the Progressive Codification of International Law (C.205.M.79.1927), as cited in L. F. L. Oppenheim, *International Law: A Treatise*, 7th ed. [H. Lauterpacht] (London, Longmans, Green and Co., 1948), vol. 1, para. 580, foot-note 2.

³³ GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No. GATT/1969-1), p. 6.

³⁴ Now that the colonial régime has practically disappeared, the exceptional case of "colonial" trade has become obsolete.

³⁵ See W. McClure, "German-American commercial relations", in *American Journal of International Law* (Washington, D.C.), vol. 19, No. 4 (October 1925), p. 692, quoted by G. Schwarzenberger, *International Law and Order* (London, Stevens, 1971), p. 157, foot-note 121.

country on an equal footing with *its own citizens*, not with those of any other foreign country.³⁶

(7) It is by now generally admitted that in the field of international trade the equal treatment of nations on the ground of most-favoured-nation clause would satisfy the conditions of formal equality but would involve explicit discrimination against the weaker members of the international community.³⁷ Similar or even more forceful considerations apply against the formal equality established by national treatment clauses in fields of trade and other economic competition between nationals and companies of countries of different level of economic development in systems based on free enterprise.

(8) As explained by Usenko:

The practice of granting foreigners equal rights with the nationals of a given country, which was an outgrowth of the bourgeois revolutions, was unquestionably a progressive development. However, since this grant of equality related not only to the protection of foreigners' lives, freedom, property and honour, not only to their legal capacity to the extent required in order to satisfy the individual's physical and spiritual needs, but also to matters of commercial and industrial activity (as must inevitably be the case under the conditions of capitalism), it contained deep contradictions within it from the outset. Where foreigners possess more capital than national industrialists and businessmen, they will in time, availing themselves of "equal rights", unquestionably occupy a dominant position in the country concerned. In the realm of economic activity, the development of capitalism quickly led to the replacement of the individual foreigner by foreign bodies corporate—large stock companies and other types of concerns. Under these conditions, it became quite obvious that the extension of national treatment to the domain of the foreign economic relations of States in effect deprives national industry and trade in weaker countries of State protection against competition from more powerful foreign capital. . . . Under the conditions of capitalism, what national treatment essentially does is thus to afford greater opportunities to the stronger side.

All of this is a sufficient explanation of the fact that socialist States are opposed as a matter of principle to the application of national treatment in the field of international economic relations.³⁸

(9) With regard to the application of national treatment clauses in treaties of socialist States, Usenko adds the following:

However, the over-all negative attitude of socialist States toward the broad application of national treatment in the field of international economic relations does not preclude its use in their mutual relations and also in their relations with third countries in specific areas where this cannot have adverse effects and, moreover, is fully justified. For example, socialist States accord national treatment for humanitarian reasons in providing assistance at sea.

³⁶ 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. 11.

³⁷ See *Yearbook . . . 1973*, vol. II, p. 220, document A/9010/Rev.1, chap. IV, B, para. 9 of the commentary to article 5.

³⁸ E. T. Usenko, *Formy regulirovaniia sotsialisticheskogo mezhdunarodnogo razdeleniia truda* (Forms of the regulation of the Socialist International Division of Labour), *Mezhdunarodnye otnosheniia* (Moscow, 1965), pp. 251-252. German edition: *Sozialistische internationale Arbeitsteilung und ihre rechtliche Regelung* (Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1966), p. 211.

Some trade treaties also provide for national treatment (in combination with most-favoured-nation treatment) in the levying of domestic taxes and other charges on imported goods. An example of this solution of the problem is article 4 of the Soviet-Hungarian Treaty of Commerce and Navigation of 15 July 1947:³⁹

"Where internal charges are payable in its territory on the production, processing, distribution or consumption of goods of a certain category, each of the Contracting Parties shall accord goods of the same category of the other Party the treatment established by it for its domestic goods, or most-favoured-nation treatment, whichever is more advantageous to the other Party."

The matter is dealt with in similar fashion in trade treaties between the USSR and Poland, Czechoslovakia and Romania.⁴⁰

(10) Technically the most-favoured-nation clause is a *renvoi* to another treaty, whereas the national treatment clause is a *renvoi* to municipal law.⁴¹

(11) When inland parity (national treatment) and foreign parity (most-favoured-nation treatment) are provided for side by side in the same treaty this may take place in the form that in one respect national treatment, in another most-favoured-nation treatment is pledged. Thus, e.g., the 1951 Convention relating to the Status of Refugees⁴² assures national treatment to refugees in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi* (art. 16) and most-favoured-nation treatment as regards the right to engage in wage-earning employment (art. 17).

(12) The case where both national treatment and most-favoured-nation treatment are stipulated in respect of the same subject-matter is dealt with separately.⁴³

(13) Articles 9 and 10 are drafted on the pattern of articles 4 and 5 as adopted by the Commission.⁴⁴ The reason for using the expression "persons or things in a determined relationship" [with a State] in article 10 is the same as that explained in paragraph 3 of the commentary to article 5.

(14) Article 10, unlike article 5, contains no reference to the treatment of a State. It is believed that there is no practice which would substantiate such reference.

(15) If articles 9 and 10 are retained by the Commission, then appropriate changes will be necessary *inter alia* in article 2, where the expressions "granting State" and "beneficiary State" are defined solely in relation to the most-favoured-nation clause and most-favoured-nation treatment.

Article 10 bis. National treatment in federal States

If the granting State is a federal State, and treatment of persons or things in the agreed sphere of relations is

³⁹ United Nations, *Treaty Series*, vol. 216, p. 247.

⁴⁰ Usenko, *op. cit.*, p. 253 (German edition, p. 212).

⁴¹ Statement by Mr. Reuter at the sixteenth session of the International Law Commission (*Yearbook . . . 1964*), vol. I, p. 113, 741st meeting, para. 14.

⁴² United Nations, *Treaty Series*, vol. 189, p. 137.

⁴³ See article 14 below.

⁴⁴ See *Yearbook . . . 1973*, vol. II, pp. 215 and 218, document A/9010/Rev.1, chap. IV, B.

not identical in all of its member States, then national treatment means treatment of persons and things in a determined relationship with the beneficiary State in one of the member States of the granting State on terms not less favourable than those of the treatment accorded in that member State to persons and things in the same relationship with other member States of the granting State.

COMMENTARY

(1) National treatment has a special feature in some of the federal States. When Switzerland grants national treatment to another country, that does not mean that the nationals of that foreign country shall be treated in Valais as Valaisans, but that they shall be treated there as citizens of another Swiss canton; and if there are differences of treatment between the citizens of the various cantons, as of the least well-treated canton. It is indeed impossible to imagine that a foreigner would be better treated in Switzerland than any Swiss national.⁴⁶

(2) In the Federal Republic of Germany the laws of the *Länder* are also highly complex and it is not always easy to ascertain the exact significance of the national treatment enjoyed by a foreigner in an individual *Land*.⁴⁶

(3) The situation in the United States is also such that national treatment has not the same content in the individual States. This is expressly spelled out, e.g., in article XIV, paragraph 2 of the Convention of Establishment between France and the United States of America signed at Paris on 25 November 1959. The text of article XIV reads as follows:

1. The term "national treatment" means treatment accorded to nationals and companies of either High Contracting Party within the territories of the other High Contracting Party upon terms no less favorable than the treatment therein accorded, in like situation, to the nationals and companies, as the case may be, of such other High Contracting Party.

2. National treatment accorded under the provisions of the present Convention to French companies shall, in any State, territory or possession of the United States of America, be the treatment accorded therein to companies constituted in other States, territories and possessions of the United States of America.⁴⁷

(4) The proposed rule does not cover in detail all possible cases. It presumes that in a member State of a federal State all citizens of the federal State are treated alike. Thus it does not refer to the notion of "the citizen of the least-well treated canton".⁴⁸

Article 11. Effect of an unconditional national treatment clause

Under an unconditional national treatment clause the beneficiary State acquires the right to national treatment from the granting State without the obligation to reciprocate the same treatment in kind to the latter State.

⁴⁶ A. Piot, "Of Realism in Conventions of Establishment", *Journal du droit international*, 88th Year, No. 1, January-March 1961, p. 67.

⁴⁶ *Ibid.*

⁴⁷ United Nations, *Treaty Series*, vol. 401, pp. 90-92.

⁴⁸ See para. 1 above.

Article 12. Effect of a national treatment clause conditional on material reciprocity

Under a national treatment clause conditional on material reciprocity the beneficiary State acquires the right to national treatment from the granting State against reciprocating the same treatment in kind to the latter State.

COMMENTARY TO ARTICLES 11 AND 12

(1) Articles 11 and 12 are drafted on the pattern of articles 6 *bis* and 6 *ter* and need no further explanation.

The Foreign Minister of France in his letter of 22 July 1929 cited below⁴⁹ has expressly stated:

"... when treaties provide for national treatment without making such treatment conditional on reciprocity, the question of whether a French national enjoys the same advantages in the territory of the other country no longer arises."⁵⁰

This thesis corresponds to the rule proposed in article 11 and from it follows *a contrario* the rule of article 12.

Article 13. The right of the beneficiary State under a most-favoured-nation clause to national treatment

1. The beneficiary State acquires under a most-favoured-nation clause the right to national treatment if the granting State has accorded national treatment to a third State.

2. Paragraph 1 applies irrespective of whether national treatment has been accorded by the granting State to a third State unconditionally or subject to material reciprocity or against any other compensation.

COMMENTARY

(1) The rule proposed in article 13 seems to be at first sight self-evident. When two States promise each other national treatment (inland parity) and then promise other States most-favoured-nation treatment, the latter group may legitimately claim that they are also entitled to be treated on a "national basis", for otherwise they are not being treated as favourably as the most-favoured-nation (assuming that there is a material difference in treatment as a result of different promises made).⁵¹

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

the m.f.n. standard fulfils the function of generalizing the privileges granted under the national standard to any third State among the beneficiaries of m.f.n. treatment in the same field."⁵²

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

Since national treatment generally embraces a maximum number of rights and the rights accorded are clearly defined, States often seek to have their nationals placed on an equal footing with those of other countries. If national treatment is thus granted to the most-

⁴⁹ Para. 4 of the commentary to article 13.

⁵⁰ Quoted by Mme M. Simon-Depitre in *Juris-classeur de droit international* (Paris, Editions techniques), vol. V, fasc. 523, p. 26.

⁵¹ Snyder, *op. cit.*, pp. 11-12.

⁵² "The Most-Favoured-Nation Standard..." (*loc. cit.*), p. 119.

favoured nation, all other entitled States can also claim it for their nationals by invoking the most-favoured-nation clause.⁵³

(4) This effect of the most-favoured-nation clause has been explicitly recognized in France. The French Foreign Minister in a letter of 22 July 1929⁵⁴ published a list of countries enjoying national treatment in France. The Minister added:

A greater number of conventions were entered into on the basis of the treatment reserved for the nationals of the most-favoured-nation. Aliens capable of availing themselves of a convention of that nature are entitled to be treated in France as the nationals of the above-listed countries.⁵⁵

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

(5) This position manifests itself also in the practice of French courts:

[French] legal thinking has, on the whole, taken the view that national treatment is to be applied to those who invoke it on the strength of a most-favoured-nation clause.⁵⁶

Thus—among many other cases—a French court, in this instance the Tribunal correctionnel de la Seine, said:

Whereas Sciama, being of Italian nationality, may legitimately claim the benefit of article 2 of the treaty of establishment of 23 August 1951 between France and Italy, which provides: "The nationals of each of the High Contracting Parties shall enjoy in the territory of the other party most-favoured-nation treatment with regard to . . . the practice of trade. . ."; and whereas, consequently, he is entitled to rely on the provisions of article 1 of the Convention concluded on 7 January 1862 between France and Spain, which provides that: "The subjects of both countries may travel and reside in the respective territories on the same footing as nationals . . . practise both wholesale and retail trade operations. . .".⁵⁷

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

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

Within these limits, and under the same conditions as the subjects of the most favoured nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament, inheritance, or in any other manner whatever, without being subject to any taxes, imposts or charges whatever, other or higher than those which are or shall be levied on natives or on the subjects of the most favoured State. . .⁵⁸

⁵³ K. Becher, "Das Prinzip der Meistbegünstigung und die Völkerrechtskommission der Vereinten Nationen", in *Deutschen Aussenpolitik* (East Berlin), 17th year, No. 4 (July-August 1972), p. 774.

⁵⁴ France, *Journal officiel de la République française, Lois et décrets* (Paris), 12-13 August, 1929, 61st year, No. 189.

⁵⁵ Piot, *loc. cit.*, p. 45.

⁵⁶ Level, *loc. cit.*, p. 338.

⁵⁷ See *Yearbook . . . 1973*, vol. II, p. 145, document A/CN.4/269, para. 77.

⁵⁸ *British and Foreign State Papers, 1880-1881*, vol. 72, (London, Ridgway, 1888), p. 1131.

The Court said:

The 1881 Treaty clearly declares its basic purpose to bring about "reciprocally full and entire liberty of commerce and navigation" between the two signatory nations so that their citizens "shall be at liberty to establish themselves freely in each other's territory". Their citizens are also to be free to receive, hold and dispose of property by trading, donation, marriage, inheritance or any other manner "under the same conditions as the subjects of the most favored nation". Thus, both paragraphs of Art. II of the Treaty which have pertinence here contain a "most favored nation" clause with regard to "acquiring, possessing or disposing of every kind of property". This clause means that each signatory grants to the other the broadest rights and privileges which it accords to any other nation in other treaties it has made or will make. In this connection we are pointed to a treaty of this country made with Argentina before the 1881 Treaty with Serbia, and treaties of Yugoslavia with Poland and Czechoslovakia, all of which unambiguously provide for the broadest kind of reciprocal rights of inheritance for nationals of the signatories which would precisely protect the right of these Yugoslavian claimants to inherit property of their American relatives.⁵⁹

The national treatment clause (article IX) of the Treaty of Friendship, Commerce, and Navigation between the United States and the Argentine Confederation of 1853 provided:

In whatever relates to . . . acquiring and disposing of property of every sort and denomination, either by sale, donation, exchange, testament, or in any other manner whatsoever, . . . the citizens of the two contracting parties shall reciprocally enjoy the same privileges, liberties and rights as native citizens. . .⁶⁰

The Court concluded:

We hold that under the 1881 Treaty, with its "most favoured nation" clause, these Yugoslavian claimants have the same right to inherit their relatives' personal property as they would if they were American citizens living in Oregon. . .⁶¹

(7) The solution sustained in practice and proposed in article 13 has been questioned in the writings of several authors. According to Level:

It may be argued against the affirmative solution that, among the concessions mutually granted by the High Contracting Parties, the most-favoured-nation clause is of a lower order than the national treatment clause and that it is paradoxical for the former to produce the same effects as the latter. It may also be wondered whether the special nature of the two clauses does not bar their cumulative application. As clauses which grant equal treatment, in one case, with the most-favoured foreigner and, in the other case, with nationals, they have no effect by virtue of their content but by mere reference. Is the intent of the contracting States truly reflected by thus linking one clause to the other to the point of producing an effect which is not in keeping with the meaning of the first of the two clauses? ⁶²

(8) This idea has been developed in some depth in the Institute of International Law in the provisional and definitive reports of Pescatore on the topic: "The most-

⁵⁹ See *Yearbook . . . 1973*, vol. II, p. 144, document A/CN.4/269, para. 73.

⁶⁰ United States of America, *The Statutes at Large and Treaties of the United States of America from December 1925 to March 1927*, vol. X (Washington, D.C., U.S. Government Printing Office, 1927), p. 1009. Text also in *British and Foreign State Papers, 1852-1853*, vol. 42 (London, Ridgway, 1864), p. 722.

⁶¹ See *Yearbook . . . 1973*, vol. II, p. 144, document A/CN.4/269, para. 73.

⁶² *loc. cit.*, p. 338.

favoured-nation clause in multilateral conventions." He writes in his definitive report:

... the two standards of treatment are so different in nature that it cannot be said that the most-favoured-nation clause can, in relevant cases, enable the beneficiary State to benefit from national treatment as well. In order that this problem—rather abstruse, it is true, but important in its practical effects—may be properly understood, let us recall in more concrete terms what it involves.

Let us assume that State A has granted most-favoured-nation treatment to one or more other States—States B, C, D, etc. It subsequently concludes with State X a treaty dealing with the same subject, e.g. the right of establishment or the protection of persons, which is based not on the standard of most-favoured-nation treatment but on the principle of national treatment, i.e. on granting nationals of State X the same status as nationals of State A. Can it not be said that, as a result of the treaty concluded by State A with State X, the most-favoured-nation standard henceforth encompasses national treatment? In other words, the most-favoured-nation clause will permit States B, C, D, etc. to enjoy the benefits of national treatment.

The question is a controversial one because the equation we have just made is open to the objection that the two clauses in question are different in nature inasmuch as the obligation assumed by a State under the most-favoured-nation clause never goes beyond granting the most favourable treatment enjoyed by a foreigner, which is not the same thing as granting the same treatment as that enjoyed by the State's own nationals. A further objection can also be made: the argument that the most-favoured-nation clause confers upon the beneficiary State the advantages of national treatment if that treatment is granted to any other State would have the inequitable effect of enabling States benefiting from the most-favoured-nation clause henceforth to claim national treatment without being themselves bound to grant it. That brings us back to the problem of reciprocity in the application of the clause. We are confronted with the fact that national treatment is normally granted only on the basis of reciprocity, and it would indeed be going very far to bestow the same advantage on countries which continue, under the clause, to grant only the same treatment as that accorded to foreigners.

The Rapporteur therefore holds to the view that the most-favoured-nation clause cannot afford more than the most favourable possible treatment which is accorded to foreigners and that the granting of national treatment, on the other hand, represents a *transitio ad aliud genus* which cannot be effected by means of the clause.

Judging from the replies received, this conclusion is not open to debate in cases where the principle of national treatment is an integral part of the constitutional framework of an economic integration scheme embracing a number of States.⁶³

In consideration of certain comments made and doubts expressed by members of the Institute (Castañeda and Guggenheim), Pescatore then seemed willing to restrict the validity of this thesis to economic relations when he stated:

... as far as international economic relations are concerned, the Rapporteur holds strongly to his view that the granting of national treatment by a State to the trade and economic activities of a third country does not obligate that State to extend the same treatment to all beneficiaries of the most-favoured-nation clause.⁶⁴

It has to be noted that this thesis of Pescatore has not been embodied in his draft resolutions and thus the Institute as a whole was not put in the position to pronounce itself on the matter.

⁶³ *Annuaire de l'Institut de droit international*, 1969 (Basle), vol. 53, t. I, pp. 201-202.

⁶⁴ *Ibid.*, p. 203.

One of the purposes of Pescatore—perhaps the main one—was to prove that the advantages granted to each other by member States of an economic union cannot be attracted by a most-favoured-nation clause of a treaty entered into between a member and a non-member State. His argument was that the advantages accorded within the framework of an economic union were not *eiusdem generis* in relation to a most-favoured-nation pledge in favour of an outsider⁶⁵ and even less so if the advantages in question consisted—as it was frequently the case in such unions—in the assimilation of each other's nationals in certain respects. However, even if it were true that the advantages granted within an economic union could not be attracted by most-favoured-nation clauses—a thesis which is open to serious doubt and by far not substantiated by practice—it would not prove the existence of a rule that national treatment grants in economic matters are not susceptible to be covered by most-favoured-nation clauses.

(9) Basing his views on the practice of States, the Special Rapporteur does not have any reason to depart from the conclusion which follows from the ordinary meaning of the clause which assimilates its beneficiary to the nation most favoured: if the most, the highest, favour accorded to a third State consists in national treatment, then it is this treatment which is, in conformity with the promise, due to the beneficiary. If a State wishes to exclude previous or future national treatment grants from its most-favoured-nation pledge, it is free to do so. If such exception is not written in the treaty, then the consequences are to be taken even if the national treatment promise follows the most-favoured-nation treaty. This situation requires nothing but a certain circumspection from statesmen involved in treaty-making, and they can rightly be expected to abstain from rash decisions.

Article 14. Cumulation of national treatment and most-favoured-nation treatment

If in an agreed sphere of relations both most-favoured-nation treatment and national treatment are stipulated by the granting State, the beneficiary State has the right to claim that treatment which it deems more favourable.

COMMENTARY

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

[t]hat the subjects of the Most Renowned King of Great Britain ... shall [not] be more burdened with Customs, Impositions, or other Taxes other than the Inhabitants and Subjects of the said Lands [Kingdoms, Provinces, Territories and Islands of the King of Portugal, in Europe], or other Subjects of any Nation whatsoever in league with the Portugals ...⁶⁶

⁶⁵ See *Yearbook* ... 1973, vol. II, pp. 106-107, document A/CN.4/266, para. 13 of the commentary to article 7.

⁶⁶ B. Nolde, "La clause de la nation la plus favorisée et les tarifs préférentiels," *Recueil des cours de l'Académie de droit international de la Haye*, 1932-1 (Paris, Sirey, 1932), vol. 39, p. 27.

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

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

(2) In some clauses it is specified that the basis of the treatment in question shall be that of the granting country's nationals or the nationals of the most-favoured-nation "whichever is more favorable". See, e.g., article 38 of the Treaty on Friendship, Commerce and Navigation between the Federal Republic of Germany and Italy of 21 November 1957.⁶⁷

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

... the problem of the compatibility of general most-favoured-nation treatment and the grant of "national treatment" to commercial shipping does not, in fact, appear to arise. Where both these systems exist side by side, the provisions for "national treatment" has overriding force—always provided that no more favourable concession has been made to a third country. In such a case, it is this more favourable treatment which must be granted to shipping of the country eligible for both "national treatment" and most-favoured-nation treatment. Such a solution, undoubtedly prevailing in treaties of commerce which, like that between Norway and the USSR, contain the "national treatment" clause for commercial shipping side by side with a general most-favoured-nation clause, seems equally applicable both in the case of a multilateral convention containing both clauses and in the case of multilateral convention containing only the general most-favoured-nation clause faced with bilateral conventions containing the "national treatment" clause for particular questions relating to commerce or navigation.⁶⁸

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

It is understood that, wherever the present Treaty stipulates national treatment, this implies the treatment of the most favoured foreign country, the intention of the High Contracting Parties clearly being that national treatment in their respective territories is at least equal or superior to the treatment of the most favoured foreign country.⁶⁹

The presumption is, however, open to rebuttal. There may be cases where foreigners enjoy advantages not granted to nationals. Should such case occur, most-favoured-nation treatment surpasses national treatment.

A specific stipulation to this effect may be found in the United Kingdom-Switzerland Treaty on Friendship, Commerce and Reciprocal Establishment of 6 September 1855, article VIII of which runs as follows:

In all that relates to the importation into, the warehousing in, the transit through, and the exportation from, their respective territories, of any article of lawful commerce, the two contracting parties engage that their respective subjects and citizens shall be placed upon the same footing as subjects and citizens of the country, or as the subjects and citizens of the most favoured nation in any case where the latter may enjoy an exceptional advantage not granted to natives.⁷⁰

(5) According to Sauvignon:

[National treatment] is sometimes granted concurrently with the most-favoured-nation clause. In such cases, it is the more favourable of the two types of treatment—normally national treatment—that applies. In exceptional cases, however, most-favoured-nation treatment may be more advantageous than national treatment. This is the case when a State which wishes to expand its industrial production grants foreign enterprises tax exemptions and other advantages greater than those accorded to national enterprises. It would therefore be quite false to suppose that the granting of national treatment automatically encompasses most-favoured-nation treatment.⁷¹

(6) According to Schwarzenberger:

... two or more of the standards may also be employed in the same treaty for the better attainment of the same or different objectives. Thus, the coupling of m.f.n. and national-treatment clauses may lead to treatment more advantageous to nationals of the other contracting party than could be achieved by the employment of one or the other standard in relation to, for instance, exemption from civil defence duties. In such cases, the typical intention of contracting parties is that the application of several standards should be cumulative. Therefore a presumption exists in favour of their cumulative interpretation.⁷²

Article 15. The commencement of the functioning of a most-favoured-nation clause

1. An unconditional most-favoured-nation clause commences to function at the time of its entry into force provided that at that time the treatment specified in the clause has been accorded by the granting State to a third State. If that treatment is accorded later, the clause commences to function at the time of the according of that treatment.

2. A most-favoured-nation clause subject to material reciprocity commences to function at the time defined in paragraph 1 provided that at that time material reciprocity has been established between the granting State and the beneficiary State in respect of the treatment specified in the clause. If that reciprocity is established later, the clause commences to function at the time of the establishment of that reciprocity.

⁷⁰ United Kingdom, Foreign Office, *Handbook of Commercial Treaties etc. with Foreign Powers*, 4th ed. (London, H.M. Stationery Office, 1931), p. 669.

⁷¹ E. Sauvignon, *La clause de la nation la plus favorisée* (Grenoble, Presses universitaires de Grenoble, 1972), p. 6.

⁷² "The principles and standards of international economic law", *Recueil des cours... 1966-I* (Leiden, Sijthoff, 1967), vol. 117, p. 69.

⁶⁷ K. Strupp, *op. cit.*, p. 500.

⁶⁸ E/ECE/270, Part II, para. 42 (h).

⁶⁹ League of Nations, *Treaty Series*, vol. CVIII, p. 432.

COMMENTARY

(1) The first task of the commentary is to explain the use of the expression "functioning" in relation to the most-favoured-nation clause. In the first drafts of the Special Rapporteur the words "operate" and "operation" were used, these being the terms commonly used for conveying the idea which has to be expressed. The term "operation" of a treaty, however, is used in the 1969 Vienna Convention on the Law of Treaties,⁷³ although not defined in its article 2 on the use of terms. Still it is obvious that what is meant in the convention by "operation" of a treaty is that it has entered into force and has not been terminated, suspended or invalidated. This follows most clearly from the expression "suspension of the operation of the treaty" as used in part V of the convention. Hence in the terminology of the 1969 Convention a treaty containing a most-favoured-nation clause—and the clause itself as a provision of a treaty—is "in operation" from the moment of its entry into force until its termination, suspension etc. It being the desire of the Commission to keep the terminology of the articles on the most-favoured-nation clause as close as possible to that of the 1969 Convention, a word other than "operation" has to be found to express the idea that the clause in itself, by its mere entry into force—by the beginning of its "operation", to use the terminology of the 1969 Convention—does not really become operative, i.e., it does not really function, in the absence of the granting State's undertaking to third States. Its functioning—here we would rather say "its operation" if this word was not reserved by the Convention for expressing another notion—begins only if such undertakings are made by the granting State, i.e., if a third State has been actually put in a favoured position.

(2) The presence of two elements is necessary to put into action an unconditional most-favoured-nation clause: (a) a valid clause contained in a treaty in force, (b) a grant of favours by the granting State to a third State. A third element is needed in the case of a clause subject to material reciprocity: the establishment of that reciprocity. If one of the necessary elements is lacking, there is no such thing as an operating or a functioning clause.⁷⁴ The moment of the beginning of the functioning is the one when the last (in the case of an unconditional clause, a second, and in that of a clause subject to reciprocity, a third) element enters the scene.

(3) Paragraphs 1 and 2 of article 15 spell out also the generally admitted rule that a most-favoured-nation clause—unless otherwise agreed—attracts benefits granted to a third State both before and after the entry into force of the treaty containing the clause. The reason of this rule is explained by Sauvignon as follows:

... since the purpose of the clause is to place the beneficiary State on an equal footing with third States, it would be an act of bad faith to confine that equality existing at the time of the treaty or to future legal situations. A "pro futuro" clause or a clause directed towards

⁷³ For text see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

⁷⁴ As Schwarzenberger (*International Law and Order* (op. cit.), p. 130), puts it, "In the absence of undertakings to third States, the m.f.n. standard is but an empty shell".

the past cannot be deemed to exist unless it is worded in unequivocal fashion. Otherwise, the clause must extend to the beneficiary all advantages granted both in the past and in the future."⁷⁵

(4) This view is sustained in practice as evidenced by the following case:

The special legislation of Belgium regulating the duration of tenancies rendered nationals of countries which were either neutral or allied to Belgium during the First World War eligible to share in its benefits, on condition of reciprocal treatment. The claimant complained that the privilege of the legal extension of her tenancy had been denied her because of her French nationality and of the lack of reciprocal treatment of Belgian nationals in France. The Court held for the claimant. Pursuant to the Franco-Belgian convention of 6 October 1927, the nationals of each of the High Contracting Parties "shall enjoy in the territory of each other most-favoured-nation treatment in all questions of residence and establishment, as also in the carrying on of trade, industry and the professions" (article 1). This privilege was extended to cover the possession, acquisition and leasing of real or personal property (article 2). The Treaty concluded between Belgium and Italy on 11 December 1882 provided (article 3) that the nationals of each of the High Contracting Parties should enjoy within each other's territory full civil rights on an equal footing. The court said:

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

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

The claimant, as a French national, is therefore entitled to claim a legal extension of her tenancy of the premises by virtue of the treaty of 6 October 1927.⁷⁶

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

According to Level:

What is at issue here is whether the clause shall follow the time-of-application provisions of the treaty from which it derives its content or those of the treaty which provides for most-favoured-nation treatment. In the latter case, nationals of the beneficiary State can it is true, claim the advantages previously granted to the favoured State, but this treatment takes effect only on the date of the entry into force of the treaty containing the most-favoured-nation clause [. . .]. If the first assumption is correct and the clause is also subject to the time-of-application provisions of the treaty concluded with the favoured State, nationals of the beneficiary State are in exactly the same position as those of the favoured State and are thus entitled to claim that the advantages in question were applicable

⁷⁵ *Op. cit.*, p. 21, note 1. In the same sense S. Basdevant, "Clause de la nation la plus favorisée," in A. de Lapradelle et J. P. Niboyet, *Répertoire de droit international* (Paris, Sirey, 1929), vol. III, p. 488.

⁷⁶ See *Yearbook . . . 1973*, vol. II, pp. 129-130, document A/CN.4/269, para. 31.

to them prior to the publication of the treaty containing the clause, i.e. as from the entry into force of the treaty concluded between the favoured State and the granting State. Thus, in the second of the two posited cases, nationals of the beneficiary State would be entitled to retroactive application—in relation to the date of publication of the treaty containing the clause—of most-favoured-nation treatment.

French legal thinking has rejected the idea of giving the clause this kind of retroactive effect. Nationals of the beneficiary State can claim the advantages granted to the favoured State only on the date of the entry into force of the treaty containing the clause. "The actual formulation of the clause does not warrant retroactive assimilation to foreigners who already enjoy favoured status." . . . "If existing advantages are automatically made applicable, this applies only to the future". [. . .] Of course, under the rule governing time of application, the High Contracting Parties may, by expressly so stipulating, provide for retroactive application of the clause . . . The view upheld by French legal thinking is in keeping with the analysis of the nature of the clause contained in the judgement rendered by the International Court of Justice in the Anglo-Iranian case. The enjoyment of advantages under the clause derives from the clause itself and not from the treaty containing the substantive provisions whose application is sought. Although the clause permits enjoyment of the advantages granted to nationals of the favoured State, it does not retroactively make the beneficiary State a party to the treaty concluded between the granting State and the favoured State.⁷⁷

In the same sense Christian Gavaldà writes:

The clause does not do away with past differences between the various national legal systems. The "standard" rule, which calls for an "inopportune" international legal situation to cease to exist at the earliest possible time . . . does not prevail against the international legal principle of non-retroactivity . . .

Most-favoured nation treatment is, as Scelle puts it, "automatically communicated", but this applies only to the future. It should be noted that the same reasoning can be employed in determining the application in time of a treaty containing a *reciprocity clause*. The advantages granted on this basis to nationals of a given State also do not extend back to the time when our nationals first enjoyed this right (*de facto, de jure* or by treaty) in the country concerned.⁷⁸

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

(6) McNair, in *The Law of Treaties* examined the question "Whether the operation of a most-favoured-nation clause is contingent upon a third State merely becoming entitled to claim certain treatment, or whether it operates only when the third State actually claims and begins to enjoy the treatment".

It seems relevant to quote here his reasoning:

Supposing that Great Britain is entitled to most-favoured-nation treatment under a treaty with State A, and by reason of a treaty between State A and State B the latter is or becomes entitled to claim for itself or its nationals certain treatment from A, e.g. exemption from income-tax or from some legislation affecting the occupation of houses, when is Great Britain entitled to claim from A the treatment due to B? At once or only when B has succeeded in asserting its treaty right to this treatment? In answer to this question two views are possible. The first is that Great Britain has no *locus standi* to claim the treatment until she can point to its actual exercise and enjoyment by B or B's nationals. This view places Great Britain at the mercy of the degree of vigilance exerted by B or the degree of importance of the matter to B; for instance, B might have no

nationals residing in the territory of A and earning a taxable income. The second view is that the most-favoured-nation clause in the treaty with Great Britain, automatically and absolutely, invests her and her nationals with all rights *in pari materia* which may be possessed at any time when the treaty is in force by B and its nationals, irrespective of the question whether those rights are in fact being exercised and enjoyed or not, that is, irrespective of the question whether B has claimed them or neglected to claim them or had no occasion to claim them. The United Kingdom Government has been advised by its law officers that the second view is the right one, that is to say, that while the question "must depend upon the true construction of the most-favoured-nation clause upon which it may arise, . . . speaking generally . . . the right extends to the treatment which the most-favoured-nation is entitled to, whether actually claimed or exercised or not." The United Kingdom has asserted, and succeeded in maintaining, this second view.⁷⁹

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

On 11 April 1906 on a question relating to the right of aliens to receive British pilotage certificates, the law officers, when asked whether the right claimable by subjects of the nations indicated was an absolute right by reason of the operation of the most-favoured-nation clause, or whether the right was one which was claimable only if and when the subjects of States who had been granted national treatment had claimed and received the particular privilege then under consideration, said that the answer to this question "must depend upon the true construction of the particular most-favoured-nation clause upon which it may arise; but speaking generally, we are of opinion that the right extends to the treatment which the most-favoured-nation is entitled to, whether actually claimed or not. On the other hand, the treatment accorded in actual practice would be very material upon the construction of the treaty upon which it depends."⁸⁰

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

In 1943 the American Embassy in Santiago took the position that the unconditional most-favoured-nation clause in the United States-Chilean commercial agreement gave the right to duty-free importation of United States lumber "of those species of woods specified in the memoranda exchanged between the Peruvian and Chilean Governments [providing duty-free treatment for such species of Peruvian lumber imported into Chile] and [that] this position holds regardless of whether there have been any imports into Chile from Peru or any other country of the particular species of wood specified in the memoranda". Thus, the most-favoured-nation clause was interpreted to accord those rights legally accorded to products of another country, whether or not there was in fact any enjoyment of such right with reference to such products.⁸¹

(7) As provided for in article 15, besides the entry into force of the most-favoured-nation clause it is the according of benefits to the third State which brings the clause into action. This "according" can also take place by the conclusion of a treaty or by any other kind of agreement reached between the granting State and the third State. Is the effect the same if the grant is not based on a treaty but on the internal law of the granting State? According to McNair:

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

⁷⁹ A. D. McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961), pp. 278-279.

⁸⁰ *Ibid.*, pp. 279-280.

⁸¹ M. Whiteman, *Digest of International Law*, vol. 14 (Washington, D.C., U.S. Government Printing Office, 1970), p. 750.

⁷⁷ *Loc. cit.*, pp. 336-337.

⁷⁸ *Revue critique du droit international privé* (Paris), No. 3 (July-September 1961), p. 538.

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

On the other hand, where the treaty merely provides that the nationals of A are entitled to whatever rights and privileges B may "grant" to the nationals of C, the question may arise whether the clause refers to grant by treaty or to grant by any means whatever. The British answer to this question is that the clause includes grant by any means whatever.⁸²

(8) According to Nolde, "it is quite immaterial whether the advantages granted to 'any third country' derive from the domestic law of the other Contracting Party or from agreements concluded by the latter with 'any third country' ".⁸³ Further he calls this rule "a rule which has long been established and is absolutely unchallengeable".⁸⁴

(9) The 1936 resolution of the Institute of International Law is also explicit: "The most-favoured-nation clause confers upon the beneficiary the régime granted by the other contracting party to the nationals, goods and ships of any third country by virtue of its municipal law and its treaty law".⁸⁵

(10) It is obvious that the answer to the question dealt with in the previous paragraphs depends on the interpretation of the given clause. The purpose of the proposed rule is precisely to give guidance in cases where the wording of the clause is such that it refers purely and simply to most-favoured-nation treatment without containing details as to its functioning. It is believed that in such cases it can be presumed that the intention of the parties consists in bringing the beneficiary in the same legal position as the third State. This idea and the theory—already adopted by the Commission⁸⁶—according to which the source of the beneficiary's right lies in the treaty containing the clause, sufficiently warrant the submission of the rule as proposed in article 15.

Article 16. Termination or suspension of the functioning of a most-favoured-nation clause

1. The functioning of an unconditional most-favoured nation clause shall be considered as terminated or suspended at the time of the termination or suspension of the operation of the clause—or at the time of the termination or suspension of the according of the favoured treatment by the granting State to a third State—whichever is earlier.

2. The functioning of a most-favoured-nation clause subject to reciprocity shall be considered as terminated or suspended at the time defined in paragraph 1 or at the time of the termination or suspension of the material reciprocity between the granting State and the beneficiary State in respect of the treatment specified in the clause—whichever is earlier.

⁸² *Op. cit.*, p. 280.

⁸³ *Loc. cit.*, p. 48.

⁸⁴ *Ibid.* Similarly Sauvignon, *op. cit.*, p. 22.

⁸⁵ See *Yearbook . . . 1969*, vol. II, p. 181, document A/CN.4/213, annex II.

⁸⁶ See *Yearbook . . . 1973*, vol. II, p. 221, document A/9010/Rev.1, chap. IV, B, article 7.

COMMENTARY

(1) Paragraph 1 uses the term "termination or suspension of the operation" of the clause with the meaning with which that expression is used in part V of the 1969 Convention.

(2) There is no special rule as to the separability of the most-favoured-nation clause from the other provisions of the treaty. The general rules apply. Each case has to be decided on its own merits.⁸⁷ The problem of separability does not arise in cases where the whole treaty consists of a single most-favoured-nation pledge.

(3) Should the parties to a most-favoured-nation clause decide by common accord to modify their agreement so as to exclude certain benefits from the operation of the clause this would of course have the same effect as a partial termination or suspension of the clause.

(4) That the functioning of the clause ceases with its own termination or suspension is almost a tautology and needs no explanation. What is a special feature of the clause and follows from its very nature is that the right of the beneficiary State—and hence the functioning of the clause—ceases when the third State loses its privileged position. The privilege having disappeared, the fact which put the clause into operation no longer exists, and therefore the clause ceases to have effect. *Cessante causa, cessat effectus*.⁸⁸

(5) Thus the Supreme Court of Administration of Finland in the case of the application of the Trade Agreement between Finland and the United Kingdom passed a judgement on 12 March 1943 in the following sense:

The duties imposed on certain goods in the trade agreement between Finland and the United Kingdom were to be applied also to goods imported from Germany in accordance with the most-favoured-nation clause between Finland and Germany. The court decided that after the United Kingdom had declared war on Finland, the most-favoured-nation clause was no longer applicable to Germany, and consequently, the duties imposed on goods imported from Germany should be treated autonomously and not according to the trade agreement between Finland and the United Kingdom.⁸⁹

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

The duration of the effects of the most-favoured-nation clause is limited by that of the conventions with third States which led to the application of that clause.⁹⁰

In the course of the discussion on the codification of the law of treaties the following draft provision was submitted by Mr. Jiménez de Aréchaga:

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

⁸⁷ Basdevant, *loc. cit.*, p. 481; D. P. O'Connell, "State succession and problems of treaty interpretation," *American Journal of International Law* (Washington, D.C.), vol. 58, No. 1 (January, 1964), p. 45.

⁸⁸ Snyder, *op. cit.*, p. 37; Sibert, *Traité de droit international public* (Paris, Dalloz, 1951), vol. II, p. 255.

⁸⁹ *Yearbook . . . 1973*, vol. II, p. 124, document A/CN.4/269, para. 13.

⁹⁰ *Yearbook . . . 1969*, vol. II, p. 181, document A/CN.4/213, annex II.

longer be relied upon by a third State by virtue of a most-favoured-nation clause.⁹¹

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

(7) The will of the parties can of course under special circumstances change the operation of the clause. That such special circumstances existed in the case was contended by the American party before the International Court of Justice in the case concerning rights of nationals of the United States of America in Morocco.⁹² The Court interpreted the most-favoured-nation clauses in the treaties between the United States and Morocco in accordance with the general nature and purpose of the most-favoured-nation clauses.

In the words of the Court:

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

From either point of view, this contention is inconsistent with the intentions of the parties now in question. This is shown both by the wording of the particular treaties, and by the general treaty pattern which emerges from the examination of the treaties . . . These treaties show that the intention of the most-favoured-nation clauses was to establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned.⁹³

In the same judgement the Court held also:

It is not established that most-favoured-nation clauses in treaties with Morocco have a meaning and effect other than such clauses in other treaties or are governed by different rules of law. When provisions granting fiscal immunity in treaties between Morocco and third States have been abrogated or renounced, these provisions can no longer be relied upon by virtue of a most-favoured-nation clause.⁹⁴

(8) A notable instance of changing the general pattern of the operation of the clause is that of the General Agreement on Tariffs and Trade. The key provision of the General Agreement is a general most-favoured-nation clause in respect of customs duties and other charges in article I, paragraph 1.⁹⁵

Article II, paragraph 1 (a) of the General Agreement however provides:

Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.⁹⁶

According to Curzon:

It can even be maintained that Article II (i)—safeguarding of schedules—is of greater significance than the most-favoured-nation

clause itself . . . This paragraph of Article II is a completely new phenomenon in international commercial legislation and an addition to the most-favoured-nation clause of no mean import. The "Schedules" are the consolidated list of all concessions made by all contracting parties in their negotiations with their trading partners and maximum rates. The difference this addition makes to the most-favoured-nation clause is the protection it offers against the raising of the tariff on scheduled items. The traditional clause, while ensuring unconditional most-favoured-nation treatment, only provides equality of treatment against tariff changes . . .⁹⁷

According to Hawkins, GATT

goes beyond the most-favoured-nation principle in this respect. Each member giving a concession is directly obligated to grant the same concession to all other members in their own right; this is different from making the latter rely on continued agreement between the Party granting the concession and the Party that negotiated it.⁹⁸

(9) A French author gives the following picture of the operation of the clause:

. . . the clause can be pictured as a float, which enables its possessor to maintain itself at the highest level of the obligations accepted towards foreign States by the grantor State; if that level falls, the float cannot turn into a balloon so as to maintain the beneficiary of the clause artificially above the general level of the rights exercised by other States.⁹⁹

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

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

The Italo-Abyssinian War provides a final example of the preservation of an advantage for a State benefiting from the clause beyond the duration of the treatment of the favoured third country. The sanctions against Italy resulted in the denunciation by States Members of the League of Nations of their trade treaties with Rome.

⁹⁶ GATT, *op. cit.*, p. 3.

⁹⁷ G. Curzon, *Multilateral Commercial Diplomacy: The General Agreement on Tariffs and Trade and Its Impact on National Commercial Policies and Techniques* (New York, Praeger, 1966).

⁹⁸ *Op. cit.*, p. 226, note on chapter VIII.

⁹⁹ Cl. Rossillion, "La clause de la nation la plus favorisée dans la jurisprudence de la Cour internationale de justice," *Journal du droit international* (Paris), 82nd year, No. 1 (January-March 1955), p. 106.

⁹¹ *Yearbook* . . . 1964, vol. I, p. 184, 752nd meeting, para. 1.

⁹² *I.C.J. Reports* 1952, p. 176.

⁹³ *Ibid.*, pp. 191-192.

⁹⁴ *Ibid.*, p. 204.

⁹⁵ See GATT, *op. cit.*, p. 2. The text is reproduced in *Yearbook* . . . 1970, vol. II, p. 221, document A/CN.4/228 and Add.1, para. 144.

The advantages conferred by those treaties should normally have ceased at the same time to accrue to third countries benefiting from the clause. They were, however, preserved for the countries in question on the basis of Article 16, paragraph 3, of the Covenant, under which the Members of the League agreed that they would mutually support one another in the financial and economic measures taken as sanctions "in order to minimise the loss and inconvenience resulting from the above measures".¹⁰⁰

¹⁰⁰ *Op. cit.*, pp. 96-97.

According to the same author:

Article 49 of the United Nations Charter [mutual assistance in carrying out measures decided upon by the Security Council] can also justify a request along these lines by a beneficiary State, perhaps after the latter has undertaken the consultation envisaged by Article 50.¹⁰¹

¹⁰¹ *Ibid.* For details of the Ethiopian-Italian case, see League of Nations, *Official Journal, Special Supplement No. 145*, p. 26 and *Special Supplement No. 150*, pp. 11-12.