

Document:-  
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**Seventh report on the most-favoured-nation clause, by Mr. Endre Ustor, Special Rapporteur -  
draft articles, with commentaries (continued)**

Topic:  
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# MOST-FAVOURLED-NATION CLAUSE

[Agenda item 4]

DOCUMENT A/CN.4/293 AND ADD.1

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

Draft articles with commentaries (continued)\*

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\* For the draft already proposed by the Special Rapporteur, see the third, fourth, fifth and sixth reports (*Yearbook . . . 1972*, vol. II, p. 161, document A/CN.4/257 and Add.1; *Yearbook . . . 1973*, vol. II, p. 97, document A/CN.4/266; *Yearbook . . . 1974*, vol. II (Part One), p. 117, document A/CN.4/280; and *Yearbook . . . 1975*, vol. II, p. 1, document A/CN.4/286).

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## ABBREVIATIONS

CMEA	Council for Mutual Economic Assistance	MFN	Most favoured nation
EEC	European Economic Community	OAS	Organization of American States
EFTA	European Free Trade Association	OECD	Organisation for Economic Co-operation and Development
GATT	General Agreement on Tariffs and Trade	UNCTAD	United Nations Conference on Trade and Development
GSP	Generalized system of preferences		

## I. GENERAL PROVISIONS

## 1. Introduction

1. The role of the most-favoured-nation clause in the relations of States and particularly in their economic and trade relations is a matter of importance. Thus, in the Final Act of the Conference on Security and Co-operation in Europe, adopted at Helsinki on 1 August 1975, under the heading "General Provisions" of the first section "Commercial Exchanges" of the part devoted to "Co-operation in the Field of Economics, of Science and Technology and of the Environment", the participating States

recognize the beneficial effects which can result for the development of trade from the application of most-favoured-nation treatment.<sup>1</sup>

2. The role of the most-favoured-nation clause in trade among countries of different levels of development was an issue thoroughly examined at the various sessions of UNCTAD and is still a matter of concern to UNCTAD, to GATT and to the world of the science of political economy.

3. It has to be pointed out, however, that the study undertaken by the International Law Commission belongs to a special sphere of research, owing to the general nature of the Commission's tasks and particularly to the fact that its present work is conceived as the elaboration of a part of the law of treaties. In simple words, the Commission is not, at this juncture, seeking answers to the important question of whether or not certain relations of States ought to be placed on the basis of treaties containing most-favoured-nation clauses. Its attention is focused on the question of what special rules within the framework of the general rules of the law of treaties are applicable to the most-favoured-nation clauses actually stipulated in treaties.

4. This being the case, it is not intended to take issue with statements such as that of a representative in the Sixth Committee of the General Assembly at its thirtieth session, who stated that the most-favoured-nation clause was clearly an institution that corresponded to past economic realities, which were being superseded by new realities that required an adjustment of rules.<sup>2</sup> Beside the document of the Helsinki

<sup>1</sup> Conference on Security and Co-operation in Europe, Co-ordinating Committee, document CSCE/CC/64, p. 30.

<sup>2</sup> Statement by the representative of Ecuador (see *Official Records of the General Assembly, Thirtieth Session, Sixth Committee, 1540th meeting, para. 29*).

Conference already mentioned, reference could be made, among many others, to General Principle Eight in annex A.I.1 of the recommendations adopted by UNCTAD at its first session, which contains a summary of UNCTAD's basic philosophy. It begins as follows:

International trade should be conducted to mutual advantage on the basis of the most-favoured-nation treatment and should be free from measures detrimental to the trading interests of other countries.<sup>3</sup>

5. In view of the foregoing and of the fact that the use of the clause is not restricted to international trade, a fact which some are at times inclined to forget, it may be thought that the statement made in the Committee of Experts for the Progressive Codification of International Law in the League of Nations: "But the nations do not seem able to escape the use of the clause",<sup>4</sup> has not lost its validity.

6. Hence, it is felt that the study of the most-favoured-nation clause is still topical and, perhaps, even more so now than it was before, for at least two reasons: it gives a chance for the legal confirmation of developments which have taken place in respect of the role of the clause in the field of international trade between States at different levels of development and, apart from the intrinsic merits of every codification, it will give assistance to the chancelleries, and among them to the many quite recently established, to foresee the sometimes far-reaching effects of the clause and to draft their treaties in accordance with their own interest.

## 2. General character of the draft articles

7. Under this heading, the Commission stated in the report on the work of its twenty-seventh session:

The articles on the most-favoured-nation clause are designed to be supplementary to the Vienna Convention on the Law of Treaties<sup>5</sup> . . . the draft articles on the most-favoured-nation clause presuppose the

<sup>3</sup> For the full text of General Principle Eight, see *Proceedings of the United Nations Conference on Trade and Development, vol. I, Final Act and Report* (United Nations publication, Sales No. 64.II.B.11), p. 20.

<sup>4</sup> League of Nations document C.205.M.79.1927.V, p. 12.

<sup>5</sup> For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289. The Convention will be referred to hereafter in the present report as "the Vienna Convention".

existence of the provisions of that Convention and are conceived as supplementary to the Vienna Convention "as an essential framework". The general rules pertaining to treaties having been stated in the Vienna Convention, the draft articles contain particular rules applicable to a certain type of treaty provisions, namely to most-favoured-nation clauses.<sup>6</sup>

8. This stand of the Commission was generally approved by the representatives of States in the Sixth Committee of the General Assembly at its thirtieth session. According to the report of the Sixth Committee:

... The close relationship between the most-favoured-nation clause and the Vienna Convention made the clause well suited for codification. The Commission's work would greatly help to clarify the often controversial situations arising out of the application and interpretation of the clause in international relations.<sup>7</sup>

9. On the basis of the foregoing the following new article is proposed:

*Article A. Relationship of the present articles to the Vienna Convention on the Law of Treaties*

The present articles are intended to supplement the Vienna Convention on the Law of Treaties done at Vienna, on 23 May 1969. The provisions of these articles shall not affect those of the said Convention.

*Commentary*

(1) A most-favoured-nation clause being part of a treaty, it is evidently subject to the law of treaties. The provisions of the articles on the most-favoured-nation clause do not detract from the provisions of the Vienna Convention regarding the conclusion, entry into force, observance, application, interpretation, invalidity, termination, etc. of a treaty including the clause and the clause itself. It is not intended here to theorize on the question of which set of provisions has priority over the other; in each particular case involving a most-favoured-nation clause the provisions of both the present articles and the Convention have to be taken into consideration.

(2) There are several treaties which contain a provision on the relationship of that treaty to another. A good and systematic selection is offered by *The Treaty Maker's Handbook*,<sup>8</sup> section 15 of which contains some 39 clauses providing partly for the priority of the given treaty over one or more others (e.g., Article 103 of the Charter of the United Nations), partly for the priority of any other treaty over that which contains the provision (e.g., article 73 of the Vienna Convention on Consular Relations).<sup>9</sup>

(3) The proposed article, in its first sentence, states the obvious by providing that the present articles are intended to supplement the Vienna Convention. The second sentence is couched in terms which can be found in many provisions of treaties that give priority to another treaty (e.g., article 30 of the Convention on the High Seas).<sup>10</sup> However, the ex-

pression "shall not affect" does provide for priority only in case of conflict of the two instruments. In the absence of such conflict—as is assumed in the present case—it means that both instruments equally apply.

### 3. Form of codification

10. From the assumption that the articles on the most-favoured-nation clause constitute a supplement to the Vienna Convention, it follows, in the belief of the Special Rapporteur, that the supplement should take the same form as the instrument it completes, that is, it should serve as the basis for a convention.

11. It may be recalled that the Commission, when preparing the draft articles on the law of treaties, considered the possibility of adopting a mere expository statement of the law but ultimately decided to submit the articles in a form that could be the basis for a convention. This decision was explained as follows by the Commission in the report on the work of its fourteenth session in 1962:

First, an expository code, however well formulated, cannot in the nature of things be so effective as a convention for consolidating the law; and the consolidation of the law of treaties is of particular importance at the present time when so many new States have recently become members of the international community. Secondly, the codification of the law of treaties through a multilateral convention would give all the new States the opportunity to participate directly in the formulation of the law if they so wished; and their participation in the work of codification appears to the Commission to be extremely desirable in order that the law of treaties may be placed upon the widest and most secure foundations.<sup>11</sup>

12. In submitting the final text of the draft articles on the law of treaties in the report on its eighteenth session, the Commission maintained the view which it accepted at the outset of its work on the topic and which it had expressed in its reports since 1961.<sup>12</sup> Its corresponding recommendation was accepted by the General Assembly and resulted ultimately in the adoption of the Vienna Convention.

13. Although the question of the form of the codification was not directly discussed with respect to the articles on the most-favoured-nation clause in the Sixth Committee, at the thirtieth session of the General Assembly, some representatives seemed already to assume that it should take the form of a convention by statements such as "a treaty with a possible life of many years".<sup>13</sup>

14. The above remarks on the form of the codification of the rules relating to the most-favoured-nation clause are of a preliminary nature, this being a matter to be decided definitively by the Commission in the course of the second reading of the articles.

### 4. Codification and progressive development

15. The articles on the most-favoured-nation clause constitute both codification and progressive development of

<sup>6</sup> *Yearbook* ... 1975, vol. II, p. 119, document A/10010/Rev.1, para. 116.

<sup>7</sup> *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, para. 121.

<sup>8</sup> H. Blix and J. H. Emerson, eds. (Dobbs Ferry, Oceana, 1973).

<sup>9</sup> For the text of this Convention, see United Nations, *Treaty Series*, vol. 596, p. 261.

<sup>10</sup> *Ibid.*, vol. 450, p. 83.

<sup>11</sup> *Yearbook* ... 1962, vol. II, p. 160, document A/5209, para. 17.

<sup>12</sup> *Yearbook* ... 1966, vol. II, p. 176, document A/6309/Rev.1, part II, paras. 23–27.

<sup>13</sup> Statement by the representative of the United States of America (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1545th meeting, para. 39).

international law in the sense in which those concepts are defined in article 15 of the Commission's Statute. The Commission may, however, in conformity with its previous practice, not wish to determine into which category each provision falls. Some of the commentaries, and particularly those relating to provisions involving rights of developing States, will indicate the novelty of the rule proposed.

### 5. National treatment

16. At the twenty-seventh session of the Commission, some members supported the Special Rapporteur's earlier proposal to extend the scope of the draft to national treatment clauses and national treatment beyond articles 16 and 17 which deal with the right to national treatment under a most-favoured-nation clause and the case where most-favoured-nation treatment, national or other treatment has been granted with respect to the same subject matter to the same beneficiary. Other members held opposing views and consequently the pronouncement of the General Assembly was asked on the question.<sup>14</sup> At the thirtieth session of the Assembly, divergent views were expressed by the representatives of States in the Sixth Committee. Against some support for the extension of the scope of the draft articles concern was voiced over the extension of the Commission's terms of reference and practical difficulties were foreseen. In view of the division of opinion and because of lack of time the Special Rapporteur now suggests the draft articles, at least for their first reading, should be left in their present framework.

### 6. Terminology

17. The Special Rapporteur submits to the consideration of the Commission the following text for insertion in article 2:

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

For the purposes of the present articles:

...

(e) "material reciprocity" means the extension by one State to another State or to persons or things in a determined relationship with that State of the same treatment in kind as the treatment extended by the latter State to the former or to persons or things in the same relationship with that former State.

#### *Commentary*

(1) In the course of the discussion during the twenty-seventh session of the Commission, it was held by some members that it would be useful if article 2 on the use of terms contained an explanation as to the meaning of the term "material reciprocity".

(2) Some explanation on the meaning of this expression was given by the Special Rapporteur in his fourth report. The best example of a clause conditional on material reciprocity, article 46 of the Consular Convention between the Polish People's Republic and the Federal People's Republic of Yugoslavia, signed on 17 November 1958, was

<sup>14</sup> *Yearbook* ... 1975, vol. II, p. 118, document A/10010/Rev.1, para. 108.

quoted there. It was pointed out that the drafters of a most-favoured-nation clause combined with the condition of material reciprocity do not aim at treatment of their compatriots in foreign lands equal to that of nationals of other countries. What they are interested in is a different kind of equality: equal treatment by the contracting States granted to each other's nationals.<sup>15</sup> Equality with competitors is of paramount importance in matters of trade and particularly as regards customs duties.

(3) As to the meaning of the expression, a simple definition is given by I. Szászy, according to which material reciprocity (*materialnaia vzaimnost, réciprocité trait pour trait*) exists when the citizen of a country is treated in a foreign country in the same way as the country to which the citizen in question belongs treats the citizen of the other country. This is to be distinguished from formal reciprocity (*formalnaia vzaimnost, réciprocité diplomatique*) which subsists when a foreign country treats the citizen of another country as it treats its own citizens.<sup>16</sup>

(4) A fuller explanation is given by J.-P. Niboyet, according to whom:

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

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

<sup>1</sup> Some "tolerance" must, of course, be allowed; otherwise, the condition could not be met. Each party therefore allows that equivalence is sufficient, but the outer limits of equivalence are impossible to specify in advance. This will depend on the factual circumstances and on the liberality of those who will have to interpret the treaty.<sup>17</sup>

(5) It is believed that for the present purposes it is not necessary to enter into further discussion of the niceties of material reciprocity. Obviously, because of the difference in individual national legal systems, cases may occur where doubts arise whether the treatment offered by the beneficiary State is materially "the same" as that extended by the granting State. Such doubts have to be dispelled by the parties themselves, and the possible disputes settled.

(6) As stated above, material reciprocity is stipulated when treatment of nationals or things like ships and possibly aircraft is in question. In commercial treaties dealing with the exchange of goods material reciprocity is, by the nature of things, never required.

### 7. Scope of the draft articles

18. In the course of preparation of the draft articles on the most-favoured-nation clause the Commission had occasion to consider the scope of application of those articles. It decided to limit that scope to clauses contained *in treaties*

<sup>15</sup> *Yearbook* ... 1973, vol. II, pp. 99-101, document A/CN.4/266, paras. 15 and 17 of the commentary to article 6.

<sup>16</sup> I. Szászy, *International Civil Procedure (A Commercial Study)* (Budapest, Akadémiai Kiadó, 1967), pp. 187-188.

<sup>17</sup> J.-P. Niboyet, *Traité de droit international privé français*, 2nd ed. (Paris, Sirey, 1951), vol. II, pp. 308-309.

between States, to the exclusion of clauses contained in agreements between States and other subjects of international law, and it also decided not to deal with clauses contained in international agreements not in written form. These decisions, explained in the Commission's report on the work of its twenty-fifth session,<sup>18</sup> were generally not questioned by representatives in the Sixth Committee. There are, however, certain matters which require further explanation and, possibly, further action.

#### MATTERS NOT WITHIN THE SCOPE OF THE PRESENT ARTICLES

##### (a) *Treaties of hybrid unions*

19. The expression "a subject of international law other than a State" used in article 3 clearly covers associations of States having the character of intergovernmental organizations, such as the United Nations, the specialized agencies, OAS, the Council of Europe and the CMEA. However, it may be recalled that for the purposes of the topic of succession of States in respect of treaties the Commission took the stand that certain hybrid unions of States appeared to keep on the plane of intergovernmental organizations. One example of such a hybrid, the Commission stated, was EEC, as to the precise legal character of which opinions differed.<sup>19</sup>

20. Because the definition of the exact scope of the articles seems to be desirable and because the kind of unions mentioned above do conclude treaties embodying most-favoured-nation clauses vis-à-vis States and vice versa,<sup>20</sup> the

<sup>18</sup> *Yearbook ... 1973*, vol. II, pp. 213–217, document A/9010/Rev.1, chap. IV, sect B, commentaries to articles 1–4.

<sup>19</sup> See *Yearbook ... 1974*, vol. II (Part One), p. 253, document A/9610/Rev.1, chap. II, sect. D, paras. 3 and 4 of the Commentary to articles 30–32 of the draft article on succession of States in respect of treaties.

<sup>20</sup> See for example, the Accord commercial entre la Communauté économique européenne et la République socialiste fédérative de Yougoslavie du 19 mars 1970\*, article I of which reads as follows:

"The Community and Yugoslavia shall accord to each other most-favoured-nation treatment with respect to customs duties and charges of any kind imposed on or in connexion with importation or exportation or imposed on the international transfer of payments for imports or exports, with respect to the method of levying such duties and charges and with respect to the formalities and procedures applied in the customs clearance of goods.

The foregoing provisions shall be binding upon the Community to the extent that it exercises its powers in the aforesaid matters."

Article II refers to customs unions and other exceptions. A similar clause is contained in the "Accord sur les échanges commerciaux et la coopération technique CEE-Liban du 18 juin 1968", published in *Journal officiel des Communautés européennes* (Luxembourg) no. L 146 of 27 June 1968. Clauses in which EEC is the beneficiary of a most-favoured-nation grant appear in the Convention of Association between the European Economic Community and the African and Malagasy States associated with that Community, signed at Yaoundé on 20 July 1963 (article 7), in the second Yaoundé Convention of 29 July 1969 (article 11), in the Agreement establishing an Association between the European Economic Community and the United Republic of Tanzania, the Republic of Uganda and the Republic of Kenya, signed at Arusha, Tanzania, on 24 September 1969 (article 8), in the Agreement establishing an Association between the European Economic Commu-

Commission may wish to take a stand in this connexion. A simple solution to the question would be for the commentary to article 3 to explain that for the present purposes the Commission considered the expression "a subject of international law other than a State" as covering the case of hybrid unions. A proviso may be added in the sense that the Commission does not wish thereby to enter into the controversy as to the precise legal character of such unions.<sup>21</sup>

21. A further point follows from the foregoing: although the Special Rapporteur is still unable to offer an example where a treaty containing a most-favoured-nation clause has been concluded between two hybrid unions, such a case seems now to him less hypothetical and somewhat more likely than at the time when paragraph 3 of the commentary to article 3 was drafted. He submits therefore for the consideration of the Commission the following text for insertion in article 3 before the words "shall not affect":

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

The fact that the present articles do not apply ... or (4) to a clause contained in an international agreement by which a subject of international law other than a State undertakes to accord most-favoured-nation treatment to another such subject of international law.

22. An insertion of this kind would also clarify the situation for those who in the Sixth Committee were of the opinion that the draft should also take into account "agreements which might be concluded between two communities or two economic integration areas".<sup>22</sup>

##### (b) *Cases of State succession, State responsibility and outbreak of hostilities*

23. Article 73 of the Vienna Convention explicitly omits the cases mentioned in the heading from the regulation of

ity and the Republic of Tunisia, signed at Tunis on 28 March 1969 (article 4, para. 1), in the Agreement establishing an Association between the EEC and the Kingdom of Morocco, signed at Rabat on 31 March 1969 (article 4, para. 1), in the Agreement between the EEC and the Arab Republic of Egypt signed at Brussels on 18 December 1972 (article 3) and in the Convention between the EEC and the 46 countries forming the ACP (African, Caribbean and Pacific) group, signed at Lomé on 28 February 1975. The most-favoured-nation clause included in article 7 of the last mentioned convention reads as follows:

"...  
"2. (a) In their trade with the Community, the ACP States shall not discriminate among the Member States [of the Community], and shall grant to the Community treatment no less favourable than the most-favoured-nation treatment.

(b) The most-favoured-nation treatment referred to in subparagraph (a) shall not apply in respect of trade or economic relations between ACP States or between one or more ACP States and other developing countries."

It has to be noted that in some of these agreements, as in those concluded with Tunis, Morocco and Egypt, the contracting party on behalf of EEC is the Council of EEC, while in others (Yaoundé, Arusha, Lomé), a mixed formula is used: the Member States themselves are contracting parties alongside the Council which is also a contracting party.

<sup>21</sup> This point may be re-examined in respect of article 21 taking into account the comment made in the Sixth Committee of the General Assembly at its thirtieth session, to the effect that that article should also reflect the situation where a community of States operated a system of preferences (statement made by the observer for EEC (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1549th meeting, para. 52).

<sup>22</sup> Statement made by the representative of Guatemala (*ibid.*, 1548th meeting, para. 28).

\* Published in the *Journal officiel des Communautés européennes* No. L 58 of 13 March 1970, quoted by D. Vignes, "La clause de la nation la plus favorisée et sa pratique contemporaine: Problèmes posés par la Communauté économique européenne", *Recueil des cours de l'Académie de droit international de la Haye, 1970-II* (Leiden, Sijthoff, 1971), tome 130, vol. II, p. 305.

the Convention. It is felt that the inclusion of a similar provision in the present articles would not be made superfluous by the adoption of the proposed article A. The following article is therefore tentatively proposed:

*Article B. Cases of State succession, State responsibility and outbreak of hostilities*

The provisions of the present articles shall not prejudice any question that may arise in regard to a most-favoured-nation clause from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

*Commentary*

(1) As to the case of State succession, it is believed that the draft prepared by the Commission on succession of States in respect of treaties covers also the problems which may arise in cases when a succession occurs in respect of a treaty embodying a most-favoured-nation clause, that is, a treaty between the granting State and the beneficiary State or between more than one of each. Any change that may occur in the life of a treaty by way of succession between a granting State and a third State, if that treaty serves as a basis for the beneficiary State's most-favoured-nation rights, can of course have its effect on those rights by force of the contingent nature of the clause.

(2) There is one point, however, which perhaps deserves special mention: in the case of a uniting of States between the granting State and the third State resulting in the termination of a treaty which assured the extension of the "relevant treatment" to the third State, the right of the beneficiary State to that treatment will terminate by virtue of article 19. This obvious rule could be embodied in a separate article, or it may just be mentioned in the commentary to article 19.

(3) As to State responsibility, just as the Vienna Convention does not contain provisions concerning the question of the international responsibility of a State with respect to a failure to perform a treaty obligation, so the draft articles on the most-favoured-nation clause do not deal with situations where the granting State through a direct breach or indirect circumvention of its obligation violates the treaty rights of the beneficiary State. Such situations, which were mentioned in the 1968 working paper of the Special Rapporteur<sup>23</sup> and in his first report,<sup>24</sup> under the heading "violations of the clause" and in connexion with "attempts to avoid the effects of the clause", as well as the possible consequences thereof, involving questions of responsibility, are discarded from the draft articles.

(4) The draft articles do not contain any provisions concerning the effect on the operation of the clause of the outbreak of hostilities between the granting State and the beneficiary State or between the granting State and the third State. Because the consideration of such situations was omitted by the Commission in connexion with the study of the general law of treaties it would be out of place to deal

with them here, in the restricted field of the most-favoured-nation clause.<sup>25</sup> It may be noted that the outbreak of hostilities between the beneficiary State and the third State probably does not affect the operation of the clause as there is no treaty relation between them or if there is one, as in a multilateral context, it has no bearing on the most-favoured-nation rights of the beneficiary.

*(c) Rights and obligations of individuals*

24. In presenting its draft articles on the law of treaties, the Commission reported to the General Assembly that no provision regarding the application of treaties providing for obligations or rights to be performed or enjoyed by individuals had been included in the draft.<sup>26</sup> The Commission then recalled the following passage of its 1964 report:

Some members of the Commission desired to see a provision on that question included in the present group of draft articles, but other members considered that such a provision would go beyond the present scope of the law of treaties, and in view of the division of opinion the Special Rapporteur withdrew the proposal.<sup>27</sup>

25. The Vienna Convention, based on the draft of the Commission, consequently does not contain provisions of the kind mentioned. In this situation the Special Rapporteur felt that, although most-favoured-nation clauses do very often contain provisions for rights to be enjoyed by individuals, in the absence of a codification as to the general rules in this respect, it would be improper in this context to attempt to break the barriers of the Vienna Convention.<sup>28</sup>

*(d) Other specific matters*

26. The Special Rapporteur admits that the provisions adopted by the Commission hitherto and those which may be adopted later will not provide a prompt and automatic solution to all questions which may arise in connexion with the application of most-favoured-nation clauses. Reference can be made at random to the following matters which came up during the study of the clause: whether a most-favoured-nation clause stipulated in a commercial treaty in favour of a neutral country will attract benefits promised by an aggressor State to the victorious Powers in a peace treaty?<sup>29</sup> Whether in case sanctions are applied under Chapter VII of the United Nations Charter against a State and trade advantages withdrawn from it, will the right of a beneficiary State to such advantages under a most-favoured-nation clause automatically cease, or will that State be entitled to claim the continuation of the advantages as of right?<sup>30</sup> How far is the granting State permitted to classify its tariff schedules? When does such classification

<sup>25</sup> See [report of the International Law Commission on the work of its eighteenth session] *Yearbook ... 1966*, vol. II, p. 176, document A/6309/Rev.1, part II, para 29.

<sup>26</sup> *Ibid.*, p. 177, para. 33.

<sup>27</sup> *Yearbook ... 1964*, vol. II, p. 176, document A/5809, para. 22.

<sup>28</sup> See *Yearbook ... 1968*, vol. II, p. 168, document A/CN.4/L.127, para. 22. Cf. the opposing views expressed in the Commission (*ibid.*, vol. I, pp. 188 and 189, 976th meeting, paras. 30 and 45).

<sup>29</sup> See *Yearbook ... 1973*, vol. II, p. 107, document A/CN.4/266, para. 14 of the commentary to article 7.

<sup>30</sup> See *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/280 *in fine*.

<sup>23</sup> *Yearbook ... 1968*, vol. II, p. 165, document A/CN.4/L.127.

<sup>24</sup> *Yearbook ... 1969*, vol. II, pp. 171-172, document A/CN.4/213, paras. 85-89.

amount to a covert discrimination and a breach of the most-favoured-nation pledge?<sup>31</sup> Questions of this kind cannot be explicitly answered within the framework of a codification of general rules unless the Commission, contrary to its traditions, wishes to embark upon a "case" approach.

27. The Special Rapporteur believes that the case brought up in the Sixth Committee by one representative belongs also to the category of questions mentioned above. That representative objected that neither article 7 nor article 20 dealt with the temporal aspect of the treatment extended by the granting State to the third State.<sup>32</sup> The Special Rapporteur believes that this element is covered by articles 18 and 19, which indicate that unless the treaty otherwise provides, the rights of the beneficiary are always contingent upon the most-favoured-nation treatment extended by the granting State to the third State, that is, any third State. This means that the clause applies to all favours which have been granted to a third State at the time of the entry into force of the clause or at any time in the future. A graphic illustration of the operation of the clause may be recalled in this respect:

... the clause can be pictured as a float, which enables its possessor to maintain itself at the highest level of the obligations accepted towards foreign States by the grantor State; if that level falls, the float cannot turn into a balloon so as to maintain the beneficiary of the clause artificially above the general level of the rights exercised by other States.<sup>33</sup>

As to the example put forward by the representative in the Sixth Committee, the Special Rapporteur imagines that the problem raised might lend itself to the following solution: if the granting State accords different treatments to nationals of different States, because of the non-retroactive discontinuance of a certain policy and if in this situation it is generous enough to conclude a treaty with a beneficiary State promising *most-favoured-nation* treatment, and forgetful enough not to include an appropriate proviso in the treaty, then the latter State may *prima facie* have a good case when insisting on fulfilment of the *most-favoured-nation* pledge.

#### (e) Other limitations of the topic

28. It has been stated in the Sixth Committee that the Commission had in the course of its study of the most-favoured-nation clause attempted to reaffirm traditional, pre-war rules of international law and neglected most of the following fundamental changes which had taken place after the Second World War: (a) the emergence of GATT; (b) the emergence of State-owned trading enterprises and the application of the clause between countries with different

<sup>31</sup> See the controversy concerning the Swiss cow case described in the Special Rapporteur's first report (*Yearbook ... 1969*, vol. II, p. 171, document A/CN.4/213, para. 85) and fifth report (*Yearbook ... 1974*, vol. II (Part One), pp. 123-124, document A/CN.4/280, para. 9 of the commentary article 7 bis). See also the report of the International Law Commission on the work of its twenty-seventh session (*Yearbook ... 1975*, vol. II, pp. 132-133, document A/10010/Rev.1, chap. IV, sect. B, para. 20 of the commentary to articles 11 and 12).

<sup>32</sup> The representative of Australia (see *Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1541st meeting, para. 6).

<sup>33</sup> Cf. Rossillion, "The most-favoured-nation clause in case-law of the International Court of Justice", *Journal du droit international* (Paris), vol. 82, No. 1 (Jan-Mar. 1955), p. 106.

economic systems; (c) the trend that customs unions and free trade areas constitute exceptions to the operation of the clause; and (d) the needs of developing countries for new rules facilitating their access to the markets of developed countries.<sup>34</sup> It is of course the purpose of all codification to reaffirm all valid rules pertinent to the subject, whether old or new. On the other hand, the delimitation of the scope of a topic for codification is a delicate matter and here legitimate views may differ as to the limits to be observed. The Special Rapporteur feels that he tried to follow the instructions of the Commission, which wished to base its studies on the broadest possible foundations, without, however, dealing with matters not included in its functions.<sup>35</sup> On this basis a full treatment was given to the system of the GATT in the second report of the Special Rapporteur, its provisions on State trading enterprises were discussed and two sections were devoted to the so-called problems of East-West trade.<sup>36</sup> In the judgment of the Special Rapporteur, however, the line between law and economics was properly drawn by the Commission, which was always careful not to tackle questions of a highly technical nature before at least the contours of a generally accepted law did not come to sight. There are other similar matters, too, not mentioned in the Sixth Committee, which have emerged during the debates in the Commission, like the application of the most-favoured-nation clause vis-à-vis quantitative restrictions, the problem of the so-called anti-dumping and countervailing duties, etc.,<sup>37</sup> but all these, the Special Rapporteur feels, belong to fields outside the functions of the Commission. It may be recalled that when these matters were raised in the Commission, one of the members called them "... the pitfalls which the Commission would have to avoid".<sup>38</sup>

## 8. Non-retroactivity

29. The Special Rapporteur submits to the consideration of the Commission the following article:

#### Article C. Non-retroactivity of the present draft articles

Without prejudice to the application of any rule set forth in the present articles to which most-favoured-nation clauses would be subject under international law independently of the articles, the articles apply only to most-favoured-nation clauses embodied in treaties which are concluded by States after the entry into force of the present articles with regard to such States.

#### Commentary

(1) This article is based on article 4 of the Vienna Convention. It is well known that article 4 of the Convention was not proposed by the Commission, having

<sup>34</sup> Statement by the representative of the Netherlands (see *Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1543rd meeting, para. 36).

<sup>35</sup> See the report of the International Law Commission on the work of its twenty-seventh session (*Yearbook ... 1975*, vol. II, p. 117, document A/10010/Rev.1, para. 103).

<sup>36</sup> *Yearbook ... 1970*, vol. II, pp. 235 *et seq.* and 239 *et seq.*, document A/CN.4/228 and Add.1, paras. 202-206 and annex II.

<sup>37</sup> *Yearbook ... 1968*, vol. I, p. 187, 976th meeting, para. 22.

<sup>38</sup> *Ibid.*, p. 189, 976th meeting, para. 44.



been added by the representatives of States assembled at the United Nations Conference on the Law of Treaties, and adopted at the 30th plenary meeting by 81 votes to 5, with 17 abstentions.

(2) It is not intended in this report to discuss in detail the philosophy of article 4.<sup>39</sup> It seems enough to refer to the fact that the provisions of the Vienna Convention, inasmuch as they represent codification of international law, do not seem to have lost their authority by the inclusion of article 4. If the articles on the most-favoured-nation clause are intended to become a supplement to the Vienna Convention, then, it is submitted, it would be appropriate that the supplement should follow the legal nature of the instrument which it supplements.

(3) The inclusion of a provision of this type in the draft articles was suggested in the course of the debate in the Commission,<sup>40</sup> and in the Sixth Committee of the General Assembly at its thirtieth session.<sup>41</sup> It may help to settle the controversy concerning the nature of the customs union exception.<sup>42</sup>

### 9. Freedom of the parties to draft the clause and restrict its operation

30. The Special Rapporteur submits to the consideration of the Commission the following article:

#### *Article D. Freedom of the parties to draft the clause and restrict its operation*

The present draft articles are in general without prejudice to the provisions which the granting State and the beneficiary State may agree to in the treaty containing the most-favoured-nation clause or otherwise. Such provisions or agreements may in particular withhold from the beneficiary State right to treatment extended by the granting State to a specified third State or States, or to persons and things in a determined relationship with such States, or to most-favoured-nation treatment in respect of a specified subject matter.

#### *Commentary*

(1) The origin and the purpose of this article is twofold. The first sentence of the article is intended to respond to the question raised in the Commission's report on its twenty-seventh session.<sup>43</sup> It chooses to express in a general way the idea that most-favoured-nation clauses can be drafted in the most diverse ways, that parties to the clause, that is, the granting and the beneficiary State, are generally free to agree on whatever they wish and that such agreement prevails over the provisions of the draft articles. Article 53 of the Vienna Convention obviously sets a limit to the

<sup>39</sup> In this connexion, see S. Rosenne, *The Law of Treaties—A guide to the legislative history of the Vienna Convention* (Leiden, Sijthoff, 1970), p. 76.

<sup>40</sup> By Mr. Tsuruoka (see *Yearbook . . . 1975*, vol. I, p. 204, 1343rd meeting, para. 35).

<sup>41</sup> By the representative of Japan (see *Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1546th meeting, para. 26).

<sup>42</sup> See sect. 11 below.

<sup>43</sup> See *Yearbook . . . 1975*, vol. II, p. 119, document A/10010/Rev.1, para. 117.

freedom of the parties, although it is not easy to imagine how a most-favoured-nation clause could conflict with a peremptory norm of general international law.

(2) It is admitted that the drafting of the first sentence of the article can be described as somewhat loose, in that it refers to the "present articles", namely to all articles of the draft. Having examined the individual articles one by one, however, the Special Rapporteur has come to the conclusion that it would be a very difficult task to establish precisely and to select those articles from which the granting State and the beneficiary State could absolutely not contract out. He believes that the drafting presented not only avoids a cumbersome punctiliousness, but, supposing a fair and reasonable interpretation, it expresses with sufficient clarity the idea that the draft articles are not intended to inhibit the contractual freedom of the granting and the beneficiary State.

(3) The second sentence is an elaboration of the first and could be considered, strictly speaking, as superfluous. However, the Special Rapporteur is very much in favour of its maintenance. He recalls the tentative proposal put forward by Mr. Pinto in the Drafting Committee in 1975, on "conditions and exclusions".<sup>44</sup> The present proposal contained in the second sentence of the article adopts the basic idea of Mr. Pinto's proposal, thus recognizing the value of a statement which, while not necessary from a strictly legal point of view, has a distinct educative character.

(4) According to the second sentence, the parties are free to exclude certain favours from the operation of the clause. Such exclusions may be *ratione personae* or *ratione materiae*.

### 10. Exceptions to the operation of the clause

31. One representative in the Sixth Committee "wondered if all the customary exceptions to the application of the most-favoured-nation clause had really been covered"<sup>45</sup> [by the study of the Commission]. This point is well taken.

32. To deal properly with the problem raised by the representative, it must be first clarified what is understood by the expression "customary exception". The expression can mean two things: an exception which is customarily included in the clause or the treaty containing it or an exception which by virtue of the rules of customary international law excepts certain favours from the operation of the most-favoured-nation clause without explicit stipulation. The former may be briefly called a conventional exception and the latter an implied exception.

33. To begin with the latter, it can be safely said that there is no rule of customary international law which would except certain favours from all kinds of most-favoured-nation promises whether they apply to consular immunities, to intellectual property or to international trade. What is

<sup>44</sup> In this connexion, see also *Yearbook . . . 1975*, vol. I, p. 174, 1337th meeting, para. 38.

<sup>45</sup> Statement by the representative of France (see *Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1549th meeting, para. 36).

alleged by some is that in the field of international trade, and only there, certain exceptions are so often stipulated in treaties that they have become international custom, or perhaps that by the way of progressive development they could be elevated to a general rule.

34. The main contention here is the case of customs unions and similar groupings of States. In this respect the Special Rapporteur has had the opportunity to expound his views, in his sixth report,<sup>46</sup> both from the point of view of the existing legal situation (*de lege lata*) and from that of a possible change (*de lege ferenda*). He will revert to the matter below.<sup>47</sup>

#### FRONTIER TRAFFIC

35. One of the exceptions which is often included in commercial treaties containing a most-favoured-nation clause relates to frontier traffic. Thus, article XXIV, paragraph 3 of GATT contains a cursory statement providing that:

The provisions of this Agreement shall not be construed to prevent:

(a) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic;

...<sup>48</sup>

The text of this provision is similar to that included in paragraph 7 of the 1936 resolution of the Institute of International Law:

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

To the treatment which is or may hereafter be granted by either contracting country to an adjacent third State to facilitate the frontier traffic;

...<sup>49</sup>

36. The frontier traffic exception was already discussed in the League of Nations Economic Committee. The Committee stated in its conclusion *inter alia* that:

... in most commercial treaties, allowance is made for the special situation in these [frontier] districts by excepting the Customs facilities granted to frontier traffic from the most-favoured-nation régime... In any case, it must be admitted that the exception concerning frontier traffic is rendered necessary, not merely by long-standing tradition but by the very nature of things, and that it would be impossible, owing to differences in the circumstances, to lay down precisely the width of frontier zone which should enjoy a special régime...<sup>50</sup>

37. Indeed, it seems to be quite general practice for commercial treaties concluded between States with no common frontier to except from the operation of the most-favoured-nation clause advantages granted to neighbouring countries in order to facilitate frontier traffic.<sup>51</sup> Commercial treaties concluded between neighbouring countries constitute a different category, inasmuch as the countries may

or may not have a uniform regulation of the frontier traffic with their different neighbours.

38. According to R. C. Snyder, there is almost universal agreement that free trade or freer trade must be allowed within a restricted (frontier) zone and that the generalization of this concession does not fall within the requirements of equality of treatment.<sup>52</sup> Snyder quotes from a 1923 Convention between France and Czechoslovakia, which exempts concessions granted within a 15-kilometre frontier zone "such régime being confined exclusively to the needs of the populations of that zone or dictated by the special economic situations resulting from the establishment of new frontiers".<sup>53</sup>

39. While recognizing that the frontier traffic exception is very general in commercial treaties, the Special Rapporteur does not propose the adoption of a provision in this respect. His reasons are as follows: the practice of States has not produced, to the best of his knowledge, an instance where a dispute has arisen over the question whether, in the absence of a specific stipulation, the advantages granted in the frontier traffic ought or ought not to be extended to a non-adjacent beneficiary State. States seem to be satisfied with the present situation in which they themselves decide upon and define the scope of the exception. They do not claim that such exception is implied in a commercial treaty without express stipulation. A rule of such sweeping character as that included in the 1936 resolution of the Institute of International Law would have little value, if any, the more so as it does not envisage the situation where the beneficiary State is itself one of the neighbours of the grantor.

#### 11. The customs-union issue

40. The stipulation of an exception as to the advantages granted within a customs union, free-trade area, etc. is very common in *commercial* treaties. It stands to reason that it is only in respect of tariff and non-tariff *trade* barriers that the contracting parties to a treaty containing such a clause agree to make an exception in the sense that they will not extend to each other *these types* of advantage in their mutual trade.<sup>54</sup>

41. A customs union, etc. may be formed not only by a multilateral but also by a bilateral treaty. This is self-evident, but, as an example, the case may be recalled of the German-Austrian attempt. Hence, the problem does not revolve around article 15 and its casting "in too rigid a form".<sup>55</sup>

<sup>46</sup> *Yearbook* ... 1975, vol. II, pp. 9–20, document A/CN.4/286, paras. 9–63.

<sup>47</sup> See sect. 11.

<sup>48</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No. GATT/1969–1), p. 41.

<sup>49</sup> *Yearbook* ... 1969, vol. II, p. 181, document A/CN.4/213, annex II.

<sup>50</sup> *Ibid.*, pp. 178–179, annex I.

<sup>51</sup> S. Basdevant "Clause de la nation la plus favorisée", in A. G. de Lapradelle and J.-P. Niboyet, *Répertoire de droit international* (Paris, Sirey, 1929), vol. III, pp. 476–477, para. 55.

<sup>52</sup> *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. 157, foot-note 5, quoting from R. Riedl and H. P. Whidden with the remark that the practice of States in this respect has changed little in 100 years.

<sup>53</sup> Commercial Convention between France and Czechoslovakia, signed at Paris on 17 August 1923, article 13 (League of Nations, *Treaty Series*, vol. XLIV, p. 29).

<sup>54</sup> There is no significant practice of States in the sense that in fields other than trade, advantages granted within "a community" or "an integration" are excepted from the operation of the clause. See in this sense D. Vignes, *loc. cit.*, p. 284.

<sup>55</sup> See *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, para. 146.

42. The question debated in the Sixth Committee can be reduced to the following: should the draft articles on the most-favoured-nation clause elevate the customs union exception by way of codification or progressive development to a general rule with respect to commercial treaties? Or expressed in other words, should the draft articles establish a rule reversing the presumption which, in the view of the Special Rapporteur, presently exists? He believes that, today, if there is no exception written in the treaty, then a most-favoured-nation pledge means that the beneficiary State is entitled to the treatment of the most-favoured third State irrespective of the relationship between that State and the granting State. Is it, then, feasible or desirable to change the situation in the direction of a devaluation of the meaning of the expression "*most-favoured-nation*", that is to reduce the meaning of this notion, even if the treaty is silent on this, to "*most-favoured-nation minus the one or more nations which have entered into a customs union or similar groupings with the granting State*", this, of course, only with respect to treaties on commerce in general and customs tariffs in particular?

43. One representative in the Sixth Committee at the thirtieth session of the General Assembly held this latter view with a certain qualification. He thought that the implied exception rule should apply in cases where the customs union or free-trade area had been established *after* the conclusion of the agreement containing the most-favoured-nation clause, while in cases where the granting State was already a member of such a union at the time of the conclusion of the agreement, the clause would extend to union-benefits unless otherwise agreed.<sup>56</sup> This view, however, does, in essence, not differ from the view of those who favour the implied exception rule, the case of a union-member promising most-favoured-nation treatment and not excepting union-benefits being more hypothetical than practical.

44. The purpose of the following considerations is to take account of the main elements of the discussion which has taken place in the Sixth Committee at the thirtieth session of the General Assembly and to offer some thoughts which may, perhaps, make it easier to adopt a common stand on the matter.

45. Taking the discussion as a whole, it can be ascertained that several representatives supported purely and simply the position of the Special Rapporteur.<sup>57</sup> Several representatives from developing countries voiced concern about a solution which would not include an exception from the operation of the clause in regard of benefits granted within customs unions and other groupings of *developing States*.<sup>58</sup> While many representatives did not take a stand on the matter, strong disapproval of the Special Rapporteur's position was expressed by the spokesmen for EEC,<sup>59</sup> and by several,

although not all, of the representatives of States members of EEC.

46. It is first proposed to concentrate here on customs unions or other groupings of developed States. Later, under the heading "*Most-favoured-nation clause in relation to trade among developing countries*" there will be an examination of the question whether there is a possibility of offering in this broader context a different solution in favour of developing countries.<sup>60</sup>

47. As their main argument, those representatives who spoke in favour of a provision establishing a general rule of an implied customs-union, etc. exception referred to the current trend towards regional co-operation, and expressed fears that if the articles did not embody such an implied exception, States would be wary of granting most-favoured-nation treatment for fear that their hands would be tied if they wished in the future to form an economic union or to conclude agreements for economic integration.<sup>61</sup>

48. This argument is felt to be unconvincing and to be even less tenable if the two newly proposed provisions (articles C and D) are adopted. States were and will always be, with a little amount of foresight, in the position to provide for an appropriate exception in their commercial treaties, and practice shows that this is very often the case. The purpose of draft article D is to draw the attention of States to this fact. States are also in the position to write into their treaties provisions which entitle them to terminate the whole or part of their treaty obligations at relatively short notice if they feel that this serves their interest. It was felt that to state this in a separate article would go too far in giving advice to States.

49. Those arguing for an implied customs-union, etc. exception look at one side of the coin only. On the other side, however, the State which has received a most-favoured-nation pledge with no reservations, that is, a position of equal opportunity and non-discrimination on its partner's market, and which (or whose nationals), relying on the subsistence of this situation may have made heavy investments in its own industries, etc., may one day find that it has lost its non-discriminative position because one of the competitors receives special advantages as a partner of the granting State in a customs union or a free trade area.

50. Such a situation would not correspond to distributive justice. Reference may be made in this connexion to a distinguished writer who, himself a protagonist of the exception (though admittedly in another context), ventilated the following idea:

It is another question whether, should the occasion arise, an arbitrator ruling in accordance with equity would not feel bound to hold it desirable that some compensation should be made by the Government participating in the union to the third State benefiting from the most-favoured-nation clause.<sup>62</sup>

<sup>56</sup> The representatives of Sweden (*ibid.*, Sixth Committee, 1545th meeting, para. 24).

<sup>57</sup> E.g. the representatives of Brazil (*ibid.*, 1538th meeting, para. 27), the Ukrainian Soviet Socialist Republic (*ibid.*, 1542nd meeting, para. 5), the USSR (*ibid.*, 1544th meeting, para. 14).

<sup>58</sup> E.g. the representatives of Peru (*ibid.*, 1539th meeting, para. 24), Guatemala (*ibid.*, 1548th meeting, para. 28), Bolivia (*ibid.*, 1548th meeting, para. 34), Nicaragua (*ibid.*, 1549th meeting, para. 18).

<sup>59</sup> See the statements by the representative of Italy (*ibid.*, 1544th

meeting, paras. 37–45) and the observer for EEC (*ibid.*, 1549th meeting, paras. 47–53).

<sup>60</sup> See paras. 108–131 below.

<sup>61</sup> See the statement by the representative of Italy, speaking on behalf of EEC (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1544th meeting, paras. 39–40).

<sup>62</sup> A.-Ch. Kiss, "La convention européenne d'établissement et la clause de la nation la plus favorisée", *Annuaire français de droit international*, 1957 (Paris), vol. III, p. 489.

51. Another argument referring to the "sometimes very extensive duties" linked to the advantages gained in an economic union<sup>63</sup> loses sight of the basic philosophy of the unconditional most-favoured-nation clause as set out in article 13 of the draft.

52. There follows the argument on the disruptive effect of article 15 (in reality not of article 15 but of the absence of a provision concerning an implied customs-union exception) on the current relationships between States members of existing customs unions or similar associations and third States with which those members had previously entered into agreements containing a most-favoured-nation clause, in case that such clause did not carry with it an express customs-union exception. This argument carries under the same breath the proper answer to it when it refers to the practice of EEC "where negotiation of mutually acceptable arrangements with third States had been a practical solution to the question of the effect of pre-existing most-favoured-nation clauses".<sup>64</sup>

53. The above reference reflects precisely the present state of the law and reveals that (a) most-favoured-nation clauses, unless explicitly otherwise agreed, do attract benefits granted within customs unions or associations like EEC, and (b) this situation, if it is too onerous for the respective members of the union, can be remedied by "mutually acceptable arrangements", that is, by arrangements which take into account the equitable interest of both parties: of the granting State, which has chosen to join a union and to grant preferential rights to the other members of the union and wishes to be freed from its obligation to extend the same treatment to the beneficiary State; and of the beneficiary State which is in possession of an acquired right to non-discriminative treatment based on the clause and which may be willing to give up the whole or part of this right if, as this follows from the nature of the trade relations of States, a mutually satisfactory solution can be found to reconcile the two conflicting interests. This is the present state of the law, as clearly admitted by those speaking on behalf of an important union, and in the circumstances it would be extremely difficult for the Special Rapporteur to propose a change in the existing law, the more so, as seen from the records of the Sixth Committee, a substantial weight of opinion would firmly oppose such a change.

54. One additional remark may be made: no representative in the Sixth Committee referred to the passage in the commentary to article 15 in the Commission's report on the work of its twenty-seventh session, in which the Special Rapporteur asked the theoretical question as to how the article on the customs-union exception should be framed, if it still seemed desirable: should it follow the complicated pattern of GATT, or should it, by means of similar drafting, be made more generous and hence less legal in character?<sup>65</sup>

<sup>63</sup> Statement by the representative of Italy, speaking on behalf of EEC (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1544th meeting, para. 41).

<sup>64</sup> *Ibid.*, para. 43.

<sup>65</sup> See *Yearbook . . . 1975*, vol. II, p. 153, document A/10010/Rev.1, chap. IV, sect. B, para. 64 of the commentary to article 15.

## ECONOMIC BACKGROUND AND CONCLUSIONS

55. It could be said that the economic background is not the Commission's business. It is not the intention of the Special Rapporteur to embark upon economic reasoning. It is, however, desirable that lawyers should not be complete strangers to the field which they wish, through the adoption of rules, to regulate. Moreover, if it comes to proposing new laws, they have to be in a position to judge if there are economic or other extralegal reasons for doing so. It was for this purpose that the Special Rapporteur, in his sixth report, quoted a short passage from a recognized authority. The conclusion of this passage was that "one of the great attractions of regional economic groupings [based on a customs union or the like] to their members is precisely that they do divert trade away from non-members".<sup>66</sup> Translated into plain English this means that such groupings serve, maybe only in the short run, the interest of members and harm those of the outsiders.

56. Incidentally, the literature of the science of economics is very rich in studies on the effects of customs unions, free-trade areas, etc. Some of these operate with an arsenal of devices: higher mathematics, diagrams, symbolic curves and the like, which do not make their reading easier for the layman in the field, as the Special Rapporteur himself admits to be.

57. From a recent scholarly study, the following brief passages, admittedly drops from an ocean of literature on the subject, may be quoted:

Customs union theory has come a long way since Jacob Viner, of Princeton University, first used the terms "trade diversion" and "trade creation" in 1950.<sup>2</sup> These terms are now so familiar that they warrant the briefest possible treatment. Trade creation and trade diversion, according to Professor Viner, may be summarized as follows. To the extent that a customs union or, for that matter a free trade area discriminates against low-cost world suppliers, and causes imports from the rest of the world to decline, it is trade-diverting. The trade flows which are thus cancelled between the union and "world" countries are taken up by less efficient union producers which were not able to compete with "world" producers as long as both were subject to non-discriminatory tariffs before the formation of the union. The formation of the union, however, causes discrimination in the conditions of access to partner markets, which gives union suppliers a tariff advantage over "world" suppliers. This is trade diversion.

...

By the mid-1960's, thinkers like C. A. Cooper and B. F. Massell,<sup>8</sup> of the University of Cambridge, and Harry Johnson<sup>9</sup> began analysing why countries pursued protection policies and formed customs unions.

...

They concluded that possibly the greatest attraction for governments in joining customs unions was that they made it possible to extend the protected market for inefficient domestic producers, . . . thus allowing for

<sup>2</sup> J. Viner, *The Customs Union Issue* (New York, Carnegie Endowment for International Peace, 1950).

<sup>8</sup> Cooper and Massell, "A New Look at Customs Union Theory", *Economic Journal*, Cambridge, vol. LXXV, 1965, pp. 742-7.

<sup>9</sup> Harry G. Johnson, "An Economic Theory of Protectionism, Tariff Bargaining, and the Formation of Customs Unions", *Journal of Political Economy*, Chicago, vol. XXVIII, 1965.<sup>67</sup>

<sup>66</sup> G. G. Patterson, "The Most-Favored-Nation Clause and Economic Integration", *Annuaire européen*, 1965 (The Hague), vol. XIII (1967), p. 149 (quoted in *Yearbook . . . 1975*, vol. II, p. 19, document A/CN.4/286, para. 60).

<sup>67</sup> V. Curzon, *The Essentials of Economic Integration: Lessons of EFTA Experience* (London, Macmillan, 1974), pp. 253 and 260.

their survival and, indeed, expansion, by persuading other countries to share the cost of supporting them.

58. What remains of all this, and much more reading, in the mind of the Special Rapporteur, is as follows: there does not seem to be any compelling economic reason to propose a change in the existing law on the most-favoured-nation clause and thereby promote, to however minuscule an extent, the formation of customs unions, at least among developed countries.

59. In this connexion, may it be permitted to quote from an UNCTAD document a passage which caught the Special Rapporteur's eye:

The difficulties faced by developing countries in exporting have been heightened with the formation of regional groupings among developed countries and the consequential removal of barriers to intra-trade. Among the countries outside these groupings, the developing countries tend to be most vulnerable to the resultant tariff and non-tariff treatment, given their initial competitive disadvantages. As a result of the formation of such groupings and other preferential arrangements, almost two fifths of the intra-trade in manufactured and semi-manufactured products among the developed market economy countries are already on a preferential basis ...<sup>68</sup>

60. Another, and the last, quotation offered which has relevance with respect to the economic and legal problems involved, is from chapter II, article 12 of the Charter of Economic Rights and Duties of States, adopted and solemnly proclaimed by the General Assembly in resolution 3281 (XXIX) of 12 December 1974, paragraph 1 of which reads as follows:

States have the right in agreement with the parties concerned, to participate in subregional, regional and interregional co-operation in the pursuit of their economic and social development. All States engaged in such co-operation have the duty to ensure that the policies of those groupings to which they belong correspond to the provisions of the present Charter and are outward looking, consistent with their international obligations\* and with the needs of international economic co-operation, and have full regard for the legitimate interests of third countries, especially developing countries.\*

61. The foregoing is, of course, a refined version of the idea already expressed in General Principle Nine contained in annex A.I.1 of the recommendations adopted by UNCTAD at its first session:

Developed countries participating in regional economic groupings should do their utmost to ensure that their economic integration does not cause injury to, or otherwise adversely affect, the expansion of their imports from third countries and, in particular, from developing countries, either individually or collectively.<sup>69</sup>

62. Article 12 of the Charter of Economic Rights and Duties of States is, in the submission of the Special Rapporteur, a clear statement of the present state of the law and is in complete accordance with his allegedly "rigid" position.<sup>70</sup>

\* Italics supplied by the Special Rapporteur.

<sup>68</sup> Operational Guide to the Generalized System of Preferences (GSP): a report by the UNCTAD secretariat" (TD/B/AC.5/41), para. 13.

<sup>69</sup> *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No. 64.II.B.11), p. 20.

<sup>70</sup> Statement by the representative of Italy, speaking on behalf of EEC (see *Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1544th meeting, para. 39).

63. In conclusion, the Special Rapporteur submits the following: The adoption of article C on the non-retroactivity of the present articles will furnish a prophylactic device against all possible ills caused by most-favoured-nation clauses included in future treaties, inasmuch as the parties to such treaties will be, as indeed they always have been, in the position to restrict the operation of the clause at their will. Article D on the freedom of the parties in drafting the clause and restricting its operation is intended to make States realize their rights. If they will avail themselves of those rights, this will further prevent disputes and difficulties.

64. To close this section of the report, the Special Rapporteur would like to refer to the commentary to article 15 in the Commission's report on the work of its twenty-seventh session<sup>71</sup> and once again to draw attention to the fact that the whole question has very limited practical significance. As he sees it, there is *de lege lata* no such thing as an implied customs-union exception, but by the many stipulations in bilateral treaties and mainly by the one in article XXIV of GATT, the exception is, under the terms and conditions of those stipulations, very widely expressly conventionally assured.

## 12. Other conventional exceptions

65. A State granting most-favoured-nation rights to another can restrict its obligation in two ways: (a) *ratione personae*, that is, by specifying certain States by name or otherwise and stating that the treatment extended to them will not be claimable by the beneficiary State, when the latter so agrees; and (b) *ratione materiae*. This can be done either by agreeing that the most-favoured-nation obligation will apply only to a restricted field, for instance, consular immunities, access to the courts, etc., or if the clause covers a wide field such as trade, shipping or the like, by excepting certain subject-matters which will fall outside the operation of the clause.

66. The customs-union exception is an example of the first type mentioned, as are those provisions which except the benefits granted to neighbouring countries, for instance, article 3 of the Trade and Payments agreement of 2 June 1961 between the Union of Soviet Socialist Republics and the Somali Republic which excludes from the operation of the clause: "... advantages which have been or which may hereafter be accorded by either Contracting Party to contiguous countries ..."<sup>72</sup>

67. The frontier traffic exception is based on both grounds because it applies to specific countries (neighbours) but only in certain matters (frontier traffic).

68. An example of treaties which exclude benefits extended to particular countries is the Agreement on Commerce of 19 July 1963, between Japan and El Salvador, paragraph 3 of the Protocol to which specifies that the clause shall not apply to the advantages accorded by El Salvador to the

<sup>71</sup> See *Yearbook ... 1975*, vol. II, p. 153, document A/10010/Rev.1, chap. IV, sect. B, para. 65 of the Commentary to article 15.

<sup>72</sup> United Nations, *Treaty Series*, vol. 493, p. 186.

countries of the isthmus of Central America, namely Costa Rica, Guatemala, Honduras, Nicaragua and Panama.<sup>73</sup>

69. Stipulations of exceptions *ratione materiae* are infinitely various. They are very often couched in terms which reserve the right of the granting State to adopt domestic laws and regulations contrary to the equality of treatment obligation. Treaties of commerce, of establishment and of shipping are typical of those including clauses of exceptions.

70. Article XX of the GATT embodies a long list of exceptions and these are worth mentioning not only because of the importance of the Agreement but also because they are based on a certain practice of States reflected in bilateral treaties concluded before the adoption of the GATT. Among the exceptions enumerated by article XX of the Agreement are measures necessary to protect public morals (according to R. C. Snyder: "Every nation protects itself against obscene literature ...";<sup>74</sup>) also mentioned are measures: necessary to protect human, animal or plant life or health; relating to the importation or exportation of gold and silver; necessary to secure compliance with laws or regulations, which are not inconsistent with the Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under article II, paragraph 4 and article XVII of the Agreement, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices; relating to the products of prison labour; imposed for the protection of national treasures of artistic, historic or archaeological value; relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; undertaken in pursuance of obligations under intergovernmental commodity agreements which conform to the principles approved by the Economic and Social Council in its resolution 30 (IV) of 28 March 1947; involving restrictions on exports of domestic materials necessary to assure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a government stabilization plan; and essential to the acquisition or distribution of products in general or local short supply.

71. All the exceptions enumerated are subject, also according to article XX, to the requirement that they should not be applied in a manner "which would constitute a means of *arbitrary*\* or *unjustifiable*\* discrimination between countries *where the same conditions prevail*,"\* or a *disguised restriction on international trade*"\*. These conditions reduce somewhat the freedom of the granting State, which consequently is not supposed to set aside its most-favoured-nation obligations unless it is in a manner which would be "justifiable" etc.

72. Further exceptions are contained in article XXI of the General Agreement as well as in some bilateral treaties. According to article XXI a contracting party may take any action which it considers necessary for the protection of its

essential security interests relating to fissionable materials or the materials from which they are derived; to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment and taken in time of war or other emergency in international relations. Finally a contracting party may take any action in pursuance of its obligations under the Charter of the United Nations for the maintenance of international peace and security.

73. This brief description of the exceptions embodied in the General Agreement has served the purpose of giving a picture of contemporary practice in respect of stipulations restricting the operation of the clause. It is believed that these exceptions are representative also of those embodied in bilateral treaties. It has to be stressed that the enumeration of these exceptions does not possess an exhaustive character. There are some others which are frequent, for instance, coastal trade and inland navigation in shipping agreements, and States are free to create new ones.

74. It is believed that these exceptions operate only if expressly stipulated. The Special Rapporteur accepts the thesis of D. Vignes: "... *on ne peut reconnaître à une exception faite expressément le caractère d'une exception de plein droit que le jour où son acceptation s'est tellement généralisée qu'elle ne devient plus qu'une "clause de style"...*"<sup>75</sup> None of the reservations enumerated belong to this category.

75. Of course, if the obligations of a granting State under a most-favoured-nation clause conflict with its duties under the United Nations Charter, these duties prevail under Article 103 of the Charter. This applies, however, to any treaty obligation and it does not therefore seem necessary to spell it out in respect of the most-favoured-nation clause.

76. That actions taken in accordance with decisions of a world organization may cause complications can be illustrated by the following case which arose in the League of Nations period. Hungary asked the United Kingdom in 1935 under a most-favoured-nation clause to accord to imports of Hungarian poultry the same customs concessions as had been granted to Yugoslavia. These concessions, however, were granted by the United Kingdom to Yugoslavia as a compensation for losses incurred by the operation of sanctions against Italy. The Hungarian claim was rejected on the ground that the concessions to Yugoslavia had been made "in virtue of a decision of the League of Nations of which Hungary was also a member and the decisions of which Hungary was also obliged to carry out."<sup>76</sup>

### 13. The case of the land-locked States

77. Several representatives in the Sixth Committee at the thirtieth session of the General Assembly raised the *sui*

<sup>73</sup> D. Vignes, *loc. cit.*, p. 284.

<sup>76</sup> *The Times* (London), 9 January 1936, p. 9 (d), quoted by G. Schwarzenberger. "The most-favoured-nation standard in British State practice", in *The British Year Book of International Law*, 1945, vol. 22, p. 111 (London).

\* Italics supplied by the Special Rapporteur.

<sup>73</sup> *Ibid.*, vol. 518, p. 167.

<sup>74</sup> R. C. Snyder, *op. cit.*, p. 163.

*generis* case of the land-locked States, believing that it merited exceptional treatment in the codification of the rules pertaining to the application of the most-favoured-nation clause.<sup>77</sup> The Chairman of the Commission promised that the Commission would study the matter.<sup>78</sup> The representatives recalled the commentary to article 14 as it appeared in the Commission's report on its twenty-seventh session. For the convenience of readers, the relevant passage is reproduced below:

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

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

2. If a contracting State grants to a land-locked State facilities or special rights greater than those provided for in this Convention, such facilities or special rights may be limited to that land-locked State, except in so far as the withholding of such greater facilities or special rights from any other land-locked State contravenes the most-favoured-nation provision of a treaty between such other land-locked States and the contracting State granting such facilities or special rights."<sup>512</sup>

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

"The facilities and special rights accorded to land-locked countries in view of their special geographical position are excluded from the operation of the most-favoured-nation clause."<sup>513</sup>

This principle stems from a proposal for an article on exclusion of the application of the most-favoured-nation clause included in a set of draft articles on access to the sea of land-locked countries submitted by Czechoslovakia to the Preliminary Conference of Land-Locked States in February 1958. The proposal was explained as follows:

"The fundamental right of a land-locked State to free access to the sea, derived from the principle of the freedom of the high seas, constitutes a special right of such a State, based on its natural geographical position. It is natural that this fundamental right belonging only to a land-locked State cannot be claimed, in view of its nature, by any third State by virtue of the most-favoured-nation clause. The exclusion from the effects of the most-favoured-nation clause of agreements concluded between land-locked States and countries of transit on the conditions of transit is fully warranted by the fact that such agreements are derived precisely from the said fundamental right."<sup>514</sup>

It was principle VII on which the drafters of the Convention relied and article 10 is seemingly nothing else but the translation of the principle into practical measures. Hence the question of the validity of article 10 vis-à-vis States not parties to the Convention turns on the nature of the "principle" on which it relies. Is it a principle derived from existing positive law or a principle derived from a conceptual postulate? Does the consensus expressed in UNCTAD suffice to establish the principle as customary law or is the principle no more than an inchoate rule of law, "a

<sup>512</sup> United Nations, *Treaty Series*, vol. 597, p. 42.

<sup>513</sup> *Ibid.*, p. 46.

<sup>514</sup> *Official Records of the United Nations Conference on the Law of the Sea*, vol. VII, *Fifth Committee (Question of Free Access to the Sea of Land-Locked Countries)* (United Nations publication, Sales No. 58.V.4, vol. VII), p. 77, document A/CONF.13/C.5/L.1, annex 6, commentary to article 8. See also the report of the Working Party to the Fifth Committee (*ibid.*, p. 84, document A/CONF.13/C.5/L.16, para. 13).

<sup>77</sup> See the statements by the representatives of Lesotho (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1545th meeting, para. 18); Botswana (*ibid.*, 1547th meeting, para. 36); Hungary (*ibid.*, para. 44) and Zambia (*ibid.*, 1550th meeting, para. 5).

<sup>78</sup> *Ibid.*, para. 29.

'stage' in the progressive development and codification of the principles of international law", which needs to be made concrete in the practice of individual States before it can acquire the character of a fully fledged rule of international law?"<sup>515</sup>

<sup>515</sup> See M. Virally, "Le rôle des 'principes' dans le développement du droit international" and S. Bastid, "Observations sur une 'étape' dans le développement progressif et la codification des principes du droit international", in *Faculté de droit de l'Université de Genève and Institut universitaire de hautes études internationales, Genève, Recueil d'études de droit international: en hommage à Paul Guggenheim* (Geneva, Imprimerie de la Tribune de Genève, 1968), pp. 531 and 132 [original text: French].<sup>79</sup>

78. The foregoing paragraphs were originally part of the commentary to article 8 as proposed by the Special Rapporteur in his fourth report.<sup>80</sup> Since that report was written, however, a new element in the development of the legal regulation of the situation of land-locked States has emerged. The problem has been dealt with by the Third United Nations Conference on the Law of the Sea and there are some signs which indicate that a consensus might be reached in respect of certain rules involving the special rights of land-locked States and also in respect of a rule excepting those special rights from the operation of the most-favoured-nation clause.

79. In the course of the 1975 session of that Conference an "Informal single negotiating text" was prepared for the purpose of providing a further basis for negotiation. The following nine articles are taken from the text presented by the Chairman of the Second Committee of the Conference and attention is drawn particularly to article 110.

#### PART VI. LAND-LOCKED STATES

##### Article 108

1. For the purposes of the present Convention:

(a) "Land-locked State" means a State which has no seacoast;

(b) "Transit State" means a State, with or without a seacoast, situated between a land-locked State and the sea through whose territory "traffic in transit" passes;

(c) "Traffic in transit" means transit of persons, baggage, goods and means of transport across the territory of one or more transit States, when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk or change in the mode of transport is only a portion of a complete journey which begins or terminates within the territory of the land-locked State;

(d) "Means of transport" means:

- (i) Railway rolling stock, sea and river craft and road vehicles;
- (ii) Where local conditions so require, porters and pack animals.

2. Land-locked States and transit States may, by agreement between them, include as means of transport pipelines and gas lines and means of transport other than those included in paragraph 1.

##### Article 109

1. Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in the present Convention including those relating to the freedom of the high seas and the principle of the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territories of transit States by all means of transport.

2. The terms and conditions for exercising freedom of transit shall be agreed between the land-locked States and the transit States concerned through bilateral, subregional or regional agreements, in accordance with the provisions of the present Convention.

<sup>79</sup> *Yearbook ... 1975*, vol. II, pp. 137-138, document A/10010/Rev.1, chap. IV, sect. B.

<sup>80</sup> *Yearbook ... 1973*, vol. II, pp. 110-111, document A/CN.4/266, para. 12 of the commentary to article 8.

3. Transit States, in the exercise of their full sovereignty over their territory, shall have the right to take all measures to ensure that the rights provided for in this Part for land-locked States shall in no way infringe their legitimate interests.

#### Article 110

Provisions of the present Convention, as well as special agreements which regulate the exercise of the right of access to and from the sea, establishing rights and facilities on account of the special geographical position of land-locked States, are excluded from the application of the most-favoured-nation clause.

#### Article 111

1. Traffic in transit shall not be subject to any customs duties, taxes or other charges except charges levied for specific services rendered in connexion with such traffic.

2. Means of transport in transit used by land-locked States shall not be subject to taxes, tariffs or charges higher than those levied for the use of means of transport of the transit State.

#### Article 112

For the convenience of traffic in transit, free zones or other customs facilities may be provided at the ports of entry and exit in the transit States, by agreement between those States and the land-locked States.

#### Article 113

Where there are no means of transport in the transit States to give effect to the freedom of transit or where the existing means, including the port installations and equipment, are inadequate in any respect, transit States may request the land-locked States concerned to co-operate in constructing or improving them.

#### Article 114

1. Except in cases of *force majeure* all measures shall be taken by transit States to avoid delays in or restrictions on traffic in transit.

2. Should delays or other difficulties occur in traffic in transit, the competent authorities of the transit State or States and of land-locked States shall co-operate towards their expeditious elimination.

#### Article 115

Ships flying the flag of land-locked States shall enjoy treatment equal to that accorded to other foreign ships in maritime ports.

#### Article 116

Land-locked States may, in accordance with the provisions of Part III, participate in the exploitation of the living resources of the exclusive economic zone of adjoining coastal States.<sup>81</sup>

80. By the time the present report is discussed by the Commission it will be seen what turn events have taken in the 1976 session of the Conference on the Law of the Sea. In any case the Special Rapporteur believes that a provision on the line of article 110 quoted above could find its place among the articles on the codification and progressive development of the rules pertaining to the operation of most-favoured-nation clauses. Such a provision would go a step further than the corresponding provision of the Convention on Transit Trade of Land-Locked States of 8 July 1965 (article 10). As seen from the records of the Law

<sup>81</sup> *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. IV (United Nations publication, Sales No. E.75.V.10), p. 168 document A/CONF.62/WP.8, document A/CONF.62/WP.8/part II.

of the Sea Conference, however, there seems to prevail a trend to remedy as far as possible the disadvantages suffered by the land-locked States. The proposed article 110 would slightly contribute to this trend.

81. There are at present 29 sovereign States that are land-locked—that is, one fifth of the members of the international community. These States are: Afghanistan, Austria, Bhutan, Bolivia, Botswana, Burundi, Byelorussian SSR, Central African Republic, Chad, Czechoslovakia, Hungary, Laos, Lesotho, Liechtenstein, Luxembourg, Malawi, Mali, Mongolia, Nepal, Niger, Paraguay, Rwanda, San Marino, Swaziland, Switzerland, Uganda, Upper Volta, Vatican City and Zambia. Twenty of these are developing countries, some of them being among the least developed countries.

82. It is not proposed that the Commission enter into the study of the rights and facilities which are needed by the land-locked States.<sup>82</sup> It seems unquestionable that some such rights and facilities are needed by the land-locked States in order to exercise their right of access to the sea. A rule excepting such rights and facilities from the operation of the most-favoured-nation clause would indirectly assist those States in enjoying the benefits of the freedom of the seas. A tentative text of such a rule, based on article 110 quoted above, would run as follows:

#### *Article E. Most-favoured-nation clauses in relation to treatment extended to land-locked States*

A beneficiary State, unless it is a land-locked State, is not entitled under a most-favoured-nation clause to any treatment extended by a granting State to a land-locked third State if that treatment serves the purpose of facilitating the exercise of the right of access to and from the sea of that third State on account of its special geographical position.

## II. PROVISIONS IN FAVOUR OF DEVELOPING STATES

### I. Introduction

83. The Commission can take note with satisfaction that representatives of States in the Sixth Committee at the thirtieth session of the General Assembly were generally in agreement with the principle contained in article 21 as provisionally adopted in the course of the Commission's twenty-seventh session. The study of the comments of representatives reveal, however, that this general agreement was expressed in various ways, the spectrum of comments extending from enthusiastic approval on the one extreme to doubts as to the appropriateness of embodying such provision in the draft, on the other. To narrow and, possibly, close the gap of the opinions which seem to agree on the substance and differ only on method, some clarification may be needed.

### 2. The Commission's approach

84. It will be useful to recall *in extenso* what the Commission stated on the matter when it originally decided

<sup>82</sup> On these see: L. C. Caffisch, "The Access of Land-Locked States to the Sea", *Iranian Review of International Relations*, 1975-76 (Teheran), Nos. 5-6 (Winter, 1975-76), p. 53.



to study the impact of the different levels of economic development of States upon the operation of the most-favoured-nation clause. In its report on the work of its twenty-fifth session, the Commission stated:

120. The Commission, though at an early stage of its work, took cognizance of the problem which the application of the most-favoured-nation clause creates in the field of international trade when a striking inequality exists between the development of the States concerned. It recalled the report on "International trade and the most-favoured-nation clause" prepared by the secretariat of UNCTAD (the UNCTAD memorandum) which states, *inter alia*:

"To apply the most-favoured-nation clause to all countries regardless of their level of development would satisfy the conditions of formal equality, but would in fact involve implicit discrimination against the weaker members of the international community. This is not to reject on a permanent basis the most-favoured-nation clause. . . . The recognition of the trade and development needs of developing countries requires that for a certain period of time, the most-favoured-nation clause will not apply to certain types of international trade relations."<sup>317</sup>

121. It also recalled General Principle Eight of annex A.I.1. of the recommendations adopted by UNCTAD at its first session, which states, *inter alia*:

"International trade should be conducted to mutual advantage on the basis of the most-favoured-nation treatment and should be free from measures detrimental to the trading interests of other countries. However, developed countries should grant concessions to all developing countries and extend to developing countries all concessions they grant to one another and should not, in granting these or other concessions, require any concessions in return from developing countries. New preferential concessions, both tariff and non tariff, should be made to developing countries as a whole and such preferences should not be extended to developed countries. Developing countries need not extend to developed countries preferential treatment in operation amongst them."<sup>318</sup>

122. In recalling the question of the operation of the most-favoured-nation clause in trade relations between States at different levels of economic development, the Commission was aware that it could not enter into fields outside its functions and was not in a position to deal with economic matters and suggest rules for the organization of international trade. Nevertheless, it recognized that the operation of the clause in the sphere of international trade with particular reference to the developing countries posed serious problems, some of which related to the Commission's work on the topic. As indicated by the Special Rapporteur, . . . the Commission intends to examine, in future draft articles, the question of exceptions to the operation of the clause; it recognizes the importance of the question and intends to revert to it in the course of its future work."

<sup>317</sup> See *Yearbook . . . 1970*, vol. II, p. 231, document A/CN.4/228 and Add. 1, para. 188.

One member of the commission has recalled the Aristotelian definition of equality:

"There will be the same equality between the shares as between the persons, since the ratio between the shares will be equal to the ratio between the persons; for if the persons are not equal, they will not have equal shares; it is when equals possess or are allotted unequal shares, or persons not equal equal shares, that quarrels and complaints arise."<sup>319</sup>

<sup>319</sup> See Aristotle, *Nicomachean Ethics*, V; iii, 6."

(*Yearbook . . . 1968*, vol. I, p. 186, 967th meeting, para. 6.)

<sup>318</sup> See *Proceedings of the United Nations Conference on Trade and Development*, vol. I. *Final Act and Report* (United Nations publication, Sales No. 64.II.B.11), p. 20.<sup>320</sup>

### 3. Most-favoured-nation clauses in relation to treatment under a generalized system of preferences: article 21

#### A. ARTICLE 21 RELATES TO TRADE AND TO TRADE ONLY

85. It is true that the text of article 21 as provisionally adopted does not contain the word "trade", this word,

<sup>320</sup> See *Yearbook . . . 1973*, vol. II, pp. 212–213, document A/9010/Rev.1.

which appeared in the original version, having been later deleted. But it is crystal clear that it refers to "treatment extended within a generalized system of preferences" (GSP) and thus its effect is limited to trade (mainly tariff) preferences. The whole provision is the legal expression of the "Agreed Conclusions" which were reached within the Special Committee on Preferences of UNCTAD and raised to a decision by the Trade and Development Board.<sup>84</sup> The core of these conclusions is chapter IX on "Legal Status" which clearly speaks of "tariff preferences".

86. Other areas of inter-State relations were mentioned in the Sixth Committee to which the principle of article 21 could be extended.<sup>85</sup> Reference was also made to the resolutions of the sixth and seventh special sessions of the General Assembly. The most relevant part of resolution 3201 (S-VI) of 1 May 1974 entitled "Declaration on the Establishment of a New International Economic Order" is the following:

...

4. The new international economic order should be founded on full respect for the following principles:

...

(n) Preferential and non-reciprocal treatment for developing countries, wherever feasible, in all fields of international economic co-operation whenever possible.

87. Basing himself on this text, one representative in the Sixth Committee urged that preferential treatment should apply not only to trade relations but also to the transfer of technology, the exploitation of resources constituting the common heritage of mankind and all areas of economic life and international relations.<sup>86</sup>

88. In this connexion, the Commission must be aware that the main concern of the developing countries is help, assistance, credits, gifts, transfer of technology, preferential treatment in any form. In this respect, however, the Commission has no power but only a very indirect influence through the progressive development of the rules pertaining to the most-favoured-nation clause. What the Commission can do is to propose rules which except from the operation of the clause certain favours granted to developing countries, thus relieving the donor countries from their obligations under most-favoured-nation clauses vis-à-vis other countries and thereby extending the favours in question to the developing countries. Of course, the Commission may wish to propose only such rules as have a chance of adoption by States. Article 21 was tentatively proposed on the basis of the agreement reached in the competent bodies of UNCTAD. This circumstance has achieved a relative success for this article in the General Assembly.

89. The extension of the article to fields other than trade would, in the view of the Special Rapporteur, not only endanger its future but would not be warranted, for the

<sup>84</sup> See *Yearbook . . . 1975*, vol. II, p. 165, document A/10010/Rev.1, chap. IV, sect. B, para. 5 of the commentary to article 21.

<sup>85</sup> See the statement made by the representative of Brazil (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1538th meeting, para. 29).

<sup>86</sup> See the statement made by the representative of Romania (*ibid.*, 1543rd meeting, para. 14).

following reasons. In some of the fields which were mentioned by representatives of States in the Sixth Committee (for instance, in the field of transfer of technology, exploitation of resources, etc.), the possible grants to developing countries do not lend themselves to generalization through most-favoured-nation clauses. In other words, these are not fields where most-favoured-nation clauses exist. In other fields the possibility of the application of most-favoured-nation clauses exists, but hitherto there has been no practice of States to support the idea that such fields should be covered by a provision similar to that of article 21. For example, the field of shipping and port facilities, which was mentioned,<sup>87</sup> is one where general non-reciprocal preferential treatment could theoretically be given to vessels of developing countries. This, however, to the knowledge of the Special Rapporteur, has not been the case and therefore the very basis upon which the establishment of an exception to most-favoured-nation clauses could be built is missing. Among the difficulties which prevent the introduction of such a complete innovation, might be mentioned the question of the nationality of the shipowner companies and the nationality of ships sailing under flags of convenience.

#### B. THE NATURE AND MEANING OF ARTICLE 21

90. Article 21 is neither a panacea for all the ills of the developing countries nor is it perfect in itself. It is the result of the study which the Commission undertook on the basis of the promise it made in the report on its twenty-fifth session,<sup>88</sup> and it seems to be within the ambit of a possible adoption by a large majority of States both developed and developing. Article 21 uses the means of a "*renvoi*" by referring to the notion of "generalized system of preferences". The usefulness of article 21 obviously depends upon the usefulness and further development of this system, the GSP.

##### (a) *Origin and objectives of the GSP*

91. For the sake of brevity, the reader is respectfully referred to the Special Rapporteur's sixth report.<sup>89</sup>

##### (b) *The shortcomings of article 21 are those of the GSP*

###### (i) *The temporary nature of the GSP*

92. It is true that "the initial duration of the generalized system of preferences" (see part VI of the Agreed conclusions reached by The Special Committee on Preferences)<sup>90</sup> is 10 years. The expression "initial duration" itself reveals that at the very origin of the idea a prolongation of the duration was envisaged. And indeed resolution 3362 (S-VII) of 16 September 1975 of the

<sup>87</sup> See the statement made by the representative of Brazil (*ibid.*, 1538th meeting, para. 29).

<sup>88</sup> See para. 84 above.

<sup>89</sup> *Yearbook ... 1975*, vol. II, pp. 20-24, document A/CN.4/286, paras. 64-74.

<sup>90</sup> *Ibid.*, p. 21, para. 66.

General Assembly contains the following passage:

#### I. INTERNATIONAL TRADE

8. ... The generalized scheme of preferences should not terminate at the end of the period of ten years originally envisaged and should be continuously improved through wider coverage, deeper cuts and other measures bearing in mind the interests of those developing countries which enjoy special advantages and the need for finding ways and means for protecting their interest ...

93. The developing countries continue to make efforts to maintain the GSP on a permanent basis. This was manifested quite recently at the Third Ministerial Meeting of the Group of 77, held at Manila from 26 January to 7 February 1976. The following are passages from the "Programme of Action" adopted at Manila:

##### *Section Two*

#### MANUFACTURES AND SEMI-MANUFACTURES

...  
(f) The GSP should be given a firm statutory basis and made a permanent feature of the trade policies of the developed market economy countries and of the socialist countries of Eastern Europe.

##### *Section Three*

#### MULTILATERAL TRADE NEGOTIATIONS

...  
6. Developing countries urge that the following specific issues of major concern to them be given immediate consideration:

...  
(d) The maintenance and improvement of the GSP ...<sup>91</sup>

(ii) *The generalized system is in fact a complex of national systems*

94. The preferences established by some 18 developed market-economy countries and by five socialist countries of Eastern Europe are far from uniform. Great differences exist in product coverage, in the depth of the tariff cut, in safeguard mechanisms by which the preference-giving countries seek to retain some degree of control over the trade which might be generated by the tariff advantages accorded by them (ceilings, tariff quotas in the case of "sensitive products", etc.), in the rules of origin (conditions for eligibility to preferential treatment, documentary evidence and procedure for claiming preferences, verification, sanctions, etc.), and in the range of the beneficiaries.

95. As to the last mentioned question, the preference-giving countries agree in general to base their choice of beneficiaries on the principle of self-election.<sup>92</sup> A statement by the preference-giving countries on this subject includes the following proviso:

Individual developed countries might ... decline to accord special tariff treatment to a particular country claiming developing status on

<sup>91</sup> See *Proceedings of the United Nations Conference on Trade and Development, Fourth Session*, vol. I, *Final Act and Report* (United Nations publication, Sales No. E.76. II.D.10), annex V.

<sup>92</sup> "Operational guide to the Generalized System of Preferences (GSP) report by the UNCTAD secretariat" (TD/B/AC.5/41), para. 118.

grounds which they hold to be compelling. Such *ab initio* exclusion of a particular country would not be based on competitive considerations ...<sup>93</sup>

(c) *General features of the tariff preferences*

96. The preferences are: (a) temporary in nature; (b) their grant does not constitute a binding commitment and, in particular, it does not in any way prevent: (i) their subsequent withdrawal in whole or in part; or (ii) the subsequent reduction of tariffs on a most-favoured-nation basis, whether unilaterally or following international tariff accommodation; (c) in the case of parties to GATT, their grant is conditional upon the necessary waiver.<sup>94</sup> The preferences are supposed to be *non-reciprocal* in the sense that the preference-giving countries are not to require the beneficiaries of the system to reciprocate with tariff concessions on their imports and *non-discriminatory* in the sense that the preferences shall be extended to products of all developing countries alike. This latter requirement is obviously qualified by the condition of self-election.

(d) *A threat to the GSP: multilateral trade negotiations*

97. The relationship between the multilateral trade negotiations (the "Tokyo Round", etc.) and the GSP is evident. To the extent that generally employed, so-called "most-favoured-nation" tariffs may be cut in the course of such negotiations in respect of products which are exported by developing countries and covered by the GSP, the margin of preference (the difference between the ordinary tariff and the preferential one) can be reduced or even eliminated, depending on the depth of the cut. Recognizing the danger of this possibility, the General Assembly, at its sixth and seventh special sessions, adopted resolutions pertaining to multilateral trade negotiations.

98. Resolution 3202 (S-VI) of 1 May 1974, entitled "Programme of Action on the Establishment of a New International Economic Order" provides *inter alia* in section I:

3. *General trade*

All efforts should be made:

...

(b) To be guided by the principles on non-reciprocity and preferential treatment of developing countries in multilateral trade negotiations between developed and developing countries, and to seek sustained and additional benefits for the international trade of developing countries, so as to achieve a substantial increase in their foreign exchange earnings, diversification of their exports and acceleration of the rate of their economic growth.

Resolution 3362 (S-VII) of 16 September 1975, entitled "Development and international economic co-operation" provides *inter alia*:

...

<sup>93</sup> Report by the Special Group on Trade with Developing Countries [of OECD], part one, sect. A (see *Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. III, *Problems and policies of trade in manufactures and semi-manufactures* (United Nations publication, Sales No. E.68.II.D.16), p. 79, document TD/56, annex).

<sup>94</sup> See *Yearbook ... 1975*, vol. II, p. 22, document A/CN.4/286, para. 66 *in fine*.

I. INTERNATIONAL TRADE

...

8. Developed countries should take effective steps within the framework of multilateral trade negotiations for the reduction or removal, where feasible and appropriate, of non-tariff barriers affecting the products of export interest to developing countries on a differential and more favourable basis for developing countries. ...

99. The problem was dealt with by the Third Ministerial Meeting of the Group of 77 held at Manila from 26 January to 7 February 1976 where a Declaration and a Programme of Action were adopted.<sup>95</sup> In section three of the latter entitled: "Multilateral Trade Negotiations" the following has been stated *inter alia*:

...

6. Developing countries urge that the following specific issues of major concern to them be given immediate consideration:

...

(d) The maintenance and improvement of the GSP and effective compensation in case of the erosion of preferential margins resulting from the MFN tariff cuts;

100. The UNCTAD secretariat has prepared a study entitled: "The generalized system of preferences and the multilateral trade negotiations" which gives a detailed analysis of the problems involved and concludes:

... the developing countries *in toto* have a common interest in extending and preserving the benefits of the GSP. If the GSP is to continue to assist the developing countries in achieving their longer term development aspirations, the concerted attention of these countries should be given to the potential erosion of GSP benefits that could result from the multilateral trade negotiations.<sup>96</sup>

(e) *The material significance of the GSP at present*

101. This is a very cursory information on a huge and complex subject. The bulk (almost two thirds) of the exports of the developing countries to the donor countries consists of primary commodities and industrial raw materials and most of these are not dutiable in the importing donor countries. From among the remaining dutiable exports to those countries, consisting of manufactured or semi-manufactured products, a considerable part (e.g. processed agricultural and fishery products, textiles, leather and petroleum products) is not eligible for GSP treatment according to the different schemes. Thus it seems that the scope of the GSP amounts to less than 10 per cent of the imports of the donor countries from the beneficiaries of the schemes.<sup>97</sup>

102. Another feature of the GSP is that because of the facts mentioned above, it has at present limited significance for the least-developed countries or, expressed in other

<sup>95</sup> See *Proceedings of the United Nations Conference on Trade and Development, Fourth Session*, vol. I, *Final Act ... (op. cit.)*, annex V.

<sup>96</sup> Document TD/B/C.5/26, "Summary and conclusions", sect. H (see *Operation and effects of the generalized system of preferences: selected studies submitted to the sixth session of the Special Committee on Preferences for its second annual review, Geneva 20-31 May 1974* (United Nations publication, Sales No. E.75.II.D.9), p. 142).

<sup>97</sup> This is a very rough estimate, based on the UNCTAD secretariat study mentioned in para. 100 above, and on Tracy Murray, "UNCTAD's Generalized Preferences: An Appraisal", *Journal of World Trade Law* (Twickenham), vol. 7, No. 4 (July-August 1973), pp. 461-472.

words, the more a developing country is industrialized, the more it benefits from the system. The result of all this is that as long as the product coverage of the GSP is not extended, and the various safeguard measures, ceilings, rules of origin, etc. not improved, the beneficial effect of the GSP on the economies of the developing countries as a whole will be limited. For individual countries, however, it can and does yield substantial advantages.

103. This is to place in proper perspective the significance of article 21. The agreement reached in the Special Committee on Preferences according to which no country will invoke its most-favoured-nation rights with a view to obtaining the preferential treatment accorded within the GSP has certainly a beneficial effect on the functioning of the GSP. Taken as a whole this effect is presently limited. In individual cases, however, the loss of their most-favoured-nation rights may mean for the affected developed or developing beneficiary States a material sacrifice. With the improvement of the system, with the broadening of the product coverage, with an approximation and possible uniformization of the rules of origin and other features of the national schemes the significance of the GSP may grow and so the importance of the provision embodied in article 21.

### C. OBJECTIONS TO ARTICLE 21

104. Some remarks made in the Sixth Committee by representatives of developing countries who believe that the scope of article 21 should be widened have been dealt with above. What the Special Rapporteur has tried to make clear is that article 21 does not and cannot apply to matters other than trade. As to the remarks of representatives of developed countries, it must first be said that several of them have made no objections to article 21, and others (the USSR<sup>98</sup> and other socialist countries,<sup>99</sup> Italy,<sup>100</sup> France,<sup>101</sup> in principle, etc.) supported it outright.

105. Some of the objections of representatives of developed countries may be summarized as follows:

(a) The current system of generalized preferences was envisaged on a temporary basis for a period of 10 years.<sup>102</sup> In this respect, attention is drawn to what has been said above on the duration of the GSP.<sup>103</sup> Further, it is true that if the GSP ceases to exist in the foreseeable future, which does not seem very probable to the Special Rapporteur (*c'est le provisoire qui dure!*) then article 21 will become objectless. Should this hypothetical case happen and article 21 become a dead letter, it still cannot do any harm and will remain on the text as an imprint of the period in which it was conceived.

(b) It is difficult to draw a clearly defined line between

<sup>98</sup> See *Official Records of the General Assembly, Thirtieth Session, Sixth Committee, 1544th meeting, para. 14.*

<sup>99</sup> See for instance the statements made by the representatives of Czechoslovakia (*ibid.*, 1546th meeting, para. 4); and Hungary (*ibid.*, 1547th meeting, para. 48).

<sup>100</sup> *Ibid.*, 1543rd meeting, para. 25.

<sup>101</sup> *Ibid.*, 1549th meeting, para. 36.

<sup>102</sup> See the statement made by the representative of Japan (*ibid.*, 1546th meeting, para. 26).

<sup>103</sup> See paras. 92–93 above.

the concepts of developed and developing States.<sup>104</sup> This objection obviously does not apply to the text of article 21. Within the GSP only developed States are preference-giving and their own schemes determine the scope of the preference-receiving developing countries. Further, the article applies to any State beneficiary of a most-favoured-nation clause irrespective of whether it belongs to the developed or the developing category. The provision must apply also to developing beneficiary States, because if it did not, the basic principle of the GSP, the principle of self-election, could be circumvented.

(c) Further difficulty could arise from the question of whether the developed granting State was the sole judge of what might be encompassed within a generalized system of preferences, that is, within its own scheme.<sup>105</sup> As shown above, the principle of self-election is part of the system, from which it cannot be severed. It is part of the price the developing States are paying for the concessions of the developed countries. The right of self-election, however, should be exercised with reasonable restraint, that is, it should not destroy completely the original idea of non-discrimination between developing countries.

(d) Doubts were expressed by one representative as to the desirability of the Commission drafting articles on the most-favoured-nation clause in an area in which the rules governing international economic relations were still subject to continuous change.<sup>106</sup> Curiously enough the same representative in the same intervention remarked that the needs of developing countries had necessitated new rules to facilitate the access of their products to the markets of developed countries and this aspect of the matter had been *inter alia* neglected by the Commission, which had attempted to reaffirm the traditional rules of international law.<sup>107</sup> Similarly, it was stated that “the draft articles on the most-favoured-nation clauses did not offer an appropriate context in which to deal with matters of economic policy rather than legal principles”.<sup>108</sup> And again, it was stated that the Commission “should concentrate on the juridical aspects of the clause, however, leaving the question of its application in commercial treaties between States at different levels of economic development to other international organs, notably . . . UNCTAD”.<sup>109</sup> On different grounds, it was said that “. . . it would be totally illogical to interpret a most-favoured-nation clause so as to give a developed country the right to enjoy the benefits granted to developing countries within a system of preferences . . . there was some question as to whether it was necessary to include a specific article on the subject.”<sup>110</sup>

<sup>104</sup> See the statement made by the representative of the United States of America (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee, 1545th meeting, para. 39.*)

<sup>105</sup> *Ibid.*

<sup>106</sup> See the statement made by the representative of the Netherlands (*ibid.*, 1543rd meeting, para. 38).

<sup>107</sup> *Ibid.*, para. 36.

<sup>108</sup> See the statement made by the representative of the United States of America (*ibid.*, 1545th meeting, para. 39).

<sup>109</sup> See the statement made by the representative of Denmark (*ibid.*, 1546th meeting, para. 18).

<sup>110</sup> See the statement made by the representative of Sweden (*ibid.*, 1545th meeting, para. 25).

106. It is the feeling of the Special Rapporteur that the Commission is bound to consider very seriously the objections of representatives of those developed countries who have spoken on the subject and made objections, since, after all, they belong to the preference-giving group. At the same time, the Commission cannot lose sight of the great number of developing States whose representatives welcomed article 21.<sup>111</sup> It is the feeling of the Special Rapporteur, and probably the feeling of some of the objectors, as was inadvertently disclosed by the representative of the Netherlands in the statement already quoted, that it would be utterly impossible for the Commission today to present a set of articles on the most-favoured-nation clause losing sight of the fact that there is emerging before our eyes a "new international law of development" and that that emerging law has an impact upon the operation of the most-favoured-nation clauses included in commercial treaties.

107. On the basis of the foregoing the Special Rapporteur believes that, taking into consideration the discussion in the Sixth Committee, the Commission could maintain the stand it provisionally took at the twenty-seventh session and adopt article 21 definitively in first reading.

#### 4. Most-favoured-nation clauses in relation to trade among developing countries

108. According to the summary records of the debate in the Sixth Committee at the thirtieth session of the General Assembly, the representative of a developing country stated that

Article 21 might not be sufficient to exclude completely the application of the most-favoured-nation clause to the developing countries [i.e. in matters of trade] and ILC might consider the possibility of adopting at least one more article for the purpose of protecting those countries, possibly along the lines of article 21 of the Charter of Economic Rights and Duties of States. Such an article would provide protection for the developing countries against the application of article 15, the provisions of which should apply only to agreements concluded between developed countries.<sup>112</sup>

Other representatives spoke, in a similar vein, if not so explicitly.

109. Article 21 of the Charter of Economic Rights and Duties of States (adopted by the General Assembly by resolution 3281 (XXIX) of 12 December 1974) reads as follows:

Developing countries should endeavour to promote the expansion of their mutual trade and to this end may, in accordance with the existing and evolving provisions and procedures of international agreements where applicable, grant trade preferences to other developing countries without being obliged to extend such preferences to developed countries, provided these arrangements do not constitute an impediment to general trade liberalization and expansion.

<sup>111</sup> See, for instance, the statements made by the representatives of Brazil (*ibid.*, 1538th meeting, para. 29); Jamaica (*ibid.*, 1541st meeting, para. 22); Sierra Leone (*ibid.*, 1543rd meeting, para. 43); Ethiopia (*ibid.*, 1545th meeting, para. 13); Yugoslavia (*ibid.*, 1546th meeting, para. 34); Oman (*ibid.*, para. 45); Botswana (*ibid.*, 1547th meeting, para. 35); Indonesia (*ibid.*, 1548th meeting, para. 25); Ghana (*ibid.*, 1549th meeting, para. 44); Zambia (*ibid.*, 1550th meeting, para. 5).

<sup>112</sup> See the statement made by the representative of Yugoslavia (*ibid.*, 1546th meeting, para. 34).

110. Article 23 of the same Charter seems to be also relevant. It reads as follows:

To enhance the effective mobilization of their own resources, the developing countries should strengthen their economic co-operation and expand their mutual trade so as to accelerate their economic and social development. All countries, especially developed countries, individually as well as through the competent international organizations of which they are members, should provide appropriate and effective support and co-operation.

#### A. THE ANTECEDENTS OF ARTICLES 21 AND 23 OF THE CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES

111. Trade expansion, economic co-operation and economic integration among developed countries have been accepted as important elements of an "international development strategy" and as essential factors towards their economic development in a number of important international instruments. In these instruments, the establishment of preferences among developing countries has been acknowledged to be one of the arrangements best suited to contribute to trade among themselves. Some of these instruments testify to the willingness of the developed countries to promote this tendency by *inter alia* granting exceptions from their most-favoured-nation rights.

112. Promotion of trade expansion and economic integration among developing countries was proclaimed in the "Programme of Action" set forth in Part Two of the Charter of Algiers adopted by the first Ministerial Meeting of the Group of 77 in 1967.<sup>113</sup> The Declaration and Principles of the Action Programme adopted by the Second Ministerial Meeting of the Group of 77 at Lima in 1971<sup>114</sup> contains under the heading "General policy issues" a chapter on "Trade expansion, economic co-operation and regional integration among developing countries" specifying the actions envisaged to that end by the developing countries and the corresponding actions demanded from the "developed market-economy countries", the socialist countries of Eastern Europe and the multilateral organizations. The intensification of efforts to promote "Intra-African trade" has been urged by an "African Declaration on Co-operation, Development and Economic Independence" adopted at the Tenth Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity on 28 May 1973.<sup>115</sup> The Conference of Ministers for Foreign Affairs of the Non-Aligned Countries in the "Lima Programme for Mutual Assistance and Solidarity" adopted in August 1975<sup>116</sup> also advocated co-operation and particularly trade among developing countries.

113. In United Nations bodies, it is in General Principle

<sup>113</sup> See *Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. I, *Report and annexes* (United Nations publication, Sales No. E.68.II.D.14), p. 431.

<sup>114</sup> See *Proceedings of the United Nations Conference on Trade and Development, Third Session*, vol. I, *Report and annexes* (United Nations publication, Sales No. E.73.II.D.4), p. 373.

<sup>115</sup> Organization of African Unity, document CM/ST.12 (XXI).

<sup>116</sup> Document NAC/FM/CONF.5/15, circulated to the General Assembly at its seventh special session under a covering note A/10217.

Eight, adopted at the first session of UNCTAD, in 1964, that the basic idea was for the first time briefly set forth:

Developing countries need not extend to developed countries preferential treatment in operation amongst them.<sup>117</sup>

In General Principle Ten, it is stated that:

Regional economic groupings, integration or other forms of economic co-operation should be promoted among developing countries as a means of expanding their intra-regional and extra-regional trade . . .<sup>118</sup>

The recommendation contained in annex A.III.8 to the Final Act adopted by UNCTAD at its first session states *inter alia* that:

. . . rules governing world trade should . . . permit developing countries to grant each other concessions, not extended to developed countries . . .<sup>119</sup>

114. At its second session, held at New Delhi in 1968, UNCTAD adopted without dissent, on 26 March 1968 a "Concerted declaration on trade expansion, economic co-operation and regional integration among developing countries" (declaration 23 (II))<sup>120</sup> which contains "declarations of support" by the developed market-economy countries and by the socialist countries of Eastern Europe. According to the former:

19. The developed market-economy countries are ready, after examination and consultation within the appropriate international framework, to support particular trading arrangements among developing countries which are consistent with the objectives set out above. This support could include their acceptance of derogations from existing international trading obligations, including appropriate waivers of their rights to most-favoured-nation treatment.

According to the latter:

21. The socialist countries view with understanding and sympathy the efforts of the developing countries with regard to the expansion of trade and economic co-operation among themselves and, following the appropriate principles by which the socialist countries are guided in that respect, they are ready to extend their support to the developing countries.

115. At its third session, held at Santiago de Chile, in 1972, UNCTAD adopted, again without dissent, a resolution entitled "Trade expansion, economic co-operation and regional integration among developing countries" (resolution 48 (III)).<sup>121</sup> This was probably inspired by paragraphs 39 and 40 of the International Development Strategy for the Second United Nations Development Decade, adopted by the General Assembly in resolution 2626 (XXV) of 24 October 1970.

116. The General Assembly resolutions adopted more

recently, at the sixth special session, contain passages reading as follows:

4. The new international economic order should be founded on full respect for the following principles:

. . .  
(s) The strengthening, through individual and collective actions, of mutual economic, trade, financial and technical co-operation among the developing countries, mainly on a preferential basis; (resolution 3201 (S-VI), of 1 May 1974, entitled "Declaration on the Establishment of a New International Economic Order").

and

#### VII. PROMOTION OF CO-OPERATION AMONG DEVELOPING COUNTRIES

1. Collective self-reliance and growing co-operation among developing countries will further strengthen their role in the new international economic order. Developing countries, with a view to expanding co-operation at the regional, subregional and interregional levels, should take further steps, *inter alia*:

. . .  
(c) To promote, establish or strengthen economic integration at the regional and subregional levels;

(d) To increase considerably their imports from other developing countries;

(e) To ensure that no developing country accords to imports from developed countries more favourable treatment than that accorded to imports from developing countries. Taking into account the existing international agreements, current limitations and possibilities and also their future evolution, preferential treatment should be given to the procurement of import requirements from other developing countries. Wherever possible, preferential treatment should be given to imports from developing countries and the exports of those countries; (resolution 3202 (S-VI), of 1 May 1974, entitled "Programme of Action on the Establishment of a New International Economic Order").

#### B. DEVELOPMENTS IN GATT

117. A Protocol relating to Trade Negotiations among Developing Countries, drawn up under the auspices of GATT, was adopted at Geneva on 8 December 1971.<sup>122</sup> The objective of trade negotiations among developing countries being to expand their access on more favourable terms in one another's markets through exchanges of tariff and trade concessions, the Protocol includes rules to govern the necessary arrangements to achieve that objective as well as a first list of concessions. The concessions exchanged pursuant to the Protocol are applicable to all developing States which become parties to it. The Protocol is open for acceptance by the countries which made offers of concessions in the negotiations and for accession to all developing countries. The Protocol came into effect on 11 February 1973 for eight participating countries and, subsequently, for four additional participating countries.

118. The Contracting Parties to GATT, desirous of encouraging trade negotiations among developing countries through their participation in the Protocol, adopted on 26 November 1971, a Decision authorizing a waiver of the provisions of paragraph 1 of article 1 of the General Agreement to the extent necessary to permit participating contracting parties to accord preferential treatment as provided in the Protocol to products originating in other parties to the Protocol, without being required to extend the

<sup>117</sup> See para. 84 above.

<sup>118</sup> *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (op. cit.), p. 20.

<sup>119</sup> *Ibid.*, p. 42. For a fuller treatment of the problems involved, and the views of the UNCTAD secretariat on trade among developing countries, see *Yearbook . . . 1970*, vol. II, p. 238, document A/CN.4/228 and Add.1, annex I).

<sup>120</sup> *Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. I and Corr.1 and Add.1, *Report and Annexes* (op. cit.), pp. 51-53.

<sup>121</sup> *Proceedings of the United Nations Conference on Trade and Development, Third Session*, vol. I, *Report and annexes* (op. cit.), p. 103.

<sup>122</sup> See GATT, *Basic Instruments and Selected Documents, Eighteenth Supplement* (Sales No. GATT/1972-1), p. 11.

same treatment to like goods when imported from other contracting parties. This decision was taken without prejudice to the reduction of tariffs on a most-favoured-nation basis.

119. The full text of the GATT decision is as follows:

#### TRADE NEGOTIATIONS AMONG DEVELOPING COUNTRIES

*Decision of 26 November 1971  
(L/3636)*

The CONTRACTING PARTIES to the General Agreement on Tariffs and Trade,

*Recognizing* that individual and joint action is essential to further the development of the economies of developing countries and to bring about a rapid advance in the standards of living in these countries;

*Noting* that the CONTRACTING PARTIES may enable developing contracting parties to use special measures to promote their trade and development;

*Considering* that trade negotiations among developing countries have as their objective expanding access on more favourable terms for developing countries in one another's markets through an exchange of tariff and trade concessions directed towards the expansion of their mutual trade;

*Recalling* that, at the twenty-third session, the CONTRACTING PARTIES recognized that the establishment of preferences among developing countries, appropriately administered and subject to the necessary safeguards, could make an important contribution to the expansion of trade among developing countries and to the attainment of the objectives of the General Agreement;

*Noting* that the countries which have participated in these negotiations have drawn up the "Protocol relating to Trade Negotiations among Developing Countries" (hereinafter referred to as the Protocol) with rules to govern the arrangements as well as a first list of concessions, and that these countries intend to keep under review the possibility of promoting negotiations for additions or enlargements to the schedules of concessions;

*Noting also* that while concessions exchanged in the Negotiations will apply among parties to the arrangements set out in the Protocol, the countries participating in these negotiations have undertaken to facilitate the accession of all developing countries on terms consistent with the latter's individual development, financial and trade needs;

*Noting further* that the CONTRACTING PARTIES express the hope that all developing countries which have not participated in the arrangements will consider acceding to the Protocol; and

*Recognizing* that these arrangements should not impede the reduction of tariffs on a most-favoured-nation basis;

*Decide:*

(a) That without prejudice to any other Article of the General Agreement and subject to the provisions of paragraphs (b) to (e) of this Decision, the provisions of paragraph 1 of Article I of the General Agreement shall be waived to the extent necessary to permit each contracting party participating in the arrangements set out in the Protocol (hereinafter referred to as a participating contracting party) to accord preferential treatment as provided in the Protocol with respect to products originating in other parties to the Protocol, without being required to extend the same treatment to like goods when imported from other contracting parties;

*Provided that* any such preferential treatment shall be designed to facilitate trade between participants and not to raise barriers to the trade of other contracting parties;

(b) That any participating contracting party which, pursuant to the arrangements set out in the Protocol, introduces or modifies any preferential concessions shall so notify the CONTRACTING PARTIES and shall furnish them with all useful information relating to the actions taken;

(c) That each participating contracting party shall afford adequate opportunity for consultations at the request of any other contracting party which considers that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the arrangements set out in the Protocol;

(d) That any contracting party which considers that the arrangements under the Protocol are being applied inconsistently with this Decision or that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the arrangements and that consultations have proved unsatisfactory, may bring the matter before the CONTRACTING PARTIES, which will examine it promptly and will formulate any recommendations that they judge appropriate; and

(e) That the CONTRACTING PARTIES will review annually, on the basis of a report to be furnished by the participating countries, the operation of this Decision in the light of the aforementioned objectives and considerations and after five years of its operation carry out a major review in order to evaluate its effects. Before the end of the tenth year, the CONTRACTING PARTIES will undertake another major review of its operations with a view to deciding whether this Decision should be continued or modified. In connexion with such annual reviews and major reviews, the participating contracting parties shall make available to the CONTRACTING PARTIES relevant information regarding action taken under this Decision.<sup>123</sup>

#### C. AN EMERGING CONSENSUS

120. From the resolutions of the General Assembly and the action of GATT it seems that a consensus of States is emerging. This consensus recognizes the importance of the expansion of trade among developing countries irrespective of the framework in which the arrangements aiming at such expansion take place. It seems also that a consensus is emerging among the developed States, both those of the market-economy group and those of the socialist group, favourable to the promotion of trade expansion among the developing countries even if this promotion entails a certain sacrifice of their most-favoured-nation rights. The signs of this tendency are most recognizable in declaration 23 (II), adopted without dissent at the second session of UNCTAD,<sup>124</sup> and the developments in GATT.

121. The logical conclusion of such a tendency would be a legal rule which could be tentatively expressed as follows:

A developed beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a granting developing State to a third developing State for the purpose of promoting the expansion of their mutual trade.

122. However, there are at least two kinds of serious obstacle to the proposal of such a rule. The first apparently relates only to terminology. As one representative in the Sixth Committee said, it is difficult to draw a clearly defined line between the concepts of developed and developing States. While it has been shown above that this comment carries no weight in respect of article 21,<sup>125</sup> it has to be admitted that it would have importance in the case of a rule fashioned in the way just suggested, because here, in contradiction to article 21, the method of self-election does not apply or at least is not embodied in the rule.

123. The view has been expressed that this difficulty was not insurmountable. According to one representative in the Sixth Committee

The term "developing country" had acquired a broad connotation within the United Nations and the United Nations Conference on Trade and Development which could be further clarified by those organizations and could be used as a basis for ILC's work. A convention on most-

<sup>123</sup> *Ibid.*, pp. 26-28.

<sup>124</sup> See para. 114 above.

<sup>125</sup> See para. 105(b) above.

favoured-nation treatment should not, however, contain a definition of that term.<sup>126</sup>

Reference could, indeed, be made to international instruments which have overcome the drafting difficulty in the sense proposed by that representative. One example is the International Covenant on Economic, Social and Cultural Rights (General Assembly resolution 2200A(XXI), annex), article 2, paragraph 3 of which runs as follows:

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Another example is article V *bis* of the Universal Copyright Convention as revised at Paris on 24 July 1971:<sup>127</sup>

1. Any Contracting State regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations may, by a notification . . . avail itself of any or all exceptions provided for in Articles V *ter* and V *quater*.

124. In the matter under consideration, it has to be admitted, however, that the situation is not as simple. This is also a territory where the general wisdom applies that equal treatment of unequals leads to injustice. On the one hand there are great differences among developed countries, not only as regards size, population, wealth, etc. but also as regards the fact that while some of them are self-sufficient, others are compelled to rely heavily on foreign trade. On the other hand there is a world of difference between giving up a State's most-favoured-nation rights on a market like, for instance, that of Brazil and that of the Maldivian Islands.

125. The second difficulty consists in the fact that here the Commission cannot build on a clear unambiguous agreement of the community of States as was the case with article 21. Indeed, if the relevant texts quoted above are analysed, it cannot fail to be seen that all of them with the exception of General Principle Eight,<sup>128</sup> which will be reverted to below, tie the exception to various conditions. The task of the Commission would be in this field, as has been graphically expressed by representatives in the Sixth Committee to "translate" the provisions of the Charter of Economic Rights and Duties of States and other related instruments "into an enforceable legal convention".<sup>129</sup> The pertinent provision of the Charter of Economic Rights and Duties is article 21, quoted above,<sup>130</sup> and that article is couched in rather uncertain terms. The same applies to article 23.<sup>131</sup> The 1968 "Concerted declaration" of UNCTAD (declaration 23 (II)) is very cautiously worded and the GATT decision of 1971 is also combined with safeguards including notification to the Contracting Parties, consul-

<sup>126</sup> See the statement made by the representative of the German Democratic Republic (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee, 1539th meeting, para. 5*).

<sup>127</sup> For the text of the revised Convention, see United Nations, *Juridical Yearbook, 1971* (United Nations publication, Sales No. E.73.V.1), pp. 123 *et seq.*

<sup>128</sup> See para. 84 above.

<sup>129</sup> See the statements made by the representatives of the Philippines (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee, 1547th meeting, para. 39*); and Cyprus (*ibid.*, 1550th meeting, para. 14).

<sup>130</sup> See para. 109 above.

<sup>131</sup> See para. 110 above.

tations, and annual review. To "translate" these texts into an "enforceable legal convention" seems not to be an easy task. It is difficult, because in this instance there is no ready device of built-in safeguards which could be referred to, as in the case of article 21 of the Commission's 1975 draft.

126. While in the view of the Special Rapporteur General Principle Eight adopted at the first session of UNCTAD is now generally accepted as a valid principle (even though in 1964 the roll-call vote was 78 to 11 with 23 abstentions) and within that principle also that part according to which: "... Developing countries need not extend to developed countries preferential treatment in operation amongst them . . .", it is for the time being not more than a principle or more precisely a "wish-principle" which cannot be translated into a legal rule in stark simplicity as it stands or as it has been tentatively suggested at the beginning of this section.<sup>132</sup> All the texts adopted in the General Assembly, within GATT or elsewhere indicate that the essence of the consensus is not that the most-favoured-nation rights which may attract the trade preferences to be established between developing countries *inter se*, outside or within customs unions, free-trade areas or other similar associations, shall be simply abolished, but rather that the developing countries concerned, grantors of such rights, and the beneficiaries of those rights, whether developed or developing countries, should (the conditional form is used in both articles 21 and 23 of the Charter of Economic Rights and Duties of States) endeavour to find appropriate and equitable solutions. Where the parties concerned are all bound by an international agreement in the framework of which there exists an established procedure to this end, as in GATT, such a solution will be relatively simple to find. Article 21 of the Charter of Economic Rights and Duties of States refers not only to existing but also to "evolving" provisions and procedures of international agreements.

127. Of course no problem arises where the developing States co-operating outside or within customs unions or other similar associations have inserted in the most-favoured-nation clauses concluded with outsiders an appropriate exception, as very often occurs on the basis of old tradition, in Latin American practice.<sup>133</sup> In some of the Latin-American integration treaties the parties undertake to embody such exceptions in their treaties. Thus, in article XXIV of the Multilateral Treaty of Free Trade and Central American Economic Integration, signed at Tegucigalpa, Honduras on 10 June 1958 by Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica, the following provision is included:

The Contracting States agree to maintain the "Central American exception clause" in any trade agreements they may conclude on the basis of most-favoured-nation treatment with any countries other than the Contracting States.

The following paragraphs in the same article are very instructive:

The Contracting States declare that, in concluding this Treaty, they are prompted by the desire to establish closer mutual links as States of

<sup>132</sup> See para. 121 above.

<sup>133</sup> Among the very rich literature, see the studies included in F. Orrego Vicuña, ed., *Derecho internacional económico: I. América Latina y la Cláusula de la Nación más favorecida*, 1st ed. (Lecturas 10\*, Mexico, Fondo de cultura económica, 1974).



Central America governed by the special principles of a Central American public law. To that end, they agree that if any of the trade agreements they may conclude with other countries or their participation in other international arrangements, should constitute an obstacle to this Treaty, particularly as a result of provisions embodied in the other treaties permitting other countries to claim no less favourable treatment, they shall renegotiate or, as the case may be, denounce them at the earliest opportunity with a view to avoiding the difficulties or prejudice which might ensue for any of the Contracting States as a result of claims of that nature.

The contracting Parties also undertake not to conclude any new agreements with other countries which are contrary to the spirit and purposes of this Treaty and, in particular, to the provisions of this article.<sup>134</sup>

The text quoted reveals the seriousness with which the developing countries concerned regard their most-favoured-nation obligations.

128. The General Treaty on Central American Economic Integration, signed at Managua, Nicaragua, on 13 December 1960 by the same countries, contains a brief provision (article XXV) as follows:

The Signatory States agree not to sign unilaterally with non-Central American countries any new treaties that may affect the principles of Central American economic integration. They further agree to maintain the "Central American exception clause" in any trade agreement they may conclude on the basis of most-favoured-nation treatment with any countries other than the Contracting States.<sup>135</sup>

129. An important exception clause can be found in the Treaty establishing a Free Trade area and instituting the Latin American Free Trade Association, signed at Montevideo, on 18 February 1960.<sup>136</sup> While the parties agreed in article 18 of the treaty to accord to each other most-favoured-nation treatment in their mutual trade, chapter VIII of the treaty provides for "Measures in favour of countries at a relatively less advanced stage of economic development". Under this heading in article 32(a) the Contracting Parties reserve their right to

Authorize a Contracting Party to grant to another Contracting Party which is at a relatively less advanced stage of economic development within the Area, as long as necessary and as a temporary measure, for the purposes set out in the present article, advantages not extended to the other Contracting Parties, in order to encourage the introduction or expansion of specific productive activities.

130. The most various exception provisions have been coupled to most-favoured-nation clauses in bilateral treaties concluded by Latin American States. The following one is

<sup>134</sup> See United Nations, *Treaty Series*, vol. 454, pp. 88 and 90.

<sup>135</sup> *Ibid.*, vol. 455, p. 90.

<sup>136</sup> *Multilateral Economic Co-operation and Latin America*, vol. I, *Text and Documents* (United Nations publication, Sales No. 62.II.G.3), p. 57.

taken from article 1 of the Colombia-USSR trade agreement signed at Bogotá on 3 June 1968:<sup>137</sup>

... The provisions of the present article [the most-favoured-nation pledge] shall not extend to the advantages and privileges which ...

...  
(b) Colombia has granted or may grant any Latin American country as a result of its participation in free trade zones or other regional economic unions of the Latin American developing countries.

131. The problem to be solved is whether a customary rule can be discerned or a new rule established which would, in the absence of specific agreement to that effect, exempt in one way or another the trade relations between developing States, outside or within customs unions or other associations, from the operation of most-favoured-nation clauses, and whether a distinction has to be drawn according to whether the beneficiary of such a clause is a developed or a developing country. It seems to the Special Rapporteur that upon the evidence available the proposal of a rule simply deriving the beneficiaries of their most-favoured-nation rights is not at present warranted. Though it is obvious that the generally recognized aim of expanding the mutual trade of developing countries may be a good reason for requesting release from a most-favoured-nation pledge and such a request should be considered with benevolence by the beneficiary, it seems problematic whether this is enough for being formulated as a rule and whether and what distinctions should be made according to the beneficiary State's status as a developing or developed country and according to the granting State's relation to its trading partner within or outside a customs union or a similar association. The Special Rapporteur does not intend to submit a proposal until he has heard the views of his colleagues in the Commission. At that time the results of the fourth session of UNCTAD, to be held at Nairobi in May 1976 should also be available, and these may include some new development on which the Commission may rely.

### III. SETTLEMENT OF DISPUTES

132. The matter last dealt with illustrates the obvious fact that the questions connected with the application of most-favoured-nation clauses may also lead to international disputes. As the articles on the most-favoured-nation clause are conceived as a supplement to the Vienna Convention, the relevant provisions of that Convention will also apply when a dispute arises in connexion with a most-favoured-nation clause.

<sup>137</sup> Text in American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. VIII, No. 6 (November 1969), p. 1302.