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Report of the International Law Commission
on the work of its thirtieth session
8 May-28 July 1978

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ABBREVIATIONS

ACP States	African, Caribbean and Pacific States
ALALC	see LAFTA
CACM	Central American Common Market
ECE	Economic Commission for Europe
ECLA	Economic Commission for Latin America
ECWA	Economic Commission for Western Asia
EEC	European Economic Community
EFTA	European Free Trade Association
ESCAP	Economic and Social Commission for Asia and the Pacific
GATT	General Agreement on Tariffs and Trade
GSP	Generalized System of Preferences
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
I.C.J.	International Court of Justice
<i>I.C.J. Pleadings</i>	<i>I.C.J., Pleadings, Oral Arguments, Documents</i>
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
LAFTA	Latin American Free Trade Organization
OAS	Organization of American States
m.f.n.	most favoured nation
P.C.I.J.	Permanent Court of International Justice
<i>P.C.I.J., Series A/B</i>	<i>P.C.I.J., Judgments, Orders and Advisory Opinions</i>
<i>P.C.I.J., Series C</i>	<i>P.C.I.J., Pleadings, Oral Statements, Documents</i>
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNITAR	United Nations Institute for Training and Research
WTO	World Tourism Organization

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EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation indicates that, in the passage immediately preceding the asterisk, the italics have been supplied by the Commission.

Chapter I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its thirtieth session at its permanent seat at the United Nations Office at Geneva from 8 May to 28 July 1978. The Commission's work during that session is described in the present report. Chapter II of the report, on the most-favoured-nation clause, contains a description of the Commission's work on that topic, together with 30 draft articles and commentaries thereto, as finally approved by the Commission. Chapter III, on State responsibility, contains a description of the Commission's work on that topic, together with 27 draft articles provisionally adopted so far, and commentaries to five of those articles, which were provisionally adopted at the thirtieth session. Chapter IV, on succession of States in respect of matters other than treaties, contains a description of the Commission's work on that topic, together with 25 draft articles provisionally adopted so far, and commentaries to three of those articles, which were provisionally adopted at the thirtieth session. Chapter V, on the question of treaties concluded between States and international organizations or between two or more international organizations, contains a description of the Commission's work on that topic, together with 44 draft articles provisionally adopted so far, and commentaries to five of those articles and to one additional subparagraph to the article concerning use of terms, which were provisionally adopted at the thirtieth session. Chapter VI, on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, contains the results of the Commission's study of the proposals on the elaboration of a protocol concerning that topic, as requested by the General Assembly in resolution 31/76 of 13 December 1976. Chapter VII deals with the Commission's work on the second part of the topic "Relations between States and international organizations". Chapter VIII deals with the law of the non-navigational uses of international watercourses, review of the multilateral treaty-making process, international liability for injurious consequences arising out of acts not prohibited by international law, and jurisdictional immunities of States and their property, as well as with the programme and methods of work of the Commission and a number of administrative and other questions.

A. Membership and attendance

2. The membership of the Commission is as follows:
 Mr. Roberto AGO (Italy)
 Mr. Mohammed BEDJAOUI (Algeria)
 Mr. Juan José CALLE Y CALLE (Peru)

Mr. Jorge CASTAÑEDA (Mexico)
 Mr. Emmanuel Kodjoe DADZIE (Ghana)
 Mr. Leonardo DÍAZ GONZÁLEZ (Venezuela)
 Mr. Abdullah EL-ERIAN (Egypt)
 Mr. Laurel B. FRANCIS (Jamaica)
 Mr. S. P. JAGOTA (India)
 Mr. Frank X. J. C. NJENGA (Kenya)
 Mr. C. W. PINTO (Sri Lanka)
 Mr. Robert Q. QUENTIN-BAXTER (New Zealand)
 Mr. Paul REUTER (France)
 Mr. Willem RIPHAGEN (Netherlands)
 Mr. Milan ŠAHOVIĆ (Yugoslavia)
 Mr. Stephen M. SCHWEBEL (United States of America)
 Mr. José SETTE CÂMARA (Brazil)
 Mr. Sompong SUCHARITKUL (Thailand)
 Mr. Abdul Hakim TABIBI (Afghanistan)
 Mr. Doudou THIAM (Senegal)
 Mr. Senjin TSURUOKA (Japan)
 Mr. Nikolai A. USHAKOV (Union of Soviet Socialist Republics)
 Sir Francis VALLAT (United Kingdom of Great Britain and Northern Ireland)
 Mr. Stephan VEROSTA (Austria)
 Mr. Alexander YANKOV (Bulgaria)

3. All members of the Commission attended meetings during the thirtieth session.

B. Officers

4. At its 1474th meeting, on 8 May 1978, the Commission elected the following officers:

Chairman: Mr. José Sette Câmara
First Vice-Chairman: Mr. Milan Šahović
Second Vice-Chairman: Mr. Frank X. J. C. Njenga
Chairman of the Drafting Committee: Mr. Stephen M. Schwebel
Rapporteur: Mr. C. W. Pinto

5. At the current session of the Commission, the Enlarged Bureau was composed of the officers, former chairmen of the Commission and the Special Rapporteurs. The Chairman of the Enlarged Bureau was the Chairman of the Commission at the current session. On the recommendation of the Enlarged Bureau, the Commission, at its 1475th meeting, held on 9 May 1978, established a Planning Group for the current session to consider matters relating to the organization, programme and methods of work of the Commission, and to report thereon to the Enlarged Bureau. The Planning Group was composed as follows:

Mr. Milan Šahović (Chairman), Mr. Roberto Ago, Mr. Leonardo Díaz González, Mr. Abdullah El-Erian, Mr. Stephen M. Schwebel, Mr. Abdul Hakim Tabibi, Mr. Nikolai A. Ushakov and Sir Francis Vallat.

C. Drafting Committee

6. At its 1477th meeting, on 11 May 1978, the Commission appointed a Drafting Committee composed as follows: Mr. Juan José Calle y Calle, Mr. Emmanuel Kodjoe Dadzie, Mr. Adbullah El-Erian, Mr. Laurel B. Francis, Mr. Paul Reuter, Mr. Willem Riphagen, Mr. Sompong Sucharitkul, Mr. Nikolai A. Ushakov, Sir Francis Vallat and Mr. Alexander Yankov. Mr. Stephen M. Schwebel was elected by the Commission to serve as chairman of the Drafting Committee. Mr. C. W. Pinto also took part in the Committee's work in his capacity as Rapporteur of the Commission.

D. Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier

7. At its 1475th meeting, on 9 May 1978, the Commission decided that the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier established at the 1977 session of the Commission should study that subject, as requested under paragraph 4 of General Assembly resolution 31/76 of 13 December 1976, and report thereon to the Commission. The composition of the Working Group was as follows: Mr. Abdullah El-Erian (Chairman), Mr. Juan José Calle y Calle, Mr. Emmanuel Kodjoe Dadzie, Mr. Laurel B. Francis, Mr. Willem Riphagen, Mr. Stephen M. Schwebel, Mr. Sompong Sucharitkul, Mr. Nikolai A. Ushakov and Mr. Alexander Yankov.

E. Working Group on review of the multilateral treaty-making process

8. At its 1475th meeting, on 9 May 1978, the Commission also established a Working Group to study the item entitled "Review of the multilateral treaty-making process", on which the Commission had been invited to submit its observations under paragraph 2 of General Assembly resolution 32/48 of 8 December 1977, and to report thereon to the Commission. The Working Group was composed as follows: Mr. Robert Q. Quentin-Baxter (Chairman), Mr. Juan José Calle y Calle, Mr. Frank X. J. C. Njenga, Mr. C. W. Pinto and Mr. Alexander Yankov.

F. Working Group on international liability for injurious consequences arising out of acts not prohibited by international law

9. At its 1502nd meeting, on 16 June 1978, the Commission established a Working Group to consider the question of future work by the Commission on the topic "International liability for injurious consequences arising out of acts not prohibited by international law" and to report thereon to the Commission. The Working Group was composed as follows: Mr. Robert Q. Quentin-Baxter (Chairman), Mr. Roberto Ago, Mr. Jorge Castañeda and Mr. Frank X. J. C. Njenga.

G. Working Group on jurisdictional immunities of States and their property

10. At its 1502nd meeting, on 16 June 1978, the Commission also established a Working Group to consider the question of the Commission's future work on the topic "Jurisdictional immunities of States and their property" and to report thereon to the Commission. The Working Group was composed as follows: Mr. Sompong Sucharitkul (Chairman), Mr. Adbullah El-Erian, Mr. Laurel B. Francis and Mr. Willem Riphagen.

H. Secretariat

11. Mr. Erik Suy, Under-Secretary-General, Legal Counsel, represented the Secretary-General at the session. Mr. Valentin A. Romanov, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. Santiago Torres-Bernárdez, Deputy Director of the Codification Division, acted as Deputy Secretary to the Commission. Mr. Eduardo Valencia-Ospina, Mr. Moritaka Hayashi and Mr. Larry D. Johnson, legal officers, served as assistant secretaries to the Commission.

I. Agenda

12. At its 1474th meeting, on 8 May 1978, the Commission adopted an agenda for its thirtieth session as follows:

1. The most-favoured-nation clause.
2. State responsibility.
3. Succession of States in respect of matters other than treaties.
4. Question of treaties concluded between States and international organizations or between two or more international organizations.
5. The law of the non-navigational uses of international watercourses.
6. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.
7. Relations between States and international organizations (second part of the topic).
8. Review of the multilateral treaty-making process (para. 2 of General Assembly resolution 32/48).
9. Long-term programme of work.
10. Organization of future work.
11. Co-operation with other bodies.
12. Date and place of the thirty-first session.
13. Other business.

13. The Commission considered all the items on its agenda. In the course of the session the Commission held 56 public meetings (1474th to 1529th meetings). In addition, the Drafting Committee held 35 meetings, the Enlarged Bureau of the Commission four meetings and the Planning Group three meetings. The Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier held four meetings and the Working Group on review of the multilateral treaty-making process three meetings. Finally, the Working Group on international liability for injurious

consequences arising out of acts not prohibited by international law held three meetings and the Working Group on jurisdictional immunities of States and their property three meetings.

J. Invitation to the Commission to participate as an observer in the World Conference to Combat Racism and Racial Discrimination

14. By a note dated 6 March 1978 addressed to the Chairman of the International Law Commission, the

Secretary-General, in accordance with General Assembly resolution 32/129 of 16 December 1977, invited the Commission to participate as an observer in the World Conference to Combat Racism and Racial Discrimination, scheduled to convene at the United Nations Office at Geneva from 14 to 26 August 1978. At its 1502nd meeting, held on 16 June 1978, the Commission decided to accept the invitation to participate as an observer in the Conference. It appointed Mr. Abdul Hakim Tabibi and Mr. Emmanuel Kodjoe Dadzie to represent it for that purpose.

Chapter II

THE MOST-FAVoured-NATION CLAUSE

A. Introduction

1. SUMMARY OF THE COMMISSION'S PROCEEDINGS

15. At its sixteenth session, in 1964, the Commission considered a proposal by one of its members, Mr. Jiménez de Aréchaga, to include in its draft articles on the law of treaties a provision on the most-favoured-nation clause.¹ The suggested provision was intended formally to reserve the clause from the operation of the articles dealing with the problem of the effect of treaties on third States. In support of the proposal it was urged that the broad and general terms in which the articles relating to third States had been provisionally adopted by the Commission might blur the distinction between provisions in favour of third States and the operation of the most-favoured-nation clause, a matter that might be of particular importance in connexion with the article dealing with the revocation or amendment of provisions regarding obligations or rights of States not parties to treaties. The Commission, however, while recognizing the importance of not prejudicing the operation of most-favoured-nation clauses, did not consider that those clauses were in any way touched by the articles in question, and therefore decided that there was no need to include a saving clause of the kind proposed. In regard to most-favoured-nation clauses in general, the Commission did not consider it advisable to deal with them in the codification of the general law of treaties, although it thought that they might at some future time appropriately form the subject of a special study.² The Commission maintained that position at its eighteenth session, in 1966.³

16. At its nineteenth session, in 1967, the Commission noted that, at the twenty-first session of the General Assembly, several representatives in the Sixth Committee had urged that the Commission should deal with the most-favoured-nation clause as an aspect of the general law of treaties. In view of the interest expressed in the matter and of the fact that clarification of its legal aspects might be of assistance to UNCITRAL, the Commission decided to place on its programme of work the topic of "most-favoured-nation clauses in the law of treaties", and appointed Mr. Endre Ustor as Special Rapporteur on that topic.⁴

17. At the twentieth session of the Commission, in 1968, the Special Rapporteur submitted a working paper giving

an account of the preparatory work undertaken by him on the topic and outlining the possible contents of a report to be presented at a later stage.⁵ He also submitted a questionnaire listing points on which he specifically asked the members of the Commission to express their opinion. The Commission, while recognizing the fundamental importance of the role of the most-favoured-nation in the sphere of international trade, instructed the Special Rapporteur not to confine his studies to that sphere but to explore the major spheres of application of the clause. The Commission considered that it should focus on the legal character of the clause and on the legal conditions governing its application and that it should clarify the scope and effect of the clause as a legal institution in the context of all aspects of its practical application. It wished to base its studies on the broadest possible foundations, without however entering into areas outside its functions. In the light of those considerations, the Commission further instructed the Special Rapporteur to consult, through the Secretariat, all organizations and interested agencies that might have particular experience in the application of the most-favoured-nation clause.

18. The Commission decided at the same session to shorten the title of the topic to "The most-favoured-nation clause".⁶

19. By its resolution 2400 (XXIII) of 11 December 1968, the General Assembly recommended that the Commission, *inter alia*, continue its study of the most-favoured-nation clause. Subsequently, the General Assembly made the same recommendation in its resolutions 2501 (XXIV) of 12 November 1969, 2634 (XXV) of 12 November 1970, 2780 (XXVI) of 3 December 1971 and 2926 (XXVII) of 28 November 1972.

20. At the twenty-first session of the Commission, in 1969, the Special Rapporteur submitted his first report,⁷ containing a history of the most-favoured-nation clause up to the time of the Second World War, with particular emphasis on the work on the clause undertaken in the League of Nations or under its aegis. The Commission considered the report and, accepting the suggestions of the Special Rapporteur, instructed him to prepare next a study based mainly on the replies from organizations and interested agencies consulted by the Secretary-General and having regard also to three cases dealt with by the International Court of Justice relevant to the clause.⁸

21. Following the instructions of the Commission, the

¹ *Yearbook ... 1964*, vol. I, p. 184, 752nd meeting, para. 2.

² *Ibid.*, vol. II, p. 176, doc. A/5809, para. 21.

³ *Yearbook ... 1966*, vol. II, p. 177, doc. A/6309/Rev.1, part II, para. 32.

⁴ *Yearbook ... 1967*, vol. II, p. 369, doc. A/6709/Rev.1, para. 48.

⁵ *Yearbook ... 1968*, vol. II, p. 165, doc. A/CN.4/L.127.

⁶ *Ibid.*, vol. I, p. 250, 987th meeting, paras. 7-12.

⁷ *Yearbook ... 1969*, vol. II, p. 157, doc. A/CN.4/213.

⁸ *Ibid.*, p. 234, doc. A/7610/Rev.1, para. 89.

Special Rapporteur submitted his second report⁹ at the Commission's twenty-second session, in 1970. In part I of that report, he presented an analytical survey of the views concerning the nature and function of the clause held by the parties and the judges in the three cases dealt with by the International Court of Justice pertaining to the clause: the *Anglo-Iranian Oil Co. case (jurisdiction)* [1952],¹⁰ the *Case concerning rights of nationals of the United States of America in Morocco* [1952],¹¹ and the *Ambatielos case (merits: obligation to arbitrate)* [1953].¹² He also dealt with the award handed down on 6 March 1956 by the Commission of Arbitration established by the Agreement of 24 February 1955 between the Governments of Greece and the United Kingdom for the arbitration of the Ambatielos claim.¹³

22. In part II of his second report, the Special Rapporteur set out in a systematic manner the replies of international organizations and interested agencies to a circular letter of the Secretary-General dated 23 January 1969. In that letter, the organizations and agencies concerned had been requested to submit, for transmittal to the Special Rapporteur, all information derived from their experience that might assist him and the Commission in the work of codification and progressive development of the rules of international law concerning the most-favoured-nation clause. They had been particularly requested to draw attention to any relevant bilateral or multilateral treaty, statement, practice or fact, and to give their views as to existing rules that could be discerned in respect of the clause. A number of international organizations and interested agencies had given detailed answers to the circular letter and those answers served as a basis for part II of the Special Rapporteur's second report.

23. The Commission was unable to consider the topic at its twenty-second (1970) and twenty-third (1971) sessions.

24. At its twenty-third session, however, the Commission, at the suggestion of the Special Rapporteur, requested the Secretariat to prepare, on the basis of the collections of law reports available to it and of the information to be requested from governments, a "Digest of decisions of national courts relating to most-favoured-nation clauses".¹⁴

25. At the twenty-fourth session of the Commission, in 1972, the Special Rapporteur submitted his third report,¹⁵ containing a set of five articles on the most-favoured-nation clause, with commentaries. The articles defined the terms used in the draft, in particular the terms "most-favoured-nation clause" (article 2) and "most-favoured-nation treatment" (article 3), and dealt with the legal

basis of most-favoured-nation treatment (article 4) and the source of the right of the beneficiary State (article 5).

26. Being fully occupied with the completion of draft articles on succession of States in respect of treaties and draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, the Commission was unable to examine the topic at its twenty-fourth session, in 1972.

27. At that session, however, at the suggestion of the Special Rapporteur, the Commission requested the Secretariat to undertake research on most-favoured-nation clauses included in the treaties published in the United Nations *Treaty Series*, such research to include a survey of the spheres of application of the clauses in question and their relation to national treatment clauses, the exceptions provided for in treaties, and the practice concerning succession of States in respect of most-favoured-nation clauses.¹⁶

28. At the twenty-fifth session of the Commission, in 1973, the Special Rapporteur submitted his fourth report,¹⁷ containing three more articles, with commentaries, dealing with the presumption of the unconditional character of the clause (article 6), the *ejusdem generis* rule (article 7) and the acquired rights of the beneficiary State (article 8).

29. Also at its twenty-fifth session, at the 1214th to 1218th meetings, the Commission considered the Special Rapporteur's third report, and referred articles 2, 3, 4 and 5 contained therein to the Drafting Committee. At its 1238th meeting, the Commission considered the reports of the Drafting Committee and adopted on first reading articles 1 to 7.

30. In its report on the work of its twenty-fifth session, the Commission reproduced for the information of the General Assembly the text of the draft articles and the commentaries thereto that it had adopted. In so doing, it drew the attention of the General Assembly to the fact that the adoption of the seven articles constituted only the initial stage of its work in the preparation of draft articles on the topic.¹⁸

31. By resolution 3071 (XXVIII) of 30 November 1973, the General Assembly recommended that the Commission proceed *inter alia* with the preparation of draft articles on the most-favoured-nation clause. Subsequently, by its resolution 3315 (XXIX) of 14 December 1974, the General Assembly made the same recommendation.

32. At the twenty-sixth session of the Commission, in 1974, the Special Rapporteur submitted his fifth report,¹⁹ containing 13 additional articles, with commentaries. The articles dealt with the effect of an unconditional most-favoured-nation clause (article 6 *bis*) and of a most-favoured-nation clause conditional on material reciprocity (article 6 *ter*); observance of the laws and regulations of the granting State (article 6 *quater*); scope of the most-favoured-nation clause regarding persons and things

⁹ *Yearbook ... 1970*, vol. II, p. 199, doc. A/CN.4/228 and Add.1.

¹⁰ *I.C.J. Reports 1952*, p. 93.

¹¹ *Ibid.*, p. 176.

¹² *I.C.J. Reports 1953*, p. 10.

¹³ United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), p. 91.

¹⁴ *Yearbook ... 1971*, vol. II (Part One), p. 347, doc. A/8410/Rev.1, para. 113.

¹⁵ *Yearbook ... 1972*, vol. II, p. 161, doc. A/CN.4/257 and Add.1.

¹⁶ *Ibid.*, doc. A/8710/Rev.1, para. 75.

¹⁷ *Yearbook ... 1973*, vol. II, p. 97, doc. A/CN.4/266.

¹⁸ *Ibid.*, p. 211, doc. A/9010/Rev.1, para. 108.

¹⁹ *Yearbook ... 1974*, vol. II (Part One), p. 117, doc. A/CN.4/280.

(article 7 *bis*); the national treatment clause (article 9); national treatment (article 10) and national treatment in federal States (article 10 *bis*); effect of an unconditional national treatment clause (article 11) and of a national treatment clause conditional on material reciprocity (article 12); right of the beneficiary State under a most-favoured-nation clause to national treatment (article 13); cumulation of national treatment and most-favoured-nation treatment (article 14); commencement and termination or suspension of the functioning of a most-favoured-nation clause (articles 15 and 16, respectively).

33. The Commission was unable to resume consideration of the topic at its twenty-sixth session, since it had to devote most of its time at that session to the second reading of the draft articles on succession of States in respect of treaties and to the preparation of draft articles on State responsibility.

34. At the twenty-seventh session, in 1975, the Special Rapporteur submitted his sixth report.²⁰ That report contained proposals for the revision of some of the articles on the most-favoured-nation clause adopted by the Commission at its twenty-fifth session and some of the articles presented by him in his two previous reports, with additional commentaries, together with additional articles on the source and scope of national treatment (article X), presumption of the unconditional character of the national treatment clause (article Y), and the most-favoured-nation clause and multilateral agreements (article 8 *bis*), with commentaries. The report also dealt with the case of customs unions and similar associations of States, and with the most-favoured-nation clause and the different levels of economic development of States.

35. At the same session, at its 1330th to 1343rd meetings, the Commission considered the fourth, fifth and sixth reports submitted by the Special Rapporteur, and referred articles 6, 6 *bis*, 6 *ter* 6 *quater*, 7, 7 *bis*, 8, 8 *bis*, 13, 14, 15 and 16 contained therein to the Drafting Committee. The Commission also referred to the Drafting Committee the text of an article submitted by the Special Rapporteur in the course of the session,²¹ providing for an exception to the operation of the most-favoured-nation clause in the case of a generalized system of preferences granted to developing States. At its 1352nd and 1353rd meetings, the Commission considered the report of the Drafting Committee and adopted on first reading articles 8 to 21.

36. In its resolution 3495 (XXX) of 15 December 1975, the General Assembly recommended that the Commission should, *inter alia*, complete at its twenty-eighth session the first reading of the draft articles on the most-favoured-nation clause.

37. At the twenty-eighth session, the Special Rapporteur submitted his seventh report,²² containing proposals concerning certain articles previously adopted (including a suggested new subparagraph (*e*), on "material reciprocity", in article 2 (Use of terms), and a suggested new sentence (4) in article 3), and five additional articles, with

commentaries, dealing with the relationship of the articles to the 1969 Vienna Convention on the Law of Treaties (article A), cases of State succession, State responsibility and outbreak of hostilities (article B), non-retroactivity of the draft articles (article C), freedom of the parties to draft the clause and restrict its operation (article D), and most-favoured-nation clauses in relation to treatment extended to land-locked States (article E). The report also contained a chapter entitled "Provisions in favour of developing States" and another entitled "Settlement of disputes".

38. The Commission considered the seventh report submitted by the Special Rapporteur at its 1377th to 1389th meetings and referred to the Drafting Committee the suggested new subparagraph (*e*) of article 2, the suggested new sentence (4) of article 3 and articles A, B, C, D and E contained therein. The Commission also referred to the Drafting Committee sections 10 ("Exceptions to the operation of the clause—Frontier traffic") and 11 ("The customs-union issue") of chapter I, and section 4 ("Most-favoured-nation clauses in relation to trade among developing countries") of chapter II, as well as article 21, which had been provisionally adopted at the twenty-seventh session. At its 1404th meeting, the Commission considered the report of the Drafting Committee and adopted on first reading articles 21 to 27, as well as subparagraph (*e*) of article 2. At the same meeting, it decided to adopt certain changes made by the Drafting Committee for the sake of terminological consistency in the articles previously adopted, and took decisions on certain pending matters. As recommended in General Assembly resolution 3495 (XXX), the Commission completed at its twenty-eighth session the first reading of the draft articles on the most-favoured-nation clause.²³

39. By resolution 31/97 of 15 December 1976, the General Assembly, recommended that the Commission should, *inter alia*, complete at its thirtieth session, in the light of comments received from Member States, from organs of the United Nations which had competence on the subject-matter and from interested intergovernmental organizations, the second reading of the draft articles on the most-favoured-nation clause adopted at its twenty-eighth session.

40. At its twenty-ninth session, in 1977, the Commission decided to appoint Mr. Nikolai A. Ushakov Special Rapporteur for the topic of the most-favoured-nation clause, to succeed Mr. Endre Ustor, who had not stood for re-election for the term of office starting 1 January 1977.²⁴

41. At the same session, pursuant to the recommendation contained in General Assembly resolution 31/97 that the Commission should complete at its 1978 session the second reading of the draft articles on the most-favoured-nation clause in the light of comments received not only from Member States but also from organs of the United

²⁰ *Yearbook ... 1975*, vol. II, p. 1, doc. A/CN.4/286.

²¹ *Ibid.*, vol. I, p. 195, 1342nd meeting, para. 1.

²² *Yearbook ... 1976*, vol. II (Part One), p. 111, doc. A/CN.4/293 and Add.1.

²³ *Official Records of the General Assembly, Thirty-first Session, Supplement No. 10 (A/31/10)*, chap. II (*Yearbook ... 1976*, vol. II (Part Two), pp. 4 *et seq.*, doc. A/31/10, chap. II).

²⁴ *Ibid.*, *Thirty-second Session, Supplement No. 10 (A/32/10)*, p. 304 (*Yearbook ... 1977*, vol. II (Part Two), p. 124, doc. A/32/10, para. 77).

Nations which had competence on the subject-matter and from interested intergovernmental organizations, the Commission instructed the Secretariat to transmit the draft articles to a number of such organs and organizations for their comments, in addition to Member States, to which the draft articles had already been sent for the same purpose.²⁵

42. By resolution 32/151 of 19 December 1977, the General Assembly recommended that the Commission should, *inter alia*, complete at its thirtieth session the second reading of the draft articles on the most-favoured-nation clause adopted at its twenty-eighth session, as recommended in General Assembly resolution 31/97 of 15 December 1976.

43. At its current session, the Commission re-examined the draft articles in the light of the comments of Member States, organs of the United Nations, specialized agencies and other intergovernmental organizations.²⁶ It had before it the first report (A/CN.4/309 and Add.1 and 2)²⁷ submitted by the new Special Rapporteur, Mr. Nikolai A. Ushakov, which summarized the above-mentioned comments and also those made orally by delegations at the General Assembly, and contained proposals on the revision of the texts of certain articles, as well as a discussion of the problem of the procedure for the settlement of disputes relating to the interpretation and application of a convention based on the draft articles.

44. The Commission also had before it proposals submitted by some of its members for additional articles: article A, entitled "The most-favoured-nation clause and treatment extended in accordance with the Charter of Economic Rights and Duties of States" (A/CN.4/L.264),²⁸ article 21 *ter*, entitled "The most-favoured-nation clause and treatment extended under commodity agreements" (A/CN.4/L.265);²⁹ article 21 *bis*, entitled "The most-favoured-nation clause in relation to arrangements between developing countries" (A/CN.4/L.266);³⁰ article 23 *bis*, entitled "The most-favoured-nation clause in relation to treatment extended by one member of a customs union to another member" (A/CN.4/L.267);³¹ and article 28, entitled "Settlement of disputes", with an annex (A/CN.4/L.270).³²

45. The Commission considered the Special Rapporteur's first report at its 1483rd to 1500th meetings, and at its 1505th and 1506th meetings. During the course of some of those meetings, the Commission also considered the five proposals mentioned in the preceding paragraph. At its 1520th to 1523rd meetings, it considered the reports of the Drafting Committee. At its 1523rd meeting, the Commission adopted the final text of its draft articles on the most-favoured-nation clause. That

text is reproduced in section D of this chapter. In accordance with its Statute, it submits the text to the General Assembly, together with a recommendation contained in paragraph 73 below.

46. At the twenty-fifth session of the Commission, the Secretariat distributed the document entitled "Digest of decisions of national courts relating to the most-favoured-nation clause",³³ prepared at the Commission's request.³⁴ The Special Rapporteurs on the topic also had at their disposal the research undertaken by the Secretariat on most-favoured-nation clauses included in the treaties published in the United Nations *Treaty Series*,³⁵ as well as other relevant materials furnished by the Secretariat.

2. THE MOST-FAVOURED-NATION CLAUSE AND THE PRINCIPLE OF NON-DISCRIMINATION

47. The Commission considered the relationship and interaction between the most-favoured-nation clause and the principle of non-discrimination. It discussed particularly the question whether the principle of non-discrimination did not imply the generalization of most-favoured-nation treatment.

48. The Commission recognized several years ago that the rule of non-discrimination "is a generale rule which follows from the equality of States",³⁶ and that non-discrimination is "a general rule inherent in the sovereign equality of States".³⁷ The General Assembly, by its resolution 2625 (XXV) of 24 October 1970, approved the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which states, *inter alia*:

States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality...

49. The most-favoured-nation clause, in the Commission's view, may be considered as a technique or means for promoting the equality of States, or non-discrimination. The International Court of Justice has stated that the intention of the clause is "to establish and maintain at all times fundamental equality without discrimination among all of the countries concerned".³⁸

50. The Commission observed, however, that the close relationship between the most-favoured-nation clause and the general principle of non-discrimination should not blur the differences between the two notions. Those differences are illustrated by the relevant articles in the Vienna Conventions on Diplomatic Relations³⁹ and

²⁵ *Ibid.*, para. 78 (*Yearbook ... 1977*, vol. II (Part Two), p. 124, doc. A/32/10, para. 78).

²⁶ See annex to the present report.

²⁷ Reproduced in *Yearbook ... 1978*, vol. II (Part One).

²⁸ See para. 55 below.

²⁹ *Ibid.*

³⁰ See section D, article 24, below.

³¹ See para. 57 below.

³² See para. 68 below.

³³ *Yearbook ... 1973*, vol. II, p. 117, doc. A/CN.4/L.269 (referred to hereinafter as "Secretariat Digest").

³⁴ See para. 24 above.

³⁵ See para. 27 above.

³⁶ *Yearbook ... 1958*, vol. II, p. 105, doc. A/3859, chap. III, sect. II, article 44, para. (1) of the commentary.

³⁷ *Yearbook ... 1961*, vol. II, p. 128, doc. A/4843, chap. II, sect. IV, article 70, para. (1) of the commentary.

³⁸ *Case concerning rights of nationals of the United States of America in Morocco (Judgment)*, I.C.J. Reports 1952, p. 192.

³⁹ United Nations, *Treaty Series*, vol. 500, p. 95.

Consular Relations,⁴⁰ in the Convention on Special Missions⁴¹ and in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.⁴² The first two Conventions contain an article reading, in part, as follows:

1. In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

...

(b) where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.⁴³

The third Convention contains an article which reads, in part, as follows:

Non-discrimination

1. In the application of the provisions of the present Convention, no discrimination shall be made as between States.

2. However, discrimination shall not be regarded as taking place:

...

(b) where States modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their special missions, ...⁴⁴

The last Convention contains an article⁴⁵ which reproduces the text of paragraph 1 of the provision quoted immediately above.

These provisions reflect the obvious rule that, while States are bound by the duty arising from the principle of non-discrimination, they are nevertheless free to grant special favours to other States on the ground of some special relationship of a geographic, economic, political or other nature. In other words, the principle of non-discrimination may be considered as a general rule that can always be invoked by any State. But a State cannot normally invoke the principle against another State which has extended particularly favourable treatment to a third State if the State concerned itself enjoys the general non-discriminatory treatment accorded to other States on a par with the latter. The claim to be assimilated to a State that is placed in a favoured position can be made only on the basis of an explicit commitment of the State granting the favours in the form of a conventional stipulation, namely, a most-favoured-nation clause.

⁴⁰ *Ibid.*, vol. 596, p. 261.

⁴¹ General Assembly resolution 2530 (XXIV) of 8 December 1969, annex.

⁴² *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207.

⁴³ Article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations.

⁴⁴ Article 49 of the Convention on Special Missions.

⁴⁵ Article 83 of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

3. THE MOST-FAVOURLED-NATION CLAUSE AND THE DIFFERENT LEVELS OF ECONOMIC DEVELOPMENT

51. The Commission, from the early stages of its work, has been aware of the problem that the application of the most-favoured-nation clause creates in the sphere of economic relations when a striking inequality exists between the development of the States concerned. It noted that the report on "International trade and the most-favoured-nation clause" prepared by the secretariat of UNCTAD (the "UNCTAD memorandum") stated, *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.⁴⁶

52. The Commission also noted that General Principle Eight of annex A.I.I. of the recommendations adopted by UNCTAD at its first session stated, *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.⁴⁷

53. In discussing 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 spheres 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 economic relations, with particular reference to developing countries, posed serious problems, some of which related to the Commission's work on the topic. The Commission examined in first reading, on the basis of the

⁴⁶ See *Yearbook ... 1970*, vol. II, p. 231, doc. A/CN.4/228 and Add.1, para. 188. According to 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 shares, that quarrels and complaints arise."⁴⁷

⁴⁷ Aristotle, *Nicomachean Ethics*, V, iii, 6." (*Yearbook ... 1968*, vol. I, p. 186, 976th meeting, para. 6.)

⁴⁷ 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.

basis of the Special Rapporteur's sixth⁴⁸ and seventh⁴⁹ reports, the question of exceptions to the operation of the clause in that respect, and recognized the importance of the matter. During its second reading of the draft articles, the Commission re-examined the question in the light of comments of Member States, organs of the United Nations, specialized agencies and other inter-governmental organizations,⁵⁰ on the basis of which the new Special Rapporteur on the topic prepared the report he submitted at the current session (A/CN.4/309 and Add.1 and 2). The Commission also took into account proposals for additional articles submitted during the session.⁵¹

54. As a result of its consideration, the Commission found that the operation of the clause in the sphere of economic relations, with particular reference to developing countries, was not a matter that lent itself easily to codification of international law in the sense in which that term was used in the Statute of the Commission, because the requirements for that process, as described in article 15 of the Statute, namely, extensive State practice, precedents and doctrine, were not easily discernible. The Commission therefore attempted to enter into the area of progressive development and adopted articles 23 and 24. It also adopted article 30, in the hope that further development might take place in that area in the future.⁵²

55. The Commission did not agree on the appropriateness of including, in its final draft, further provisions relating to that aspect of the operation of the clause based on two proposals for additional articles submitted by one member at the current session. It decided instead to bring their texts to the attention of the General Assembly, so that Member States might take them into account, as appropriate, when undertaking the final stage of codification of the topic. The texts of the two proposals are as follows:

Article A. The most-favoured-nation clause and treatment extended in accordance with the Charter of Economic Rights and Duties of States

A beneficiary State is not entitled under a most-favoured-nation clause to the treatment extended by a granting State under an agreement in conformity with the Charter of Economic Rights and Duties of States if the grant of the benefit of the most-favoured-nation clause is contrary to the object and purpose of such an agreement and

(a) if the agreement is open to all member States of the international community and is concluded under the auspices of the United Nations or an organization of a universal character belonging to the United Nations family; or

(b) if the conformity of the agreement with the principles of the charter of Economic Rights and Duties of States is subject to review by an organ of the United Nations or an organization of a universal character belonging to the United Nations family.⁵³

⁴⁸ *Yearbook ... 1975*, vol. II, p. 1, doc. A/CN.4/286.

⁴⁹ *Yearbook ... 1976*, vol. II (Part One), p. 111, doc. A/CN.4/293 and Add.1.

⁵⁰ See annex to the present report.

⁵¹ See para. 44 above.

⁵² See section D below, articles 23, 24 and 30, and commentaries thereto.

⁵³ A/CN.4/L.264.

Article 21 ter. The most-favoured-nation clause and treatment extended under commodity agreements

A beneficiary State is not entitled under a most-favoured-nation clause to the treatment extended by a granting State under an agreement open to all member States of the international community, concluded under the auspices of the United Nations or an organization of a universal character belonging to the United Nations family and the object of which is the economic régime of a commodity, if the grant of the benefit of the most-favoured-nation clause is contrary to the object and purpose of such an agreement.⁵⁴

4. THE MOST-FAVORED-NATION CLAUSE IN RELATION TO CUSTOMS UNIONS AND SIMILAR ASSOCIATIONS OF STATES

56. The question whether a most-favoured-nation clause does or does not attract benefits accorded within customs unions and similar associations of States⁵⁵ was dealt with by the Commission in first reading in the course of its twenty-seventh (1975) and twenty-eighth (1976) sessions.⁵⁶

57. At its current session, the Commission re-examined the question on the basis of the first report submitted by the new Special Rapporteur (A/CN.4/309 and Add. 1 and 2) and in the light of the comments of Member States, organs of the United Nations, specialized agencies and other intergovernmental organizations.⁵⁷ The Commission also had before it the text of an additional article proposed by one member. That text reads as follows:

Article 23 bis. The most-favoured-nation clause in relation to treatment extended by one member of a customs union to another member

A beneficiary State other than a member of a customs union is not entitled under a most-favoured-nation clause to treatment extended by the granting State as a member of the customs union to a third State which is also a member.⁵⁸

58. As a result of its consideration of the matter, the Commission, bearing in mind the inconclusiveness of the comments made thereon and the lack of time available to it to consider the matter, agreed not to include an article on a customs union exception in the draft articles. It was understood that the silence of the draft articles could

⁵⁴ A/CN.4/L.265.

⁵⁵ In this connexion see, *inter alia*, article XXIV of the General Agreement on Tariffs and Trade (GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No. GATT/169-1), p. 41); article 234 of the Treaty establishing the European Economic Community, signed at Rome on 25 March 1957 (United Nations, *Treaty Series*, vol. 298, p. 3); article XXIV of the Multilateral Treaty of Free Trade and Central American Economic Integration, signed at Tegucigalpa (Honduras) on 10 June 1958 (United Nations, *Treaty Series*, vol. 454, p. 47); and article 12 of the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX) of 12 December 1974).

⁵⁶ See *Yearbook ... 1975*, vol. II, pp. 143 *et seq.*, doc. A/10010/Rev.1, chap. IV, sect. B, article 15, paras. (24)-(71) of the commentary, and *Yearbook ... 1976*, vol. II (Part Two), pp. 45 *et seq.*, doc. A/31/10, chap. II, sect. C, article 15, paras. (24)-(39) of the commentary.

⁵⁷ See annex to the present report. The following United Nations organs and intergovernmental organizations referred to the question: ECWA, GATT, EEC, EFTA, LAFTA, the Board of the Cartagena Agreement, the Caribbean Community Secretariat and the League of Arab States.

⁵⁸ A/CN.4/L.267.

not be interpreted as an implicit recognition of the existence or non-existence of such a rule, but should rather be interpreted to mean that the ultimate decision was one to be taken by the States to which that draft was submitted, at the final stage of the codification of the topic.

5. GENERAL CHARACTER OF THE DRAFT ARTICLES

59. As noted above,⁵⁹ the Commission originally took up its study of the most-favoured-nation clause as an aspect of the general law of treaties. The Commission considers that the 1969 Vienna Convention on the Law of Treaties⁶⁰ is today the most authoritative statement of the general law of treaties. Accordingly, the draft articles on most-favoured-nation clauses, which contain particular rules applicable to certain types of treaty provisions, namely, to most-favoured-nation clauses, should be interpreted in the light of the provisions of that Convention. Articles 1, 2, 27 and 28 of the draft closely follow the language of the corresponding articles of the Vienna Convention. Nevertheless, the draft articles are intended to constitute an autonomous set of legal rules relating to most-favoured-nation clauses; they are not intended to form an "annex" to the Vienna Convention. Furthermore, the residual character of the draft articles is expressly recognized in article 29, and explained in the commentary thereto.

(a) *Scope of the draft*

60. As already noted, the idea that the Commission should undertake a study of the most-favoured-nation clause arose in the course of its work on the law of treaties.⁶¹ The Commission considered that, although the clause, conceived as a treaty provision, fell entirely under the general law of treaties, it would be desirable to make a special study of it. While recognizing that there was a particular interest in taking up that study because of the attention devoted to the clause as a device frequently used in the economic sphere, it understood its task as being to deal with the clause as an aspect of the law of treaties.⁶² When it first discussed the question on the basis of the preparatory work of the Special Rapporteur in 1968, the Commission had decided to concentrate on the legal character of the clause and the legal conditions of its application, in order that the scope and effect of the clause as a legal institution might be clarified.⁶³

61. The Commission maintains the position it took in 1968 and points out that the fact that the title of the topic was changed from "most-favoured-nation clauses in the law of treaties" to "the most-favoured-nation clause" did not indicate any change in its intention to deal with the clause as a legal institution and to explore the rules of

law pertaining to the clause. The Commission's approach has remained the same: while recognizing the fundamental importance of the role of the most-favoured-nation clause in the domain of international trade, it did not wish to confine its study to the operation of the clause in that sphere but to extend the study to the operation of the clause in as many spheres as possible.

62. The Commission has been cognizant of matters relating to the operation of the most-favoured-nation clause in the sphere of international trade, such as the existence of the General Agreement on Tariffs and Trade, the emergence of State-owned enterprises, the application of the clause between countries with different economic systems, the application of the clause vis-à-vis quantitative restrictions and the problem of the so-called "anti-dumping" and "countervailing" duties. The Commission has attempted to maintain the line it set for itself between law and economics, so as not to try to resolve questions of a technical economic nature, such as those mentioned above, which pertain to areas specifically assigned to other international organizations.

63. On the other hand, although it was not the Commission's intention to deal with matters pertaining to areas specifically assigned to other international organizations, it wished to take into consideration all modern developments that might have a bearing upon the codification or progressive development of rules relating to the operation of the clause. In that connexion, the Commission devoted special attention to the question of the manner in which the need of developing countries for preferences in the form of exceptions to the most-favoured-nation clause in the sphere of economic relations could be given expression in legal rules.⁶⁴

64. The Commission delimited the scope of the draft articles by the introduction of articles 1, 3, 6 and 27, for the reasons given in the commentaries to those articles.

65. The Commission decided not to deal with national treatment and the national treatment clause in the draft articles, which contain rules specifically concerning most-favoured-nation clauses and most-favoured-nation treatment.⁶⁵ Nevertheless, the Commission adopted two articles dealing respectively with the irrelevance of the fact that treatment is extended to a third State as national treatment (article 18) and most-favoured-nation treatment and national or other treatment with respect to the same subject-matter (article 19) since, in its view, such provisions would help to clarify certain aspects of the operation of most-favoured-nation clauses.

66. Further in regard to the general scope of the draft articles, it may be recalled that, in presenting its draft articles on the law of treaties to the General Assembly in 1966, the Commission indicated that it had not included therein a provision for obligations or rights to be performed or enjoyed by individuals.⁶⁶ The Vienna Conven-

⁵⁹ See para. 16 above.

⁶⁰ 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. 287. The Convention is hereinafter referred to as the "Vienna Convention".

⁶¹ See para. 15 above.

⁶² See para. 16 above.

⁶³ See para. 17 above.

⁶⁴ See paras. 51-55 above, and section D, articles 23, 24 and 30, and commentaries thereto, below.

⁶⁵ *Yearbook ... 1976*, vol. II (Part Two), pp. 9 and 10, doc. A/31/10, paras. 50-52.

⁶⁶ See *Yearbook ... 1966*, vol. II, p. 177, doc. A/6309/Rev.1, part II, para. 33.

tion similarly does not contain such a provision. The Commission therefore considered that, although most-favoured-nation clauses very often contained provisions for rights to be enjoyed by individuals, it was preferable, in the absence of a codification of the general rules on the matter, and in the light of the relationship between the draft articles and the general law of treaties and the Vienna Convention,⁶⁷ to remain within the limits of the sphere of application of that Convention.

67. The Commission is also fully aware that the implementation of the rules on most-favoured-nation clauses may cause particular difficulties inasmuch as they often refer expressly or by implication to domestic laws, and hence their application may involve conflict-of-laws rules. However, the Commission has confined itself to the sphere of public international law in the belief that the difficulties of implementation in particular cases are inherent in the subject and that the existence of such difficulties does not detract from the value of adopting rules of a general international law character.

68. Lastly, the Commission is aware that the provisions of the draft articles will not provide an automatic solution to all questions that may arise in connexion with the interpretation and application of most-favoured-nation clauses. The Commission has maintained its tradition of dealing with the subject-matter as much as possible within the framework of a codification of general rules, and has not embarked on a "case-by-case" approach. As noted earlier,⁶⁸ the first Special Rapporteur had referred in his seventh report to the question of the settlement of disputes. The new Special Rapporteur also referred to that question in his first report, submitted at the current session.⁶⁹ In addition, the Commission was seized of a proposal by one member for an additional article on the question, reading as follows:

Article 28. Settlement of disputes

1. Any dispute between two or more parties concerning the interpretation or application of the present articles which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration in accordance with the annex to the present articles.

2. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

ANNEX

1. A list of arbitrators shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State Party shall be invited to nominate two arbitrators, and the names of the persons so nominated shall constitute the list. If at any time the arbitrators nominated by a State Party in the list so constituted shall be fewer than two, that State Party shall be entitled to make further nomination as necessary. The name of an arbitrator shall remain on the list until withdrawn by the State Party which made the nomination, provided that such arbitrator shall continue to serve until the completion of any case in which the arbitrator has begun to serve.

2. The arbitral commission shall consist of five members and shall, unless the parties otherwise agree, be constituted as follows:

⁶⁷ See para. 59 above.

⁶⁸ See para. 37 above.

⁶⁹ See A/CN.4/309 and Add.1 and 2, sect. IV.

(1) Each party to the dispute shall appoint one member who shall be chosen from the list and may be its national. In the case of the party requesting arbitration, such appointment shall be made at the time of the request.

(2) The other three members shall be appointed by agreement of the parties and shall be chosen preferably from the list and shall be nationals of third States, unless the parties otherwise agree.

(3) The parties to the dispute shall, by agreement, appoint the President of the arbitral commission from among these three members.

3. In the absence of an agreement to the contrary between the parties to the dispute, the arbitral commission shall lay down its own procedure assuring to each party a full opportunity to be heard and to present its case.

4. Decisions of the arbitral commission shall be taken by a majority vote of its members. In the event of an equality of votes, the President shall have a casting vote.

5. The arbitral commission shall apply the present articles and other rules of international law not incompatible with the present articles.

If the parties to a dispute so agree, the arbitral commission shall decide a case *ex aequo et bono*.

6. The award shall be final and shall be complied with by all parties to the dispute. It shall have no binding force except between the parties and in respect of that particular dispute.

7. The expenses of the arbitral commission, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares.⁷⁰

69. Although the proposal attracted some support, the Commission decided not to include a provision on the settlement of disputes in the draft articles on most-favoured-nation clauses. It was decided that the question should be referred to the General Assembly and Member States and, ultimately, to the body that might be entrusted with the task of finalizing the draft articles.

(b) *Form of the draft*

70. The Commission has cast its study of most-favoured-nation clauses in the form of a group of draft articles, as recommended by the General Assembly. The Commission was of the view that the preparation of draft articles was the most appropriate and effective method of studying and identifying the rules of international law relating to most-favoured-nation clauses. The draft articles have been prepared in a form designed to render them capable of serving as a basis for the conclusion of a convention, should that be decided upon by the General Assembly. The corresponding recommendation is made in paragraph 73 below.

(c) *Scheme of the draft*

71. The Commission did not deem it necessary to depart from the general scheme of the draft, which is composed of only 30 articles, by introducing therein chapters or sections. However, the Commission wishes to point out the following: the first eight articles may be considered as introductory articles of a definitional nature, and as relating to the scope and basis of most-favoured-nation treatment; articles 9 to 22 relate to the general application of the most-favoured-nation clause; articles 23 to 26 relate to exceptions to the application of the clause; and articles 27 to 30 constitute what may be considered as miscellaneous provisions.

⁷⁰ A/CN.4/L.270.

72. Finally, the Commission wishes to indicate that it considers that its work on most-favoured-nation clauses constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's Statute. The articles it has formulated contain elements both of progressive development and of codification of the law and, as in the case of several previous drafts, it is not practicable to determine into which category each provision falls.

B. Recommendation of the Commission

73. At the 1522nd meeting, on 20 July 1978, the Commission decided, in conformity with article 23 of its Statute, to recommend to the General Assembly that the draft articles on most-favoured-nation clauses should be recommended to Member States with a view to the conclusion of a convention on the subject.

C. Resolution adopted by the Commission

74. At its 1522nd meeting, on 20 July 1978, the Commission adopted by acclamation the following resolution:

The International Law Commission,

Having adopted the draft articles on most-favoured-nation clauses,

Desires to express to the Special Rapporteur, Professor Nikolai A. Ushakov, its deep appreciation of the outstanding contribution he has made to the treatment of the topic by this scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its work on most-favoured-nation clauses.

D. Draft articles on most-favoured-nation clauses

Article 1. Scope of the present articles

The present articles apply to most-favoured-nation clauses contained in treaties between States.

Commentary

(1) This article corresponds to article 1 of the Vienna Convention; its purpose is to define the basic scope of the present articles.

(2) It gives effect to the Commission's decision that the scope of the present articles should be mainly restricted to most-favoured-nation clauses contained in treaties concluded between States. It therefore emphasizes that the provisions that follow are designed for application to most-favoured-nation clauses contained in treaties between States. This restriction also finds expression in article 2, paragraph 1 (a), which gives to the term "treaty" the same meaning as in the Vienna Convention, a meaning that specifically limits the term to "an international agreement concluded between States".

(3) It follows from the use of the term "treaty" and from the meaning given to it in article 2, paragraph 1 (a), that article 1 restricts the scope of the articles to most-favoured-nation clauses contained in international agree-

ments between States in written form. Consequently, the present articles have not been drafted so as to apply to clauses contained in oral agreements between States. Under article 6 of the present draft, and as explained below in the commentary to that article, the present articles apply to the relations of States as between themselves under international agreements containing clauses on most-favoured-nation treatment concluded between States and other subjects of international law. At the same time, the Commission recognized that the principles contained in the articles might also be applicable in some measure to clauses in international agreements falling outside the scope of the present articles. Accordingly, in article 3 it has made a general reservation on this point.

Article 2. Use of terms

1. For the purposes of the present articles:

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

(b) "granting State" means a State which has undertaken to accord most-favoured-nation treatment;

(c) "beneficiary State" means a State to which a granting State has undertaken to accord most-favoured-nation treatment;

(d) "third State" means any State other than the granting State or the beneficiary State;

(e) "condition of compensation" means a condition providing for compensation of any kind agreed between the granting State and the beneficiary State, in a treaty containing a most-favoured-nation clause or otherwise;

(f) "condition of reciprocal treatment" means a condition of compensation providing for the same or, as the case may be, equivalent treatment by the beneficiary State of the granting State or of persons or things in a determined relationship with it as that extended by the granting State to a third State or to persons or things in the same relationship with that third State.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Commentary

(1) Following the example of many international conventions concluded on the basis of previous drafts elaborated by the Commission, the Commission has specified in article 2 the meaning of the expressions most frequently used in the draft.

(2) As the introductory words of the article indicate, the definitions contained therein are limited to the draft articles. They state only the meanings in which the expressions listed in the article should be understood for the purposes of the draft articles.

(3) Paragraph 1 (a) reproduces the definition of the term "treaty" given in article 2, paragraph 1 (a), of the Vienna

Convention. It results from the general conclusions reached by the Commission concerning the scope of the present draft articles and their relationship with the Vienna Convention.⁷¹ Consequently, the term "treaty" is used throughout the present draft articles, as in the Vienna Convention, as a general term covering all forms of international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation.

(4) *Subparagraphs (b) and (c) of paragraph 1* define the terms "granting State" and "beneficiary State". These expressions denote the States parties to a treaty that contains a "most-favoured-nation" clause, parties which are promisors and promisees, respectively, of the most-favoured-nation treatment. The verbal form "has undertaken to accord" has been used to convey the meaning not only of an actual according or enjoyment of the treatment but also the creation of the legal obligation and corresponding right to that treatment. A State party to a treaty including a most-favoured-nation clause may be a granting State and a beneficiary State at the same time if, by the same clause, it has undertaken to accord to another State most-favoured-nation treatment and that other State has undertaken to accord it the same treatment.

(5) *Paragraph 1 (d)*, in defining the term "third State", departs from the meaning assigned to that term by article 2, paragraph 1 (*h*), of the Vienna Convention. According to that subparagraph, "third State" means a State not a party to the treaty. In cases where a most-favoured-nation clause is contained in a bilateral treaty, that definition could have been applicable. However, most-favoured-nation clauses can be—and indeed are—included in multilateral treaties. In such clauses the parties undertake to accord each other the treatment extended by them to any third State. In such cases, the third State is not necessarily outside the bounds of the treaty: it may also be one of the parties to the multilateral treaty in question. It is for this reason that article 2 defines the term "third State" as meaning "any State other than the granting State or the beneficiary State".

(6) *Paragraph 1 (e)* defines the term "condition of compensation". Although the meaning of the term is more fully explained below,⁷² the Commission believed that it would be useful to include in the text of the articles themselves a definition of that term. As to the word "compensation", it is a generic term, intended to cover all possible concessions that the beneficiary State agrees to give to the granting State in exchange for the undertaking by the granting State to accord to it most-favoured-nation treatment.

(7) *Paragraph 1 (f)* gives the meaning of the term "condition of reciprocal treatment". Although this meaning is likewise more fully explained below,⁷³ the Commission considered it also useful to include in the present article a definition of that term.

(8) As conceived by the Commission, the condition of reciprocal treatment is a category of the condition of compensation defined in subparagraph (*e*). The expression "reciprocal treatment" corresponds to the expression "material reciprocity", which is often found in the literature on most-favoured-nation clauses.⁷⁴ Although the meaning of the two expressions is deemed to be analogous, the Commission decided not to employ in the present draft the expression "material reciprocity" because of the ambiguity created by the use of the word "material" and the absence of an express reference to treatment. In the expression "reciprocal treatment", the emphasis is properly on "treatment". The word "reciprocal", qualifying "treatment", is intended to indicate clearly that, in order for the beneficiary State to be accorded the treatment to which it is entitled under a most-favoured-nation clause, its own treatment of the granting State must be the *same* as, or *equivalent* to, the treatment extended by that granting State to a third State.

(9) An explanation of the expression "material reciprocity" ("réciprocité trait pour trait") is given by one author, according to whom:

Material reciprocity means that a given right claimed by one party shall not 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.¹

¹ 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.⁷⁵

(10) For the present purposes there is no need to enter into a detailed discussion of reciprocal treatment. Because of the differences in individual national legal systems, cases may occur where doubts arise whether the treatment offered by the beneficiary State is "equivalent" to that accorded by the granting State. Such doubts have to be dispelled by the parties themselves, and the possible disputes settled.

(11) Reciprocal treatment is normally stipulated when treatment of nationals or things, like ships and possibly aircraft, is in question. In commercial treaties dealing with the exchange of goods, reciprocal treatment, by the nature of things, is practically never required.

(12) Lastly, *paragraph 2* follows paragraph 2 of article 2 of the Vienna Convention. The provision is designed to safeguard in matters of terminology the position of States in regard to international law and usages.

⁷⁴ See, for example, I. Szászy, *International and Civil Procedure (A Comparative Study)*, Budapest, Akademia Kiado, 1967, pp. 187 and 188, and A. Piot, "La clause de la nation la plus favorisée", *Revue critique de droit international privé*, Paris, vol. 45 No. 1 (January-March 1956), pp. 9 and 10.

⁷⁵ J.-P. Niboyet, *Traité de droit international privé français*, 2nd ed., Paris, Sirey, 1951, vol. II, pp. 308 and 309.

⁷¹ See para. 59 above.

⁷² See articles 11, 12 and 13 below, paras. (23)-(25) of the commentary.

⁷³ *Ibid.*, paras. (31)-(38) of the commentary.

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

The fact that the present articles do not apply to a clause on most-favoured treatment other than a most-favoured-nation clause referred to in article 4 shall not affect:

(a) the legal effect of such a clause;

(b) the application to it of any of the rules set forth in the present articles to which it would be subject under international law independently of the present articles.

Commentary

(1) This article is drafted on the pattern of article 3, paragraphs (a) and (b), of the Vienna Convention. Its first purpose is to prevent any misconception that might result from the limitation of the basic scope of the draft articles to clauses contained in treaties concluded between States and in written form.

(2) Article 3 recognizes that the present articles do not apply to a clause on most-favoured treatment other than a most-favoured-nation clause referred to in article 4. However, it preserves the legal effect of such a clause and the possibility of the application to such a clause of any of the rules set forth in the present articles to which it would be subject under international law independently of the articles.

(3) Article 3 follows in this respect the system of the Vienna Convention which, in its article 3, preserves the legal force of certain agreements and the possibility of the application to them of certain rules of the Vienna Convention. Article 3, however, does not refer to types of international agreements, as does the Vienna Convention. Having in mind that, as indicated in article 4, a most-favoured-nation clause is a treaty provision (a treaty being defined in article 2, paragraph 1 (a), as, *inter alia*, an international agreement between States in written form), the Commission found it appropriate to deal separately with the case of clauses on most-favoured-nation treatment contained in agreements to which other subjects of international law are also parties. This is done in article 6 of the present draft. On the other hand, the Commission found it unnecessary to make reference in article 3 to clauses on most-favoured-nation treatment contained in an international agreement not in written form, in view of the virtual nonexistence and highly hypothetical nature of such clauses. In any event, article 3 of the Vienna Convention would apply to such clauses.

(4) The expression "clause on most-favoured treatment", used in article 3, as distinct from the expressions "clause on most-favoured-nation treatment" used in article 6 and "most-favoured-nation clause" used in article 4, is intended to cover those situations where either the promisor or the promisee, or both, are subjects of international law other than States. The expression "clause on most-favoured treatment" is generic in character and is intended to cover the wide variety of possible situations that may exist involving such other subjects of international law. For example, in specific cases, such clauses might appropriately be termed "most-favoured-international organization clauses", or "most-favoured-free city clauses".

Article 4. Most-favoured-nation clause

A most-favoured-nation clause is a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations.

Commentary

(1) Articles 4 and 5 establish, for the purposes of the present draft, the juridical meaning of "most-favoured-nation clause" and "most-favoured-nation treatment", which are the corner-stones of these articles.

(2) As to the expressions "most-favoured-nation clause" and "most-favoured-nation treatment", it may be said that they are not legally precise. They refer to a "nation" instead of a State and to "most-favoured" nation, although the "most-favoured" third State in question may in fact be less favoured than the beneficiary State.⁷⁶ Nevertheless, the Commission has retained these expressions as they are those traditionally employed, it being understood, however, that, for the purposes of the present draft, the word "nation" refers to a State. There are other expressions in international law, such as the very term "international law" itself, which could be criticized as imprecise, but which, having been sanctioned by practice, remain in constant use.

(3) As to the use of the word "clause", there are cases where a whole treaty consists of nothing else but a more or less detailed stipulation of most-favoured-nation pledges. It is the understanding of the Commission that the word "clause" covers both single provisions of treaties or other agreements and any combination of such provisions, including entire treaties, when appropriate. From the point of view of the present articles, it is irrelevant whether a most-favoured-nation clause is short and concise or long and detailed, or whether it amounts to the whole content of a treaty or not.

(4) A "treaty provision" is understood to be a conventional provision. The articles apply to clauses in treaties in the sense of the word "treaty" as defined in article 2 of the Vienna Convention and in article 2 of the present draft. This definition, however, does not affect the provision in article 6 according to which the present articles are also applicable to the clauses described in that article.

(5) Article 4 explains the contents of the clause as a treaty provision whereby a State undertakes the special obligation towards another State to accord most-favoured-nation treatment. In the simplest form of the clause, one State—the granting State—makes this undertaking, and the other State—the beneficiary State—accepts it. This constitutes a unilateral clause, which is today a rather exceptional phenomenon. Most-favoured-nation pledges are usually undertaken by the States parties to a treaty in a synallagmatic way.

(6) Unilateral most-favoured-nation clauses were found in capitulatory régimes and have largely disappeared with them. They were also provided, for a short period, in favour of the victorious Powers in the peace treaties

⁷⁶ See article 5 below, para. (5) of the commentary.

concluding the world wars. Those clauses were justified by the fact that the war had terminated the commercial treaties between the contesting parties and the victorious Powers wanted to be treated by the vanquished, even before the conclusion of a new commercial treaty, at least on an equal footing with the allies of the latter. The usual practice today is for States parties to a treaty to accord to each other most-favoured-nation treatment. There are, however, exceptional situations in which, in the nature of things, only one of the contracting parties is in a position to offer most-favoured-nation treatment in a certain sphere of relations, possibly against a different type of concession. Such unilateral clauses occur, for example, in treaties by which most-favoured-nation treatment is accorded to the ships of a land-locked State in the ports and harbours of the granting maritime State. The land-locked State not being in a position to offer in return the same kind of treatment, the clause remains unilateral. The same treaty may of course provide for another type of concession against the granting of most-favoured-nation treatment. There are other exceptional situations: the States associated with the European Economic Community have accorded to the Community, against special preferences, unilateral most-favoured-nation treatment of imports and exports in certain agreements on association and commerce.⁷⁷

(7) Usually, both States parties to a treaty or, in the case of a multilateral treaty, all States parties, accord each other most-favoured-nation treatment, thereby becoming granting and beneficiary States at the same time. The expressions "granting" and "beneficiary" then become somewhat artificial. These expressions are useful, however, in the examination of the situations that may arise from each individual pledge.

(8) Although most-favoured-nation treatment is usually granted by States parties to a treaty mutually, this form of reciprocity is in the simplest and unconditional type of the most-favoured-nation clause only a formal reciprocity. There is no guarantee that States granting each other most-favoured-nation treatment will receive the same kind of advantages. The grant of most-favoured nation treatment is not necessarily a great advantage to the beneficiary State. It may be no advantage at all if the granting State does not extend any favours to third States in the domain covered by the clause. All that the most-favoured-nation clause promises is that the contracting party concerned will treat the other party as well as it treats any third State—which may be very badly. It has been rightly said in this connexion that, in the absence of any undertakings to third States, the clause remains but an empty shell.

(9) A clause is usually drafted in a positive form, i.e. the parties promise each other most favourable treatment. An example of this is the most-favoured-nation clause of

article I, paragraph 1, of the General Agreement on Tariffs and Trade.⁷⁸ The clause may be formulated in a negative way when the pledge is for the least unfavourable treatment. An example of the latter formula is article 4 of the Treaty of Trade and Navigation between the Czechoslovak Republic and the German Democratic Republic of 25 November 1959:

... natural and manufactured products imported from the territory of one Contracting Party ... shall not be liable to any duties, taxes or similar charges other or higher, or to regulations other or formalities more burdensome, than those imposed on similar natural and manufactured products of any third State.⁷⁹

(10) Article 4 is intended to cover most-favoured-nation clauses in bilateral as well as multilateral treaties. Traditionally, most-favoured-nation clauses appear in bilateral treaties. However, with the increase of multilateralism in international relations, such clauses have found their way into multilateral treaties. The most notable examples of the latter are the clauses of the General Agreement on Tariffs and Trade, of 30 October 1947, and the clause of the Treaty establishing a Free Trade Area and instituting the Latin American Free Trade Association, signed at Montevideo on 18 February 1960. The most important most-favoured-nation clause in the General Agreement (article I, paragraph 1) reads as follows:

With respect to customs duties and charges of any kind imposed on or in connexion with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connexion with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of article III [i.e. matters of internal taxation and quantitative and other regulations], any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Contracting Parties.⁸⁰

The most-favoured-nation clause of the Montevideo Treaty reads as follows:

Article 18

Any advantage, benefit, franchise, immunity or privilege applied by a Contracting Party in respect of a product originating in or intended for consignment to any other country shall be immediately and unconditionally extended to the similar product originating in or intended for consignment to the territory of the other Contracting Parties.⁸¹

Unless multilateral treaties containing a most-favoured-nation clause stipulate otherwise, the relations created by such clauses are essentially bilateral, i.e. every party to the treaty may demand from any other party to accord to it treatment equal to that extended to any third State,

⁷⁸ See para. (10) below.

⁷⁹ United Nations, *Treaty Series*, vol. 374, p. 116.

⁷⁷ Convention of Yaoundé (article 11), Agreements of Arusha (article 8), Rabat (article 4, para. 1) and Tunis (article 4, para. 1). Cited in D. Vignes, "La clause de la nation la plus favorisée et sa pratique contemporaine" *Recueil des cours de l'Académie de droit international de La Haye, 1970-II*, Leyden, Sijthoff, 1971, vol. 130, p. 324. See also the pledge of Cyprus, quoted in para. (14) below.

⁸⁰ GATT, *Basic Instruments and Selected Documents*, vol. IV (*op. cit.*), p. 2. The texts of the relevant articles of the General Agreement are referred to in *Yearbook ... 1970*, vol. II, pp. 218 *et seq.*, doc. A/CN.4/228 and Add.1, paras. 131 *et seq.*

⁸¹ United Nations, *Multilateral Economic Co-operation in Latin America*, vol. I, *Text and documents* (United Nations publication, Sales No. 62.II.G.3), p. 59. (Quoted in *Yearbook ... 1970*, vol. II, p. 222, doc. A/CN.4/228 and Add.1, para. 149.)

irrespective of whether that third State is a party to the treaty or not. Under the GATT system (under article II of the General Agreement), each contracting party is obliged to apply its duty reductions to all other parties. The General Agreement goes beyond the most-favoured-nation principle in this respect. Each member granting a concession in the most-favoured-nation part of its schedule is generally bound to grant the same concession to all other members in their own right; that is not the same thing as obligating all other members to rely on continued agreement between the party granting the concession and the party that negotiated it.⁸² Thus the operation of the GATT clause differs in this respect from that of the usual bilateral most-favoured-nation clause, although the concession can be withdrawn from all members by the granting State subject to any temporal commitment in effect.

(11) Article 4 expresses the idea that a most-favoured-nation pledge is an international, i.e. inter-State, undertaking. As such, the beneficiary of this undertaking is the beneficiary State and only through the latter State do the persons in a particular relationship with that State, usually its nationals, or the things in a similar relationship with it, enjoy the treatment stipulated by the granting State.⁸³

(12) It follows from the notion of the most-favoured-nation clause, as described in article 4, that the undertaking of an obligation to accord most-favoured-nation treatment is the constitutive element of a most-favoured-nation clause. Consequently, clauses which do not contain this element will fall outside the scope of the present articles even if they aim at an effect similar to that of a most-favoured-nation clause. A case in point is article XVII, paragraph 2, of the General Agreement on Tariffs and Trade, where "fair and equitable treatment" is demanded from the contracting parties with respect to imports of products for immediate or ultimate consumption in governmental use.⁸⁴ Other examples are article XIII, paragraph 1, of the General Agreement, which requires that the administration of quantitative restrictions shall be "non-discriminatory",⁸⁵ and article 23 of the Montevideo Treaty.⁸⁶ While a most-favoured-nation clause insures the beneficiary against discrimination, a clause promising non-discrimination will not necessarily yield the same advantages as a most-favoured-nation clause. Cases in point are article 47 of the Vienna Convention on Diplomatic Relations, article 72 of the Vienna Convention on Consular Relations, article 49 of the Convention on Special Missions and article 83 of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a

Universal Character.⁸⁷ These clauses, while assuring the States parties to the Conventions of non-discrimination by other parties to the treaty, do not give any right to most-favoured-nation treatment.

(13) Whether a given treaty provision falls within the purview of a most-favoured-nation clause is a matter of interpretation. Most-favoured-nation clauses can be drafted in the most diverse ways, and that is why an eminent authority on the matter stated:

Although it is customary to speak of *the* most-favoured-nation clause, there are many forms of the clause, so that any attempt to generalize upon the meaning and effect of such clauses must be made, and accepted, with caution.⁸⁸

Expressed in other words: "Speaking strictly, there is no such thing as *the* most-favoured-nation clause: every treaty requires independent examination... There are innumerable m.f.n. clauses, but there is only *one* m.f.n. standard".⁸⁹ These considerations were taken into account in drafting article 4. In that article stress is laid upon most-favoured-nation treatment, the essence of the notion being that any treaty stipulation according most-favoured-nation treatment is a most-favoured-nation clause.

(14) Article 4 states that the grant of most-favoured-nation treatment to another State by a most-favoured-nation clause shall be in "an agreed sphere of relations". Most-favoured-nation clauses have been customarily categorized as "general" or "special" clauses. A "general" clause means a clause which promises most-favoured-nation treatment in all relations between the parties concerned, whereas a "special" one refers to relations in certain limited areas. Although States are free to agree to grant to each other most-favoured-nation treatment in all fields which are susceptible to such agreements, this is rather an exception today. A recent case in point is a stipulation (annex F, part II) in the Treaty concerning the establishment of the Republic of Cyprus signed at Nicosia on 16 August 1960, which is rather a *pactum de contrahendo* concerning future agreements on most-favoured-nation grants:

The Republic of Cyprus shall, by agreement on appropriate terms, accord most-favoured-nation treatment to the United Kingdom, Greece and Turkey in connexion with all agreements whatever their nature.⁹⁰

(15) The usual type of a "general clause", however, does not embrace all relations between the respective countries. It refers to all relations in certain areas; thus, for example, "in all matters relating to trade, navigation and all other economic relations...".⁹¹ Most-favoured-nation clauses

⁸² H. C. Hawkins, *Commercial Treaties and Agreements: Principles and Practice*, New York, Rinehart, 1951, p. 226.

⁸³ See paras. (2) and (3) of the commentary to article 5 below.

⁸⁴ See GATT, *Basic Instruments and Selected Documents*, vol. IV (*op. cit.*), p. 28. (Quoted in *Yearbook ... 1970*, vol. II, p. 224, doc. A/CN.4/228 and Add.1, para. 162.)

⁸⁵ *Ibid.*, p. 21. (Quoted in *Yearbook ... 1970*, vol. II, pp. 223 and 224, doc. A/CN.4/228 and Add.1, para. 160.)

⁸⁶ United Nations, *Multilateral Economic Co-operation in Latin America*, vol. I (*op. cit.*), p. 60 (quoted in *Yearbook ... 1970*, vol. II, p. 224, document A/CN.4/228 and Add.1, para. 161).

⁸⁷ See para. 50 above.

⁸⁸ A. D. McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1962, p. 273.

⁸⁹ G. Schwarzenberger, *International Law and Order*, London, Stevens, 1971, pp. 138 (quoting in part, A. D. McNair), and 159.

⁹⁰ United Nations, *Treaty Series*, vol. 382, p. 144. This provision was embodied in the Constitution of Cyprus as article 170 (see A. Peaslee, *Constitutions of Nations*, The Hague, Nijhoff, 1968, vol. III, p. 201).

⁹¹ Treaty of Trade and Navigation between the Czechoslovak Republic and the German Democratic Republic, article 2 (United Nations, *Treaty Series*, vol. 374, p. 114).

may be less broad but still general, the "general clause" of article I, paragraph 1 of the General Agreement on Tariffs and Trade being a well-known example.⁹²

(16) The areas in which most-favoured-nation clauses are used are extremely varied. A tentative classification of the areas in question, which does not claim to be exhaustive, may be given as follows:

(a) International regulation of trade and payments (exports, imports, customs tariffs);

(b) Transport in general and treatment of foreign means of transport (in particular, ships, airplanes, trains, motor vehicles, etc.);

(c) Establishment of foreign physical and juridical persons, their personal rights and obligations;

(d) Establishment of diplomatic, consular and other missions, their privileges and immunities and treatment in general;

(e) Intellectual property (rights in industrial property, literary and artistic rights);

(f) Administration of justice, access to courts and to administrative tribunals in all degrees of jurisdiction, recognition and execution of foreign judgements, security for costs (*cautio judicatum solvi*), etc.

A most-favoured-nation clause can apply to one or more of the areas enumerated above. The important point is that the clause always applies to a determined sphere of relations agreed upon by the parties to the treaty concerned.

(17) The *ejusdem generis* rule, according to which no other rights can be claimed under a most-favoured-nation clause than those falling within the limits of the subject-matter of the clause, is dealt with below in connexion with articles 9 and 10.

Article 5. *Most-favoured-nation treatment*

Most-favoured-nation treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.

Commentary

(1) While article 4 establishes the juridical meaning of "most-favoured-nation clause" by reference to "most-favoured-nation treatment", article 5 establishes the juridical meaning of the latter. In some languages most-favoured-nation treatment is expressed as most favourable treatment, as in the Russian term: "rezhim naibolshego blagopriatsvovaniya". The Commission wishes to retain in English, French, Russian and Spanish, the customary forms of expression: "most-favoured-nation treatment"; "traitement de la nation la plus favorisée"; "rezhim naibolee blagopriatzenoi natsii"; and "trato de la nación más favorecida". In addition, the Commission decided to use in this article, and systematically throughout the

draft, the verb "to accord", and its equivalents in the other languages, when referring to the treatment applied by the granting State to the beneficiary State, and the verb "to extend", and its equivalents in the other languages, when referring to the treatment applied by the granting State to a third State.

(2) While the obligation to accord most-favoured-nation treatment is undertaken by one State vis-à-vis another, the treatment promised thereby is one actually given in most cases to persons or things, and only in some cases to States themselves (e.g. in cases promising most-favoured-nation treatment to embassies or consulates).⁹³ By what methods and under what circumstances the persons or things concerned will come to enjoy the treatment depends on the intention of the parties to the treaty in question and on the internal law of the granting State. The High Commissioner of Danzig, in his decision of 8 April 1927 regarding the jurisdiction of Danzig courts in actions brought by railway officials against the Railway Administration, explained the relationship between a treaty and the application of its provisions to individuals as follows:

It is a rule of law generally recognized in doctrine and in practice that international treaties do not confer direct rights on individuals, but merely on the governments concerned. Very often a government is obliged, under a treaty, to accord certain benefits or rights to individuals, but in this case the individuals do not themselves automatically acquire these rights. The government has to introduce certain provisions into its internal legislation in order to carry out the obligations into which it has entered with another government. Should it be necessary to insist on the carrying out or application of this obligation, the only Party to the case who can legally take action is the other government. That government moreover would not institute proceedings in civil courts but would take diplomatic action or apply to the competent organs of international justice.

The case in question is not comparable to that of an undertaking on behalf of a third Party ... which figures in certain civil codes, precisely because international treaties are not civil contracts under which governments assume obligations at private law on behalf of the persons concerned. To give an example: "the most-favoured-nation" clause in a treaty of commerce does not entitle an individual to refuse to pay customs duties on the ground that in his opinion they are too high to be compatible with the clause; he can only base his action on the internal customs legislation which should be drafted in conformity with the clauses of the treaty of commerce.⁹⁴

Although the Court reversed the decision of the High Commissioner in the case in question, referring to the intention of the parties and the special characteristics of the case, the situation in countries where treaties are not self-executing is primarily the one described by the High Commissioner of Danzig. This is the case with regard to treaties in general, and most-favoured-nation clauses in particular, in the United Kingdom and Australia.⁹⁵ The

⁹³ See article 3, para. 1, of the United Kingdom-Norway Consular Convention of 1951, according to which "either High Contracting Party may establish and maintain consulates in the territories of the other at any place where any third State possesses a consulate..." (United Nations, *Treaty Series*, vol. 326, p. 214).

⁹⁴ Jurisdiction of the Courts of Danzig Case, *P.C.I.J.*, Series B, No. 15, p. 31.

⁹⁵ See the statements quoted in the Secretariat Digest (*Year-book ... 1973*, vol. II, pp. 117 and 118, doc. A/CN.4/269, footnote 2).

⁹² Quoted in para. (10) above.

situation is similar in the Federal Republic of Germany, where the courts have explicitly refused in several instances to recognize a direct application of article III of the General Agreement on Tariffs and Trade (on national treatment on internal taxation and regulation), on the ground that this commitment binds the States parties to the Agreement alone and that individuals may therefore derive no rights from this provision.⁹⁶ In the United States, however, self-execution is the rule for treaties embodying most-favoured-nation clauses, for the following reasons:

... Unconditional most-favoured-nation clauses ... [provide] for United States private interests the benefit in a particular country of the best economic opportunity given by that country to any alien goods or alien capital, whether arising before or after the treaty with the United States has come into effect. But trade and establishment treaties, including the most-favored-nation clauses in them, must run both ways, for States will not enter into such arrangements on any other basis. This means that the United States must be able at any given moment to show that the goods and capital of the other party may claim unconditional most-favored-nation treatment in this country. It would be difficult for the United States to be able to give the required reciprocity, considering the fact that unconditional most-favored-nation clauses are open-ended (i.e. they promise the best treatment given in any other treaty, regardless of whether the other treaty is later or earlier in time) if in each instance implementing legislation by the Congress had to be obtained to extend the benefit of a treaty with a third country to the country claiming most-favored-nation rights. Self-execution is the only feasible answer to the problem...⁹⁷

(3) According to article 5, most-favoured-nation treatment is that which is accorded by a State to another State (e.g. with respect to its embassy or consulates) or to persons or things. The expression "persons or things" is also used throughout the present draft. As used in the draft, the expression "persons or things" includes any person or any thing that can constitute the object of treatment. The Commission was conscious of the almost insurmountable difficulties of attempting to draft an abstract definition of persons or things. It did not find that it would be likely to arrive at a generally acceptable definition of that expression which would be sufficiently comprehensive and clear, for inclusion in article 2 (Use of terms), even if it was merely by reference to the subject-matter of the draft articles. In the view of the Commission, the expression "persons or things" must be understood as covering persons and things in the natural and juridical meaning attributed to those words in the different languages and legal systems of the world. In particular, the word "things" embraces not only corporeal and incorporeal things but, *inter alia*, activities and services. Indeed, activities such as the exercise of certain trades and professions, entry into port of ships, etc., can also

be objects of most-favoured-nation treatment.⁹⁸ The Commission, however, decided not to refer to activities in the articles because activities might be ultimately related to persons and things, so that an express reference was deemed not to be indispensable.

(4) Article 5 states that the persons or things whose treatment is in question have to be in a "determined relationship" with the beneficiary State and that their treatment is contingent upon the treatment extended by the granting State to persons or things which are in the "same relationship" with a third State. A "determined relationship" in this context means that the relationship between the States concerned and the persons or things concerned is determined by the clause, i.e. by the treaty. The clause embodied in the treaty between the granting and the beneficiary State has to determine the persons or things to whom and to which the most-favoured-nation treatment is applicable and this determination has to include, obviously, the link between the beneficiary State and the persons or things concerned. Such relationships are nationality or citizenship of persons, place of registry of vessels, State of origin or products, etc. Under article 5, the beneficiary State can claim most-favoured-nation treatment in respect of its nationals, ships, products, etc., only to the extent that the granting State confers the same benefits upon the nationals, ships, products, etc., of a third State. The beneficiary State is normally not entitled to claim for its residents the benefits which the granting State extends to the nationals of the third State. Although residence creates also a certain relationship between a person and a State, this is not the same relationship as that of the link of nationality. These two relationships are not interchangeable. This example explains the meaning of the expression "same relationship" as used in article 5. However, the expression "same relationship" has to be used with caution because, to continue the example, the relationship between State A and its nationals is not necessarily the "same" as the relationship between State B and its nationals. Nationality laws of States are so diverse that the sum total of the rights and obligations arising from one State's nationality laws might be quite different from that arising from another State's nationality laws. The meaning of the word "same" in this context might perhaps be better expressed by the expressions "the same type of" or "the same kind of". The Commission came to the conclusion, however, that the wording of article 5 was clear enough and that an overburdening of the text would not be desirable.

(5) Article 5 describes the treatment to which the beneficiary State is entitled as "not less favourable" than the treatment extended by the granting State to a third State. The Commission considered whether it should not use the adjective "equal" to denote the relationship between the terms of the treatment enjoyed by a third State and those promised by the granting State to the

⁹⁶ See G. Bebr, "Directly applicable provisions of community law: the development of a community concept", *International and Comparative Law Quarterly*, London, vol. 19, April 1970, p. 257.

⁹⁷ *Restatement of the Law, Second, Foreign Relations Law of the United States*, St. Paul, Minn., American Law Institute Publishers, 1965, para. 154, Reporters' Note 3.

⁹⁸ An understanding was reached between Bolivia and Germany in 1936 to the effect that the operation of the most-favoured-nation clause included in article V of the Treaty of Friendship between the two countries should also cover marriages celebrated by consuls (see *Reichgesetzblatt*, 1936, II, p. 216, quoted in L. Raape, *Internationales Privatrecht*, Berlin, Vahlon, 1961, p. 20).

beneficiary State. Arguments in favour of the use of the word "equal" are based on the fact that the notion of "equality of treatment" is particularly closely attached to the operation of the most-favoured-nation clause. It has been argued that the clause represents and is the instrument of the principle of equality of treatment and that the clause is a means to an end: the application of the rule of equality of treatment in international relations. The arguments against the use of the adjective "equal" admit that "equal" is not as rigid as "identical" and not as vague as "similar", and is therefore more appropriate than those expressions. However, although a most-favoured-nation pledge does not oblige the granting State to accord to the beneficiary State treatment more favourable than that extended to the third State, it does not exclude the possibility that the granting State may accord to the beneficiary State additional advantages beyond those extended to the most-favoured third State. In other words, while most-favoured-nation treatment excludes preferential treatment of third States by the granting State, it is fully compatible with preferential treatment of the beneficiary State by the granting State, although it may be required to accord such preferential treatment under other most-favoured-nation clauses. Consequently, the treatment accorded to the beneficiary State and that accorded to the third State are not necessarily "equal". This argument is countered by the obvious truth that, if the granting State accords preferential treatment to the beneficiary State, i.e. treatment beyond that extended to the third State, which it need not do on the strength of the clause, such treatment will be accorded independently of the operation of the clause. Ultimately, the Commission accepted the term "not less favourable", because it believed it to be the expression commonly used in most-favoured-nation clauses.

(6) Most-favoured-nation clauses may define exactly the conditions for the operation of the clause, namely, the kind of treatment extended by the granting State to a third State that will give rise to the actual claim of the beneficiary State to similar, the same, equal or identical treatment. If, as is the usual case, the clause itself does not provide otherwise, the clause begins to operate, i.e. a claim can be raised under the clause if the third State (or persons or things in the same relationship with the third State as are the persons or things mentioned in the clause with the beneficiary State) has actually been extended the favours that constitute the treatment. It is not necessary for the beginning of the operation of the clause that the treatment actually extended to the third State, with respect to itself or the persons or things concerned, be based on a formal treaty or agreement. The mere fact of favourable treatment is enough to set in motion the operation of the clause. However, the fact of favourable treatment may consist also in the conclusion or existence of an agreement between the granting State and the third State by which the latter is entitled to certain benefits. The beneficiary State, on the strength of the clause, may also demand the same benefits as were extended by the agreement in question to the third State. The mere fact that the third State has not availed itself of the benefits which are due to it under the agreement concluded with the granting State cannot absolve the

granting State from its obligation under the clause. The arising and the termination or suspension of rights under the clause are dealt with in articles 20 and 21 below.

(7) Article 5 brings in the notion of third State. The term "third State" also appears in the Vienna Convention, and the reasons for not using the expression "third State" in the present articles in the same manner as in the Vienna Convention have been set out in connexion with article 2, paragraph 1 (d).⁹⁹ In earlier history there was a practice whereby the States parties to the clause explicitly named the third State enjoying the treatment that might be claimed by the beneficiary State. Thus the treaty of 17 August 1417 concluded between Henry V of England and the Duke of Burgundy and Count of Flanders specified that the masters of the ships of the contracting parties should enjoy in their respective ports the same favours as the "François, Hollandois, Zellois et Eschois".¹⁰⁰ Similarly, in the Anglo-Spanish Treaty of Commerce of 1886, Spain accorded to England most-favoured-nation treatment in all matters of commerce, navigation, consular rights and privileges under the same terms and with the same advantages as were extended to France and Germany by virtue of the treaties of 6 February 1882 and 12 July 1883.¹⁰¹ This way of drafting does not necessarily produce a "most-favoured" nation clause, because the States mentioned in the clause as *tertium comparationis* are not necessarily those most favoured by the granting State. In the instances quoted, and in most similar cases, they were the "most favoured", and it was precisely because of their favoured position that they were selected and explicitly indicated in the clauses in question. In modern practice, most-favoured-nation clauses are usually drafted in such a way that they refer as *tertium comparationis* to "any State".

(8) What often happens is rather an indication or enumeration of determined third States which, under the operation of the most-favoured-nation clause, will remain in an exceptional position, i.e. the treatment granted to them will not be attracted by the operation of the clause. This question is examined in greater detail below, in connexion with article 29. In addition, articles 23, 24 and 30 and the commentaries thereto deal with the most-favoured-nation clause in relation to treatment extended to developing States under a generalized system of preferences or in relation to arrangements between developing States, as well as with new rules of international law in favour of developing States.

Article 6. Clauses in international agreements between States to which other subjects of international law are also parties

Notwithstanding the provisions of articles 1, 2, 4 and 5, the present articles shall apply to the relations of States

⁹⁹ See article 2 above, para. (5) of the commentary.

¹⁰⁰ G. Schwarzenberger, "The most-favoured-nation standard in British State practice", *The British Year Book of International Law*, 1945, London, vol. 22, p. 97.

¹⁰¹ Cited in B. Nolde, "Droit et technique des traités de commerce", *Recueil des cours...*, 1924-II, Paris, Hachette, 1925, vol. 3, p. 413.

as between themselves under an international agreement containing a clause on most-favoured-nation treatment to which other subjects of international law are also parties.

Commentary

(1) Article 6 has its basis in article 3, paragraph (c), of the Vienna Convention. That article basically deals in its introductory paragraph with two kinds of international agreements, namely, those concluded by States not in written form and those to which subjects of international law other than States are also parties.

(2) As has already been explained in the commentary to article 3,¹⁰² the Commission, taking into account that, as indicated in article 4, a most-favoured-nation clause is a treaty provision (treaty being defined in article 2 as, *inter alia*, an international agreement between States in written form), deemed it appropriate to deal separately in the present article with the case of clauses on most-favoured-nation treatment contained in agreements to which other subjects of international law are also parties.

(3) Article 3, paragraph (c), of the Vienna Convention concerns the relations of States as between themselves under international agreements to which other subjects of international law are also parties. Similarly, the present article refers to such relations of States under an international agreement containing a clause on most-favoured-nation treatment to which other subjects of international law are also parties.

(4) Article 6 is intended to extend the application of the rules set forth in the draft articles to the relations of States as between themselves under clauses by which States undertake to accord most-favoured-nation treatment to other States, when such clauses are contained in international agreements in written form to which other subjects of international law are also parties. The article uses the expression "clause on most-favoured-nation treatment", rather than "most-favoured-nation clause", in view of the juridical meaning attributed to that notion in article 4 by reference to the term "treaty" as defined in article 2. The expression employed in the present article is intended to make clearer the distinction between clauses which, although similar in nature and in the way they operate, are nevertheless found in international agreements that differ from one another as a result of the different character of the parties to them—States or other subjects of international law. As in the parallel paragraph (c) of article 3 of the Vienna Convention, the present text does not refer to clauses contained in international agreements in written form. The provisions of the present articles will obviously not be applicable to clauses contained in international agreements concluded by States and other subjects of international law not in written form. That, however, is such a hypothetical case that the Commission has not found it necessary to provide for it in the articles. The Commission wishes further to stress that the expression "relations of States as between themselves" refers to the legal relations arising for the parties under the treaty containing the clause on most-favoured-nation treatment. Finally, the inclusion, at the beginning

of the article, of the phrase, "notwithstanding the provisions of articles 1, 2, 4 and 5", is required in view of the contents of the provisions of those articles.

Article 7. Legal basis of most-favoured-nation treatment

Nothing in the present articles shall imply that a State is entitled to be accorded most-favoured-nation treatment by another State otherwise than on the basis of an international obligation undertaken by the latter State.

Commentary

(1) Article 7 states in negative form the obvious rule that no State is entitled to most-favoured-nation treatment by another State unless that State has undertaken an international obligation to accord such treatment. The rule follows from the principle of the sovereignty of States and their liberty of action. This liberty includes the right of States to grant special favours to some States and not to be bound by customary law to extend the same favours to others. This right is not impaired by the general duty of non-discrimination. The general duty not to discriminate between States is not breached by treating another State, its nationals, ships, products, etc., in a particularly advantageous way. Other States do not have the right to challenge such behaviour and to demand for themselves, for their nationals, ships, products, etc., the same treatment as that granted by the State concerned to a particularly favoured State. Such a claim can rightfully be made only if it is proved that the State in question has undertaken an international obligation to accord to the claiming State the same treatment as that extended to the particularly favoured State or to its nationals, ships, products, etc.

(2) In practice, such an obligation cannot normally be proved otherwise than by means of a most-favoured-nation clause, i.e. a conventional undertaking by the granting State to that effect. Indeed, legal literature is practically unanimous that, while there is no most-favoured-nation clause without a promise of most-favoured-nation treatment (such a promise being the constitutive element of the clause), States have no right to claim most-favoured-nation treatment without being entitled to it by a most-favoured-nation clause.¹⁰³

(3) The question whether States can claim most-favoured-nation treatment from each other as a right was discussed in the Economic Committee of the League of Nations but only with respect to customs tariffs. The Economic Committee did not reach any agreement in the matter beyond declaring that "... the grant of most-

¹⁰² See article 3 above, para. (3) of the commentary.

¹⁰³ See, *inter alia*, E. T. Usenko, "Formy regulirovaniya sotsialisticheskogo mezhdunarodnogo razdeleniya truda" [Forms of the regulation of the socialist international division of labour], *Mezhdunarodnye otnoshenia* [International relations], Moscow, 1965, p. 238 (German edition, *Sozialistische internationale Arbeitsteilung und ihre rechtliche Regelung*, Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1966, p. 200); Vignes (*loc. cit.*), p. 224; E. Sauvignon, *La clause de la nation la plus favorisée*, Grenoble, Presses universitaires de Grenoble, 1972, p. 7; K. Hasan, *Equality of Treatment and Trade Discrimination in International Law*, The Hague, Nijhoff, 1968, p. 33.

favoured-nation treatment ought to be the normal...".¹⁰⁴ Although the grant of most-favoured-nation treatment is frequent in commercial treaties, there is no evidence that it has developed into a rule of customary international law. Hence it is widely held that only treaties are the foundation of most-favoured-nation treatment.¹⁰⁵

(4) It might be maintained that the rule of article 7 could be embodied in a provision simply stating that most-favoured-nation treatment cannot be claimed except on the basis of a most-favoured-nation clause, i.e. under a provision of a treaty (as defined in article 2, paragraph 1 (a)) promising most-favoured-nation treatment. Although a rigid statement to this effect would to a large extent satisfy all practical purposes, it nevertheless would not be in complete conformity with the legal situation as it exists and would not cover possible future development. While most-favoured-nation clauses, i.e. treaty provisions, constitute in most cases the basis for a claim to most-favoured-nation treatment, it is not impossible even at present that such claims might be based on oral agreements. Among other possible sources of such claims that might be mentioned are binding resolutions of international organizations and legally binding unilateral acts, and as a potential source, a possible evolution of regional customary law to that effect. The Commission therefore decided to adopt the rule in more general terms, i.e. that a State is not entitled to most-favoured-nation treatment by another State unless there exists an international obligation undertaken by the latter to accord such treatment. The expression "an international obligation undertaken by the latter State" is intended to avoid any interpretation that the obligation in question could arise from agreements, not international in character, involving States and private persons.

(5) The Commission further concluded that a rule stating directly that most-favoured-nation treatment could not be claimed unless there existed an international obligation to accord it would, as such, appear to fall outside the scope of the articles on most-favoured-nation clauses. The purpose of such articles can only be to state the rules of the operation and application of such a clause if it exists. It is not for these articles to state the conditions under which States can claim most-favoured-nation treatment from each other. It is for these reasons that the Commission, while not wishing to omit the rule from the articles because of its theoretical and practical importance, decided to state it in negative form as a general saving clause.

(6) As to the question whether or not a State would violate its international obligations if it granted most-favoured-nation treatment to most of its partners in a certain area but refused to make similar agreements with others, the Commission took the view that, while such behaviour could be considered by the States not granted

most-favoured-nation treatment as an unfriendly act, the articles under consideration could not establish a legal title to such claims, which might perhaps be based on a general rule of non-discrimination. The answer to this question is thus clearly beyond the scope of the present articles.

Article 8. The source and scope of most-favoured-nation treatment

1. The right of the beneficiary State to most-favoured-nation treatment arises only from the most-favoured-nation clause referred to in article 4, or from the clause on most-favoured-nation treatment referred to in article 6, in force between the granting State and the beneficiary State.

2. The most-favoured-nation treatment to which the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, is entitled under a clause referred to in paragraph 1, is determined by the treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.

Commentary

(1) This article sets out the basic structure of the operation of the most-favoured-nation clause. It states that the right of the beneficiary State to receive from the granting State most-favoured-nation treatment is anchored in the most-favoured-nation clause referred to in article 4 or, as the case may be, in the clause on most-favoured-nation treatment referred to in article 6, in other words, that any such clause is the source of the beneficiary State's rights. Paragraph 1 of the article emphasizes that, in either case, the essential factor is that the clause in question should be in force for both the granting and beneficiary States. The requirement of being "in force" explains the need to refer expressly in the text of the paragraph to the two kinds of clauses envisaged in articles 4 and 6 of the present draft contained, respectively, in treaties between States and in international agreements to which subjects of international law other than States are also parties. In the present and subsequent commentaries, however, when reference is made to a "most-favoured-nation clause" alone, it must be understood as also covering, as appropriate, a clause on most-favoured-nation treatment. The article also states that the treatment, i.e. the extent of benefits to which the beneficiary State may lay claim for itself or for persons or things in a determined relationship with it, depends upon the treatment extended by the granting State to a third State or to persons or things in the same relationship with a third State. The rule is important and its validity is not dependent on whether the treatment extended by the granting State to a third State, or to persons or things in a determined relationship with the latter, is based upon a treaty, another agreement or a unilateral, legislative, or other act, or mere practice.

(2) When two treaties exist, one between the granting and the beneficiary State containing the most-favoured-nation clause and the other between the granting State and a third State entitling the latter to certain favours, the question arises as to which is the basic treaty. That question was thoroughly discussed in the *Anglo-Iranian*

¹⁰⁴ League of Nations, "Recommendations of the Economic Committee relating to tariff policy and the most-favoured-nation clause" (E.805.1933.II.B.1), quoted in *Yearbook ... 1969*, vol. II, p. 175, doc. A/CN.4/213, annex I.

¹⁰⁵ See, for example, G. Schwarzenberger, "The principles and standards of international economic law", *Recueil des cours...*, 1966-1, Leyden, Sijthoff, 1967, vol. 117, p. 74.

Oil Company case before the International Court of Justice. It was contended before the Court that:

... A most-favoured-nation clause is in essence by itself a clause without content; it is a contingent clause. If the country granting most-favoured-nation treatment has no treaty relations at all with any third State, the most-favoured-nation clause remains without content. It acquires its content only when the grantor State enters into relations with a third State, and its content increases whenever fresh favours are granted to third States.¹⁰⁶

Against this argument it was maintained that the most-favoured-nation clause:

... involves a commitment whose object is real. True, it is not determined and is liable to vary in extent according to the treaties concluded later, but that is enough to make it determinable. Thus the role of later treaties is not to give rise to new obligations towards the State beneficiary of the clause but to alter the scope of the former obligation. The latter nevertheless remains the root of the law, the source of the law, the origin of the law, on which the United Kingdom Government is relying in this case.¹⁰⁷

The majority of the Court held that:

The treaty containing the most-favoured-nation clause is the basic treaty... It is this treaty which establishes the juridical link between the United Kingdom [the beneficiary State] and a third party treaty and confers upon that State the rights enjoyed by the third party. A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom [the beneficiary State] and Iran [the granting State]: it is *res inter alios acta*.¹⁰⁸

The decision of the Court contributed, to a great extent, to the clarification of legal theory. Before the Court's decision there was no lack of legal writers who presented the operation of the most-favoured-nation clause (or more precisely that of the third-party treaty) as an exception to the rule *pacta tertiis nec nocent nec prosunt*, i.e. that treaties produce effects only as between the contracting parties.¹⁰⁹ Legal theory seems now unanimous in endorsing the finding of the majority of the Court.¹¹⁰

(3) The solution adopted by the Court is in accordance with the rules of the law of treaties relating to the effect of treaties on States not parties to a particular treaty. The view that the third-party treaty (the treaty by which the granting State extends favours to a third State) is the origin of the rights of the beneficiary State (a State not party to the third-party treaty) runs counter to the rule embodied in article 36, paragraph 1, of the Vienna Convention. As explained in the commentary of the

Commission to article 32 of the 1966 draft (which, with insignificant drafting changes, became article 36 of the Convention):

"Paragraph 1 lays down that a right may arise for a State from a provision of a treaty to which it is not a party under two conditions. First, the parties must intend the provision to accord the right either to the particular State in question, or to a group of States to which it belongs, or to States generally. *The intention to accord the right is of cardinal importance*," since it is only when the parties have such an intention that a legal right, as distinct from a mere benefit, may arise from the provision ..."¹¹¹

It seems evident that the parties to a third-party treaty do not have such an intention. They may be aware that their agreement can have an indirect effect through the operation of the most-favoured-nation clause (to the advantage of the State beneficiary of the clause), but any such indirect effect is unintentional. It follows that the right of the beneficiary State to a certain advantageous treatment does not derive from the treaty concluded between the granting State and the third State.

(4) The United Nations Conference on the Law of Treaties upheld that view. At the fourteenth plenary meeting, held on 7 May 1969, the President of the Conference stated that article 32, paragraph 1 (of the 1966 draft of the International Law Commission), "did not affect the interests of States under the most-favoured-nation system".¹¹²

(5) By the adoption of article 8, the Commission has maintained its previous position. Article 8 reflects the view that the basic act (*acte règle*) is the agreement between the granting State and the beneficiary State. Under this agreement, i.e. under the most-favoured-nation clause, the beneficiary State will benefit from the favours extended by the granting State to the third State, but only because this is the common wish of the granting State and the beneficiary State. The agreement between the granting State and a third State creating obligations in their mutual relations does not create obligations in the relations between the granting State and the beneficiary State. It is nothing more than an act creating a condition ("acte condition").

(6) The relationship between the treaty containing the most-favoured-nation clause and the subsequent, third-party treaty has been characterized as follows:

If the later treaty can be compared to the hands of a clock that point to the particular hour, it is the earlier treaty which constitutes the mechanism that moves the hands round.¹¹³

(7) If there is no treaty or other agreement between the granting State and the third State, the rule stated in the article is even more evident. The root of the right of the beneficiary State is obviously the treaty containing the

¹⁰⁶ *I.C.J. Pleadings, Anglo-Iranian Oil Co. case (United Kingdom v. Iran) (1952) p. 533.*

¹⁰⁷ *Ibid.*, p. 616.

¹⁰⁸ *Anglo-Iranian Oil Co. case (Preliminary objection), Judgment of 22 July 1952 (I.C.J. Reports 1952, p. 109).*

¹⁰⁹ See e.g. P. Fauchille, *Traité de droit international*, Paris, Rousseau, 1926, vol. I, 3rd part, p. 359, and L. Oppenheim, *International Law: A Treatise*, 8th ed. [Lauterpacht], London, Longmans, Green, 1955, vol. I, para. 522. See however the contrary views of H. Accioly, *Traité de droit international public*, Paris, Recueil Sirey, 1941, vol. II, p. 479, and M. Sibert, *Traité de droit international public*, Paris, Dalloz, 1951, vol. II, p. 255.

¹¹⁰ G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 3rd ed., London, Stevens, 1957, p. 243; P. Guggenheim, *Traité de droit international public*, 2nd rev. ed., Geneva, Georg, 1967, vol. I, pp. 208 and 209; and Sauvignon, *op. cit.*, p. 78.

¹¹¹ *Yearbook ... 1966*, vol. II, p. 229, doc. A/6309/Rev.1, part II, article 32, para. (7) of the commentary.

¹¹² *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 63, Fourteenth plenary meeting, para. 36.

¹¹³ Sir Gerald Fitzmaurice, "The law and procedure of the International Court of Justice, 1951-4: Points of substantive law, part II", *The British Year Book of International Law, 1955-56*, London, 1957, vol. 32, p. 88.

clause. The extent of the favours to which the beneficiary of that clause may lay claim will be determined by the actual favours extended by the granting State to the third State.

(8) The parties stipulating the clause, i.e. the granting State and the beneficiary State, can, however, restrict in the treaty or agreement itself the extent of the favours that can be claimed by the beneficiary State. For example, the restriction can consist in the imposition of a condition, a matter that is dealt with below.¹¹⁴ If the clause contains a restriction, the beneficiary State cannot claim any favours beyond the limits set by the clause, even if this extent does not reach the level of the favours extended by the granting State to a third State. In other words, the treatment granted to the third State by the granting State is applicable only within the framework set by the clause. This is the reason for the wording of paragraph 2 of article 8, which expressly states that the most-favoured-nation treatment to which the beneficiary State—for itself or for the benefit of the persons or things in a determined relationship with it—is entitled *under a clause referred to in paragraph 1*, is determined by the treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State. Paragraph 2 reflects in general the *ejusdem generis* rule, whose substance is developed in articles 9 and 10 that follow.

Article 9. Scope of rights under a most-favoured-nation clause

1. Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause.

2. The beneficiary State acquires the rights under paragraph 1 only in respect of persons or things which are specified in the clause or implied from its subject-matter.

Article 10. Acquisition of rights under a most-favoured-nation clause

1. Under a most-favoured-nation clause the beneficiary State acquires the right to most-favoured-nation treatment only if the granting State extends to a third State treatment within the limits of the subject-matter of the clause.

2. The beneficiary State acquires rights under paragraph 1 in respect of persons or things in a determined relationship with it only if they:

(a) belong to the same category of persons or things as those in a determined relationship with a third State which benefit from the treatment extended to them by the granting State and

(b) have the same relationship with the beneficiary State as the persons and things referred to in subparagraph (a) have with that third State.

¹¹⁴ See articles 11, 12 and 13 below, and the commentary thereto.

Commentary to articles 9 and 10

Scope of the most-favoured-nation clause regarding its subject-matter

(1) The rule which is sometimes referred to as the *ejusdem generis* rule is generally recognized and affirmed by the jurisprudence of international tribunals and national courts and by diplomatic practice. The essence of the rule has been explained in the following graphic way:

Suppose that a most-favoured-nation clause in a commercial treaty between State A and State B entitled State A to claim from State B the treatment which State B gives to any other State, that would not entitle State A to claim from State B the extradition of an alleged criminal on the ground that State B has agreed to extradite alleged criminals of the same kind to State C, or voluntarily does so. The reason, which seems to rest on the common intention of the parties, is that the clause can only operate in regard to the subject-matter which the two States had in mind when they inserted the clause in their treaty.¹¹⁵

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

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

The United Kingdom also put forward, in a quite different form, an argument concerning the most-favoured-nation clause. If Denmark, it is argued, can bring before the Court questions as to the application of her 1934 Treaty with Iran, and if the United Kingdom cannot bring before the Court questions as to the application of the same Treaty to the benefit of which she is entitled under the most-favoured-nation clause, then the United Kingdom would not be in the position of the most-favoured-nation. *The Court needs only observe that the most-favoured-nation clause in the Treaties of 1857 and 1903 between Iran and the United Kingdom has no relation whatever to jurisdictional matters between the two Governments.** If Denmark is entitled under Article 36, paragraph 2, of the Statute, to bring before the Court any dispute as to the application of its Treaty with Iran, it is because that Treaty is subsequent to the ratification of the Iranian Declaration. This cannot give rise to any question relating to most-favoured-nation treatment.¹¹⁶

(3) In the *Ambatielos case*,¹¹⁷ the Commission of Arbitration, in its award of 6 March 1956, held the following views on article X (most-favoured-nation clause) of the Anglo-Greek Treaty of Commerce and Navigation of 1886:

The Commission [of Arbitration] does not deem it necessary to express a view on the general question as to whether the most-favoured-nation clause can never have the effect of assuring to its beneficiaries treatment in accordance with the general rules of international law, because in the present case the effect of the clause is expressly limited to "any privilege, favour or immunity which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State",

¹¹⁵ McNair, *op. cit.*, p. 287.

¹¹⁶ *Anglo-Iranian Oil Co. case (Preliminary objection)*, Judgment of 22 July 1952, I.C.J. Reports 1952, p. 110. For the facts and other aspects of the case, see *Yearbook ... 1970*, vol. II, pp. 202 and 205, doc. A/CN.4/228 and Add.1, paras. 10-30.

¹¹⁷ *The Ambatielos case (merits: obligation to arbitrate)*, Judgment of 19 May 1953, I.C.J. Reports 1953, p. 10.

which would obviously not be the case if the sole object of those provisions were to guarantee to them treatment in accordance with the general rules of international law.

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

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

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

It is true that "the administration of justice", when viewed in isolation, is a subject-matter other than "commerce and navigation", but this is not necessarily so when it is viewed in connexion with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by Treaties of commerce and navigation.

Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes "all matters relating to commerce and navigation". The question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty.¹¹⁸

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

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

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

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

(4) that the object of these provisions corresponds with that of Article XV of the Anglo-Greek Treaty of 1886, and that the only question which arises is, accordingly, whether they include

more extensive "privileges", "favours" and "immunities" than those resulting from the said Article XV;

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

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

The Commission [of Arbitration] is therefore of the opinion that the provisions contained in other Treaties relied upon by the Greek Government do not provide for any "privileges, favours or immunities" more extensive than those resulting from the said Article XV, and that accordingly the most-favoured-nation clause contained in Article X has no bearing on the present dispute...¹¹⁹

(4) Decisions of national courts also testify to the general recognition of the rule. In an early French case (1913), the French Court of Cassation had to decide whether certain procedural requirements for bringing suit, as provided in a French-Swiss Convention on jurisdiction and execution of judgement, applied also to German nationals as a result of a most-favoured-nation clause in a Franco-German commercial treaty concluded at Frankfurt on 10 May 1871. The Franco-German treaty guaranteed most-favoured-nation treatment in their commercial relations, including the "admission and treatment of subjects of the two nations". The decision of the Court was based in part on the following propositions: that these provisions pertain exclusively to the commercial relations between France and Germany, considered from the viewpoint of the rights under international law, but they do not concern, either expressly or implicitly, the rights under civil law, particularly, the rules governing jurisdiction and procedure that are applicable to any disputes that develop in commercial relations between the subjects of the two States, and that

the most-favoured-nation clause may be invoked only if the subject of the treaty stipulating it is the same as that of the particularly favourable treaty the benefit of which is claimed.¹²⁰

(5) In *Lloyds Bank v. de Ricqlès and de Gaillard* before the Commercial Tribunal of the Seine, Lloyds Bank, which as plaintiff had been ordered to give security for costs (*cautio judicatum solvi*), invoked article I of an Anglo-French Convention of 28 February 1882.¹²¹ That Convention intended, according to its preamble, "to regulate the commercial maritime relations between the

¹¹⁹ *Ibid.*, pp. 109 and 110.

¹²⁰ M. Whiteman, *Digest of International Law*, Washington, D. C., U. S. Government Printing Office, 1970, vol. 14, pp. 755 and 756, quoting the decision of the French Court of Cassation, 22 December 1913, in the case of *Braunkohlen Briket Verkauferverein Gesellschaft c. Goffart, ès qualités*. The decision is also quoted by P. Level, "Clause de la nation la plus favorisée", *Encyclopédie Dalloz - Droit International*, Paris, Dalloz, 1968, vol. I, p. 338, para. 38, and by H. Batiffol, *Droit international privé*, 4th ed. Paris, Librairie générale de droit et de jurisprudence, 1967, p. 216, No. 189.

¹²¹ *British and Foreign State Papers, 1881-1882* (London, Ridgway, 1889), vol. 73, p. 22.

¹¹⁸ United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), pp. 106 and 107.

two countries, as well as the status of their subjects", and article I provided, with an exception not relevant here, that:

... each of the High Contracting Parties engages to give the other immediately and unconditionally the benefit of every favour, immunity or privilege in matters of commerce or industry which have been or may be conceded by one of the High Contracting Parties to any third nation whatsoever, whether within or beyond Europe.¹²²

On the basis of that article, Lloyds Bank claimed the benefit of the provisions of a Franco-Swiss Treaty of 15 June 1889, which gave Swiss nationals the right to sue in France without being required to give security for costs. The court rejected that claim, holding that a party to a convention of a general character such as the Anglo-French Convention regulating the commercial and maritime relations of the two countries could not claim under the most-favoured-nation clause the benefits of a special convention such as the Franco-Swiss Convention, which dealt with one particular subject, namely, freedom from the obligation to give security for costs.¹²³

(6) Drafters of a most-favoured-nation clause are always confronted with the dilemma either of drafting the clause in too general terms, risking thereby the loss of its effectiveness through a rigid interpretation of the *ejusdem generis* rule, or of drafting it too explicitly, enumerating its specific domains, in which case the risk consists in the possible incompleteness of the enumeration.

(7) The rule is observed also in the extra-judicial practice of States, as shown by the case concerning the Commercial Agreement of 25 May 1935 between the United States of America and Sweden, article I of which provided as follows:

Sweden and the United States of America will grant each other unconditional and unrestricted most-favored-nation treatment in all matters concerning the customs duties and subsidiary charges of every kind and in the method of levying duties, and, further, in all matters concerning the rules, formalities and charges imposed in connexion with the clearing of goods through the customs, and with respect to all laws or regulations affecting the sale or use of imported goods within the country.¹²⁴

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

Since the most-favored-nation provision in the Reciprocal Trade Agreement between the United States and Sweden signed in 1935 is designed only to prevent discrimination between imports

from and exports to Sweden as compared with imports from and exports to other countries, I regret that this Department would be unable to send to the New York Liquor Authority a letter such as you suggest to the effect that the Agreement accords to Swedish *nationals* the same treatment as is accorded to the nationals of other countries.

All of the countries listed in the enclosure to your letter (countries, nationals of which are held by the New York State Liquor Authority to be entitled to liquor licences) have treaties with the United States which grant either national or most-favored-nation rights as to engaging in trade to nationals of those countries. Thus existence of the trade agreements to which you refer in addition to these treaties is irrelevant...¹²⁵

(8) In the following examples, the question of the application of the rule arose under extraordinary circumstances. In the case of *Nyugat-Swiss Corporation Société Anonyme Maritime et Commerciale v. State* (Kingdom of the Netherlands), the facts were as follows. On 13 April 1941, the steamship *Nyugat* was sailing outside territorial waters of the former Dutch East Indies. It sailed under the Hungarian flag. The Netherlands destroyer *Kortenaar* stopped it, searched it and took it into Surabaya, where it was sunk in 1942. The plaintiffs claimed that the action taken with regard to the *Nyugat* was illegal. The vessel was Swiss property. It had formerly belonged to a Hungarian company, but the Swiss corporation became the ship's owner in 1941, when it already held all shares in the Hungarian company. The Hungarian flag was a neutral flag. Defendant relied upon the fact that on 9 April 1941 diplomatic relations between the Netherlands and Hungary were severed, that on 11 April 1941 Hungary, as an ally of Germany, attacked Yugoslavia, and that consequently on the basis of certain relevant Dutch decrees the capture of the ship was legal. Plaintiffs contended that those decrees were in conflict with the Treaty of Friendship, Establishment and Commerce concluded with Switzerland at Berne on 19 August 1875¹²⁶ and with the Treaty of Commerce concluded with Hungary on 9 December 1924,¹²⁷ and notably with the most-favoured-nation clause contained in those treaties. Plaintiffs referred to the Treaty of Friendship, Navigation and Commerce signed on 1 May 1829 with the Republic of Colombia, providing that, "if at any time unfortunately a rupture of the ties of friendship should take place", the subjects of the one party residing in the territory of the other party "will enjoy the privilege of residing there and of continuing their business... as long as they behave peacefully and do not violate the laws; their property ... will not be subject to seizure and attachment".¹²⁸ The Court held:

The invoking of this provision fails, since it is unacceptable that a rupture of friendly relations, as understood in the year 1829, can be assimilated to a severance of diplomatic relations as it occurred during the Second World War; in the present case the determination of the flag was also based upon the assumption by

¹²² *Ibid.*, pp. 23-24.

¹²³ H. Lauterpacht, ed., *Annual Digest of Public International Law Cases, 1929-30*, London, vol. 5, 1935, Case No. 252, p. 404; *Journal du droit international*, Paris, 58th year, 1931, p. 1018, digested by McNair, *op. cit.*, p. 287. Other cases before French courts based on the *ejusdem generis* rule are cited by A.-Ch. Kiss, "La convention européenne d'établissement et la cause de la nation la plus favorisée", *Annuaire français de droit international*, 1957, Paris, vol. III, p. 478, and for cases before American courts, by G. H. Hackworth, *Digest of International Law*, Washington, D. C., U. S. Government Printing Office, vol. V, 1943, pp. 292 and 293.

¹²⁴ League of Nations, *Treaty Series*, vol. CLXI, p. 111.

¹²⁵ Legal Adviser Fisher, Department of State, 3 November 1949, MS. Department of State, quoted by Whiteman, *op. cit.*, p. 760.

¹²⁶ Netherlands, *Staatsblad van het Koninkrijk der Nederlanden*, No. 137, 1878, Decree of 19 September 1878.

¹²⁷ *Ibid.*, No. 36, 1926, Decree of 3 March 1926.

¹²⁸ *British and Foreign State Papers, 1829-1830*, London Ridgway, 1832, p. 902.

Hungary of an attitude contrary to the interests of the Kingdom by collaborating in the German attack against Yugoslavia. This case surely does not fit in with the provisions of the 1829 Treaty. From the preceding it follows that the shipowners are wrong in their opinion that the Court should not apply the Decree as being contrary to international provisions.¹²⁹

(9) According to one source, "some authority exists" for the view that rights and privileges obtained in the course of a territorial and political arrangement or a peace treaty

cannot be claimed under a most-favoured-nation clause... The reason presumably is that such concessions are not commercial, while most-favoured-nation clauses are usually concerned with trade and commerce.¹³⁰

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

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

I consider that these privileges were conceded to France and the United States of America as part of a territorial and political arrangement extorted from Great Britain at the termination of a war which had been successfully carried on against her by those nations.¹³¹

(10) No writer would deny the validity of the *ejusdem generis* rule which, for the purposes of the most-favoured-nation clause, derives from its very nature. It is generally admitted that a clause conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can attract the rights conferred by other treaties (or unilateral acts) only in regard to the same matter or class of matter.¹³²

(11) The effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another. Unless this process is strictly confined to cases where there is a substantial identity between the subject-matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting State obligations it never contemplated.¹³³ Thus the rule follows clearly from the general principles of treaty interpretation. States cannot be regarded as being bound beyond the obligations they have undertaken.

¹²⁹ Judgment of 6 March 1959 by the Supreme Court of the Netherlands (*Nederlandse Jurisprudentie* 1962, No. 2, pp. 18 and 19).

¹³⁰ McNair, *op. cit.*, p. 302.

¹³¹ *Ibid.*, p. 303.

¹³² See *Yearbook ... 1970*, vol. II, p. 210, doc. A/CN.4/228 and Add.1, para. 68.

¹³³ *Ibid.*, p. 211, doc. A/CN.4/228 and Add.1, para. 72.

(12) The essence of the rule is that the beneficiary of a most-favoured-nation clause cannot claim from the granting State advantages of a kind other than that stipulated in the clause. For instance, if the most-favoured-nation clause promises most-favoured-nation treatment solely for fish, such treatment cannot be claimed under the same clause for meat.¹³⁴ The granting State cannot evade its obligations, unless an express reservation so provides,¹³⁵ on the ground that the relations between itself and the third country are friendlier than or "not similar" to those existing between it and the beneficiary. It is only the subject-matter of the clause that must belong to the same category, the *idem genus*, and not the *relation* between the granting State and the third State on the one hand and the relation between the granting State and the beneficiary State on the other. It is also not proper to say that the *treaty* or *agreement* including the clause must be of the same category (*ejusdem generis*) as that of the benefits that are claimed under the clause.¹³⁶ To hold otherwise would seriously diminish the value of a most-favoured-nation clause.

Scope of the most-favoured-nation clause regarding persons or things

(13) In respect of the subject-matter, the right of the beneficiary State is restricted in two ways: first, by the clause itself, which always refers to a certain matter,¹³⁷ and secondly by the right conferred by the granting State on the third State.

(14) The situation is similar, although not identical, in respect of the subjects in the interest of which the beneficiary State is entitled to claim most-favoured-nation treatment. The clause itself may indicate those persons, ships, products, etc., to which it applies, but it may not necessarily do so. The clause may simply state that the beneficiary State is accorded most-favoured-nation treatment in respect of customs duties, or in the sphere of commerce, shipping, establishment, etc., without specifying the persons or the things that will be given most-favoured-nation treatment. In such cases the indication of the sphere of operation for the clause implicitly denotes the class of persons or things in whose interest the beneficiary State may exercise its rights.

¹³⁴ In connexion with the problem of "like products", see the relevant passage in the excerpts from the conclusions of the Economic Committee of the League of Nations in regard to the most-favoured-nation clause annexed to the Special Rapporteur's first report (*Yearbook ... 1969*, vol. II, p. 178, doc. A/CN.4/213, annex 1), and articles I, II and XIII of the General Agreement on Tariffs and Trade (GATT, *Basic Instruments and Selected Documents*, vol. IV, *op. cit.*, pp. 2-5 and 21-23). Notable efforts are being made to facilitate the identification and comparison of products by setting up uniform standards for the purpose; these efforts include the Brussels Convention of 15 December 1950 establishing a Customs Co-operation Council (United Nations, *Treaty Series*, vol. 157, p. 129) and the Convention on the Nomenclature for the Classification of Goods in Customs Tariffs of 15 December 1950 (*ibid.*, vol. 347, p. 127).

¹³⁵ See article 29 below, and commentary thereto.

¹³⁶ Vignes, *loc. cit.*, p. 282.

¹³⁷ With very rare exceptions, there is no clause in modern times that would not be restricted to a certain sphere of relations, e.g. commerce, establishment and shipping. See article 4 above, paras. (14) and (15) of the commentary.

(15) The beneficiary State may claim most-favoured-nation treatment only for the category of persons or things (merchants, commercial travellers, persons taken into custody, companies, vessels, distressed or wrecked vessels, products, goods, textiles, wheat, sugar, etc.) that receives or is entitled to receive certain treatment, certain favours, under the right of a third State. And, further, the persons or things in respect of which most-favoured-nation treatment is claimed must be in the same relationship with the beneficiary State as are the comparable persons or things with the third State (nationals, residents in the country, companies having their seat in the country, companies established under the law of the country, companies controlled by nationals, imported goods, goods manufactured in the country, products originating in the country, etc.).¹³⁸

(16) The following French case may serve as an illustration of the proposed rule. Alexander Serebriakoff, a Russian subject, brought an action against Mme. d'Oldenbourg, also a Russian subject, alleging the nullity of a will under which she was a beneficiary. The defendant, after having obtained French citizenship by naturalization, obtained an *ex parte* decision from the Court of Appeal of Paris ordering Serebriakoff to furnish 100,000 francs security. Serebriakoff appealed, against that *ex parte* decision, claiming *inter alia* that he was exempt from furnishing security by the terms of the Franco-Soviet agreement of 11 January 1934. The Court held that the appeal must be dismissed. The Court stated:

Whereas the Decree of 23 January 1934 ordering the provisional application of the trade agreement concluded on 11 January 1934 between France and the USSR ... is not applicable in the current case; and Alexander Serebriakoff is not entitled to claim the benefit of that agreement; and, while the agreement does provide, on the basis of reciprocity, free and unrestricted access by Russian subjects to French courts, the privilege thus granted to such subjects is limited strictly to merchants and industrialists; and this conclusion results inevitably both from the agreement as a whole and from the separate consideration of each of its provisions; and the agreement in question is entitled "Trade Agreement"; and the various articles of which it is composed confirm that description, and its article 9, on which Serebriakoff specifically relies, in determining the beneficiaries of the provisions in question, begins with the words: "Save in so far as may be otherwise provided subsequently, French merchants and manufacturers, being natural or legal persons under French law, shall not be less favourably treated ... than nationals of the most-favoured-nation..."¹³⁹

(17) In another case, the Tribunal de Grande Instance de la Seine held that the most-favoured-nation clause embodied in the Franco-British Convention of 28 February 1882, as supplemented by an exchange of letters of interpretation of 21 and 25 May 1929, by which British subjects were entitled to rely on treaties stipulating the assimilation of foreigners to nationals, applied solely to British subjects who settled in France. The Tribunal stated:

... [a] British national domiciled in Switzerland may not rely on a treaty of establishment which grants the benefit of the most-favoured-nation clause only to British nationals established in

France and therefore entitled to carry on a remunerative activity there on a permanent basis."¹⁴⁰

(18) Article 10, when referring to the same category of things, implicitly states the rule regarding the controversial notion of "like articles" or "like products". It is not uncommon for commercial treaties to state explicitly that, in respect to customs duties or other charges, the products, goods, articles, etc., of the beneficiary State will be accorded any favours accorded to like products, etc., of the third State.¹⁴¹ Obviously, even in the absence of such an explicit statement, the beneficiary State may claim most-favoured-nation treatment only for the goods specified in the clause or belonging to the same category as the goods enjoying most-favoured-nation treatment by the third State.

(19) The Commission did not wish to delve into all the intricacies of the notion of "like products". The following paragraphs supply a brief explanation. As to exactly what is meant by the expression as it appears in commercial treaties, it has been said that:

One test in such cases is a comparison of the intrinsic characteristics of the goods concerned. Such a test would prevent the classification of articles on the basis of external characteristics. If products are intrinsically alike, they should be considered to be like products, and differing rates of duty on them would contravene the most-favored-nation clause. For example, in the Swiss Cow case [¹⁴²], the question arises whether a cow raised at a certain elevation is "like" a cow raised at a lower level. Applying the intrinsic characteristics test gives a simple answer to the question. The cows are intrinsically alike, and a tariff classification based on such an extraneous consideration as the place where the cows are raised is clearly designed to discriminate in favour of a particular country.

In other situations the application of the intrinsic characteristics test would show clearly that a classification was *not* objectionable. To invent such a case: under the tariff law of the United States, apples are dutiable and bananas are free of duty. If Canada and the United States have a treaty providing that products of either party will be accorded treatment no less favorable than that accorded to "like articles" of any third country, Canada might argue that apples should be free of duty. Any such claim would have to be based on the argument that since both bananas and apples are used for the same purpose, i.e. eating, they are "like articles". Applying the test of intrinsic characteristics in this case would promptly settle the question, since apples and bananas are intrinsically different products.¹⁴³

(20) With regard to the "Swiss Cow" case, mentioned in the text quoted in the preceding paragraph, the Special Rapporteur in his second report had the following to say:

The difficulties inherent in the expression "like product" can *ad oculos* be demonstrated in the following manner. In the working paper on the most-favoured-nation clause in the law of treaties, submitted by the Special Rapporteur on 19 June 1968, the following classical example of an unduly specialized tariff was cited under the heading "Violations of the clause".¹⁴⁴ In 1904 Germany granted a duty reduction to Switzerland on

¹³⁷ Yearbook ... 1968, vol. II, p. 170, doc. A/CN.4/L.127, para. 31.

¹⁴⁰ *Ibid.*, pp. 145 and 146, doc. A/CN.4/269, para. 78.

¹⁴¹ See article I, para. 1, of the General Agreement on Tariffs and Trade, quoted above (article 4, para. 10) of the commentary.

¹⁴² See para. (20) below.

¹⁴³ Hawkins, *op. cit.*, pp. 93 and 94.

¹³⁸ See article 5 above, para. (4) of the commentary.

¹³⁹ See Secretariat Digest, Yearbook ... 1973, vol. II, p. 132, doc. A/CN.4/269, para. 40.

"large dappled mountain cattle or brown cattle reared at a spot at least 300 metres above sea level and which have at least one month's grazing each year at a spot at least 800 metres above sea level".¹³⁸

Sources quoting this example generally consider a cow raised at a certain elevation "like" a cow raised at a lower level. This being so, they believe—and the working paper followed this belief—that a tariff classification based on such an extraneous consideration as the place where the cows are raised is clearly designed to discriminate in favour of a particular country, in the case in question, in favour of Switzerland and against, for example, Denmark.¹³⁹ However, the Food and Agriculture Organization of the United Nations, being an interested agency and having special expertise in matters of animal trade, in its reply to the circular letter of the Secretary-General, made the following comment on the example given in the working paper:

"In view of the background situation relating to the case cited in the example, it would seem that the specialized tariff may have been technically justified because of the genetic improvement programme which was carried out in Southern Germany at that time. At present, this specialized tariff would presumably have been worded in a different way, but in 1904 terms like Simmental or Brown Swiss were probably not recognized as legally valid characteristics [...]. Apart from this, it must be recognized that unduly specialized tariffs and other technical or sanitary specifications have been—and continue to be—used occasionally for reasons that may be regarded as discriminatory."

¹³⁸ League of Nations, Economic and Financial Section, *Memorandum on Discriminatory Classifications* (Ser. L.o.N.P. 1927.II.27), p. 1.

¹³⁹ H. C. Hawkins, *Commercial Treaties and Agreements; Principles and Practice* (New York, Rinehart, 1951, pp. 93-94; J. E. S. Fawcett, "Trade and Finance in International Law", ... *Recueil des cours ... 1968* (Leyden, Sijthoff, 1969), vol. 123, p. 263.¹⁴⁴

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

... the United States said:

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

This lack of definition, however, in the view of the British delegate,

"has not prevented commercial treaties from functioning, and I think it would not prevent our Charter from functioning until such time as the ITO is able to go into this matter and make a proper study of it. I do not think we could suspend other action pending that study..."

and Australia further noted:

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

procedure through the Organization you would find that this issue would be self-solving."¹⁴⁵

(22) The Commission is aware that in certain cases the application of the rule contained in article 9 and 10 can cause considerable difficulties. It has stated already that the expression "same relationship" has to be used with caution because, for example, the relationship between State A and its nationals is not necessarily the "same" as the relationship between State B and its nationals. Nationality laws of States are so diverse that the sum total of the rights and obligations arising from one State's nationality laws might be quite different from that arising from another State's nationality laws.¹⁴⁶ Similar difficulties can be encountered when treaties refer to internal law in other instances; for example, where the right of establishment of legal persons is concerned. The case of legal persons can raise a particularly difficult problem because they are defined by internal law. When, for example, a treaty expressly grants to a third State favourable treatment for a category of legal persons specified according to the internal law of the third State, e.g. a particular kind of German limited liability company ("Gesellschaft mit beschränkter Haftung") that is unknown to the Anglo-Saxon countries, could the United Kingdom invoke the most-favoured-nation clause to claim the same advantages for the British type of company that most closely resembles the German type of company referred to in the treaty, or would it be debarred from doing so? Similarly, if a treaty grants some advantage to French companies of the type known as "association en participation", which corresponds to the "joint venture" of the common law countries, would an Anglo-Saxon country be able to invoke the most-favoured-nation clause to claim the same advantages for those of its companies which are of the "joint venture" type?

(23) A similar problem may arise in connexion with the nationality of companies, which is not determined by international law. For when, under a treaty of establishment, a State grants to another advantages for its national companies, it is the law of that State that determines the nationality of those companies. That being so, could the State that claims the benefit of the most-favoured-nation clause claim it for all the companies defined as national under its own law? Under that law a company might be regarded as national merely if it had its registered offices or principal place of business in the territory of the State in question, or if that State controlled a substantial part of the registered capital. Might not then the granting State be able to object that the national companies of a third State to which it had extended advantages were defined much more restrictively under the law of that third State? Hence, the granting State might refuse to accord the benefit of the clause, arguing that it had extended to the third State a specific kind of advantage which, if it

¹⁴⁴ *Yearbook ... 1970*, vol. II, pp. 221-222, doc. A/CN.4/228 and Add.1, para. 148.

¹⁴⁵ J. H. Jackson, *World Trade and the Law of GATT (A Legal Analysis of the General Agreement on Tariffs and Trade)*, Indianapolis, Bobbs-Merrill, 1969, pp. 260 and 261. Excerpts from the reports of the Economic Committee of the League of Nations are annexed to the Special Rapporteur's first report (see *Yearbook ... 1969*, vol. II, p. 175, doc. A/CN.4/213, annex I).

¹⁴⁶ See article 5 above, para. (4) of the commentary.

were transposed into the law of another State, would become more extensive.

(24) Some of the cases quoted above testify to the difficulties that are encountered when it comes to the question whether a particular right falls within the limits of the subject-matter of the clause or is outside it. All these difficulties are inherent in the application of a most-favoured-nation clause and do not detract from the usefulness of articles 9 and 10 which, as a general rule, state and elucidate the mechanism of the most-favoured-nation clause.

(25) On the basis of the foregoing, article 9, entitled "Scope of rights under a most-favoured-nation clause", indicates indeed the *potential* scope of the clause. Its paragraph 1 provides that the beneficiary State acquires only those rights which fall within the limits of the subject-matter of the clause, and *paragraph 2* gives a further precision to the rule in stating that the beneficiary State acquires the rights falling within the limits of the subject-matter of the clause only in respect of those persons or things which are specified in the clause or implied from the subject-matter of that clause. If the clause refers simply, e.g. to shipping or to consular matters or to commerce in general, then these general references imply in a more or less precise fashion the persons or things in respect of which the beneficiary State acquires the rights under a most-favoured-nation clause.

(26) Article 10, which appears under the heading "Acquisition of rights under a most-favoured-nation clause", indicates the *actual* scope of the clause. The general rule concerning the acquisition by the beneficiary State of most-favoured-nation treatment is stated in paragraph 1, whereas paragraph 2 provides the further specification of that rule regarding such acquisition in respect of persons or things in a determined relationship with that beneficiary State. *Paragraph 1* provides that, even if the beneficiary State wishes to claim rights falling within the limits of the subject-matter of the clause, it will acquire those rights only if a condition is fulfilled, namely, that the granting State extends to a third State treatment which falls within the same limits of the subject-matter. *Paragraph 2* of the article provides that, if the beneficiary State makes claim to rights in respect of persons or things, it will acquire the rights under paragraph 1 only if the persons or things in question: (a) fall into the same category of persons or things as those in a determined relationship with a third State which benefit from the treatment extended to them by the granting State, and (b) have the same relationship with the beneficiary State as those persons or things have with that third State.

Article 11. Effect of a most-favoured-nation clause not made subject to compensation

If a most-favoured-nation clause is not made subject to a condition of compensation, the beneficiary State acquires the right to most-favoured-nation treatment without the obligation to accord any compensation to the granting State.

Article 12. Effect of a most-favoured-nation clause made subject to compensation

If a most-favoured-nation clause is made subject to a condition of compensation, the beneficiary State acquires the right to most-favoured-nation treatment only upon according the agreed compensation to the granting State.

Article 13. Effect of a most-favoured-nation clause made subject to reciprocal treatment

If a most-favoured-nation clause is made subject to a condition of reciprocal treatment, the beneficiary State acquires the right to most-favoured-nation treatment only upon according the agreed reciprocal treatment to the granting State.

Commentary to articles 11, 12 and 13

The conditional form and the conditional interpretation

(1) For the explanation of the necessity of the provisions of articles 11, 12 and 13 reference has to be made to the development of the most-favoured-nation clauses historically known as "conditional" and to the "conditional" interpretation of clauses which in their terms made no reference to conditions.

(2) It was in the eighteenth century that the "conditional" form made its first appearance, in the treaty of amity and commerce concluded between France and the United States of America on 6 February 1778. Article II of that treaty read as follows:

The Most Christian King and the United States engage mutually not to grant any particular favour to other nations, in respect of commerce and navigation, which shall not immediately become common to the other Party, who shall enjoy the same favour, freely, if the concession was freely made, or on allowing the same compensation, if the concession was conditional.¹⁴⁷

It has been held that the "conditional" clause was inserted in the treaty of 1778 at French insistence. Even if it were true that the idea was of French origin, the "conditional" form of the clause seemed peculiarly suited to the political and economic interests of the United States for a long period.¹⁴⁸

(3) The phrase "freely, if the concession was freely made, or on allowing the same compensation [or the equivalent], if the concession was conditional" was the model for practically all commercial treaties of the United States until 1923. Prior to that year, the commercial treaties of the United States contained (with only three exceptions) conditional rather than unconditional pledges on the part of that country.¹⁴⁹

¹⁴⁷ W. M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909*, Washington, D. C., United States Government Printing Office, 1910, vol. I, p. 468.

¹⁴⁸ V. G. Setser, "Did Americans originate the conditional most-favoured-nation clause?", *The Journal of Modern History*, Chicago, vol. V (September 1933), pp. 319-323.

¹⁴⁹ C. C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, 2nd rev. ed., Boston, Little, Brown, 1947, vol. II, p. 1504.

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

Under the most-favored-nation clause in a bilateral treaty or agreement concerning commerce, each of the parties undertakes to extend to the goods of the country of the other party treatment no less favorable than the treatment which it accords to like goods originating in any third country. The unconditional form of the most-favored-nation clause provides that any advantage, favor, privilege, or immunity which one of the parties may accord to the goods of any third country shall be extended immediately and unconditionally to the like goods originating in the country of the other party. In this form only does the clause provide for complete and continuous nondiscriminatory treatment. Under the conditional form of the clause, neither party is obligated to extend immediately and unconditionally to the like products of the other party the advantages which it may accord to products of third countries in return for reciprocal concessions; it is obligated to extend such advantages only if and when the other party grants concessions "equivalent" to the concessions made by such third countries...¹⁵⁰

(5) The conditional form of the clause was also dominant in Europe after the Napoleonic period. It has been asserted that perhaps 90 per cent of the clauses written into treaties during the years 1830 to 1860 were conditional in form.¹⁵¹ However, in the treaty of commerce between Great Britain and France of 23 January 1860,¹⁵² often called the Cobden treaty or the Chevalier-Cobden treaty, the two countries reduced their tariffs substantially, abolished import prohibitions and granted each other unconditionally the status of a most-favored-nation.

(6) The Chevalier-Cobden treaty was a signal for starting the negotiation of many commercial agreements embodying the unconditional clause with a wider scope of application than at any time in its history. A wave of liberal economic sentiment carried the unconditional clause to the height of its effectiveness. In the period following the Chevalier-Cobden treaty, the unconditional form and interpretation of the clause were entirely dominant in intra-European relations.¹⁵³

(7) The conditional clause served the purposes of the United States as long as it was a net importer and its primary aim was to protect a growing industrial system. When the position of the United States in the world economy changed after the First World War, the conditional clause was inadequate. The essential condition for successful access to international markets, that is, the elimination of discrimination against American prod-

ucts, could be achieved only through the unconditional clause.¹⁵⁴

(8) The departure of the United States from the practice of employing the conditional type of the most-favored-nation clause was explained by the United States Tariff Commission as follows:

... the use by the United States of the conditional interpretation of the most-favored-nation clause has for half a century occasioned and, if it is persisted in, will continue to occasion frequent controversies between the United States and European countries.¹⁵⁵

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

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

While we were preserving in the following of the policy of conditional most-favored-nation treatment, the leading commercial countries of Europe, and in fact most of the countries of the world, adopted and pursued the policy of unconditional most-favored-nation treatment. Each concession which one country made to another became generalized in favor of all countries to which the country making the concession was obligated by treaty to extend most-favored-nation treatment... As we seek pledges from other foreign countries that they will refrain from practising discrimination, we must be ready to give such pledges, and history has shown that these pledges can be made adequate only in terms of unconditional most-favored-nation treatment.¹⁵⁶

(10) The use of the conditional clause, as practised until 1923 by the United States, has almost disappeared from the international scene. The reasons for this have been stated to be as follows:

... the elimination of automatism from the most-favored-nation clause, ostensibly better to ensure reciprocity, fails to achieve its aim and renders the clause itself completely useless. That fact, together with the trade expansion which currently characterizes the trade policy of all States, explains why the conditional clause has generally been abandoned in recent treaty practice.¹⁵⁷

(11) The "conditional" form of the clause is now largely of historical significance. Many sources agree that this

¹⁵⁰ United States of America, Department of State, *Bulletin No. 58* of 3 August 1940, quoted in Whiteman, *op. cit.*, p. 751.

¹⁵¹ L. E. Visser, "La clause de la nation la plus favorisée dans les traités de commerce", *Revue de droit international et de législation comparée*, Brussels, 2nd series, vol. IV (1902), pp. 66, 159 and 270. Quoted by R. C. Snyder, *The Most-Favored-Nation Clause: An Analysis with Particular Reference to Recent Treaty Practice and Tariffs*, New York, King's Crown Press, Columbia University, 1948, p. 41.

¹⁵² *British and Foreign State Papers, 1859-1860*, London, Ridgway, 1867, vol. 50, p. 13.

¹⁵³ A. Nussbaum, *A Concise History of the Law of Nations*, rev. ed., New York, MacMillan, 1954, p. 202.

¹⁵⁴ Snyder, *op. cit.*, p. 243; and E. T. Usenko, chapter on commercial treaties in: State Institute of Law of the Academy of Sciences of the Soviet Union, *Kurs mezhdunarodnogo prava* [Course on international law], edited by F. I. Kozhevnikov *et. al.* Moscow, Nauka, 1968, vol. IV, p. 251.

¹⁵⁵ Quoted by Hyde, *op. cit.*, p. 1506, foot-note 13.

¹⁵⁶ Hackworth, *op. cit.*, p. 273.

¹⁵⁷ M. Virally, "Le principe de réciprocité en droit international contemporain", *Recueil des cours...*, 1967-III, Leiden, Sijthoff, 1969, vol. 122, p. 74.

form of the clause has definitely fallen into disuse.¹⁵⁸ Nevertheless, the possibility cannot and should not be excluded for States to agree on clauses made subject to conditions of compensation.

The conditional interpretation of an unconditional clause

(12) In the nineteenth century and in the first decades of the twentieth century, international doctrine and practice were divided on the interpretation of a most-favoured-nation clause that did not explicitly state whether it was conditional or unconditional.¹⁵⁹ The division was due to the then constant practice of the United States of construing the clause as conditional even if the character of the clause was not spelled out explicitly.¹⁶⁰

(13) The United States position can be traced back to the time of the Louisiana Purchase, i.e. to the treaty of 30 April 1803 by which France ceded Louisiana to the United States. Article 8 of that treaty provided that "the ships of France shall be treated upon the footing of the most favoured nations" in the ports of the ceded territory. By virtue of that provision, the French Government asked in 1817 that the advantages granted to Great Britain in all the ports of the United States should be secured to France in the ports of Louisiana. The advantages accorded to Great Britain were based upon an Act of Congress of 3 March 1815. That Act exempted the vessels of foreign countries from discriminating duties in ports of the United States on condition of a like exemption of American vessels in the ports of such countries. This exemption was granted by Great Britain but not by France, with the result that French vessels continued to pay discriminating duties in the ports of the United States, while British vessels became exempt. The French claim was rejected on the ground that the clause did not mean that France should enjoy as a free gift that which was conceded to other nations for a full equivalent. The United States position was explained as follows:

"It is obvious", said Mr. Adams, "that if French vessels should be admitted into the ports of Louisiana upon the payment of the same duties as the vessels of the United States, they would be treated, not upon the footing of the most-favored-nation, according to the article in question, but upon a footing more favored than any other nation; since other nations, with the exception of England, pay higher tonnage duties, and the exemption of English vessels is not a free gift, but a purchase at a fair and equal price." France, however, did not concede the correctness of that position and maintained its claim in diplomatic correspondence until 1831, when it was settled by a treaty which in effect accepted the American interpretation.¹⁶¹

¹⁵⁸ Snyder, *op. cit.*, p. 56. See also G. Jaenicke, "Meistbegünstigungsklausel" in K. Strupp, *Wörterbuch des Völkerrechts*, 2nd ed. [Schlochauer], Berlin, de Gruyter, 1961, vol. II, p. 498; Level, *loc. cit.*, p. 333, para. 5; Sauvignon, *op. cit.*, p. 23.

¹⁵⁹ S. Basdevant, "Clause de la nation la plus favorisée", in A. G. de Lapradelle and J. P. Niboyet, *Répertoire de droit international*, Paris, Sirey, 1929, vol. III, p. 479, para. 73.

¹⁶⁰ See C. C. Hyde, "Concerning the interpretation of treaties", *American Journal of International Law*, Washington, D. C., vol. 3, No. 1 (January 1909), p. 57.

¹⁶¹ J. B. Moore, *A Digest of International Law*, Washington, D. C., United States Government Printing Office, 1906, vol. V, pp. 257-260. See also G. W. Wickersham, Rapporteur, Committee of Experts for the Progressive Codification of International Law, League of Nations document C.205.M.79.1927.V., p. 7.

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

There is one apparent misapprehension which I should like to remove. It may be argued that by the most-favored-nation clauses in the pending treaty with Germany we would automatically extend privileges given to Germany to other Powers without obtaining the advantages which the treaty with Germany gives to us. This is a mistake. We give to Germany explicitly the unconditional most-favored-nation treatment which she gives to us. We do not give unconditional most-favored-nation treatment to other Powers unless they are willing to make with us the same treaty, in substance, that Germany has made. Most-favored-nation treatment would be given to others Powers only by virtue of our treaties with them, and these treaties, so far as we have them, do not embrace unconditional most-favored-nation treatment. We cannot make treaties with all the Powers at the same moment, but if the Senate approves the treaty which we have made with Germany we shall endeavour to negotiate similar treaties with other Powers and such other powers will not obtain unconditional most-favored-nation treatment unless they conclude with us treaties similar to the one with Germany.¹⁶²

Ten years later, however, Secretary of State Hull took the less rigid position that the according of a benefit to a country pursuant to an unconditional most-favoured-nation clause constituted the according of it freely within the terms of a conditional most-favoured-nation clause, with the result that the benefit should be accorded immediately and without compensation pursuant to the conditional clause. Consistent with that interpretation, when in 1946 the United States sought waivers from most-favoured-nation clauses in existing treaties for tariff preferences to be extended on the basis of reciprocity to most Philippine products following Philippine independence, such waivers were sought from countries with which the United States had treaties containing clauses that were conditional as well as from countries the treaties with which contained clauses that were unconditional.¹⁶³ The consequence of this change in interpretation was to produce a system in which conditional treatment was merged to a certain extent with unconditional treatment.

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

... The basis of the American theory is to be found in the Anglo-Saxon system of contracts and the requirement that advantages must be reciprocal for the formation of a contract (consideration). However, this application of the theory is not justified here, for the nation which has acquired equal treatment has paid in advance for the third-party rights which it may thus acquire, since it has granted to the other contracting party the same equal treatment and the right to receive the advantages of third parties... The search for "equivalents" designed to pay for the third-party right by conventional means imposed on the contracting parties is tantamount to stating that the most-favoured-nation clause in

¹⁶² Whiteman, *op. cit.*, p. 754.

¹⁶³ *Ibid.*, p. 753.

itself has absolutely no effect. Lastly, from the customs point of view, the American system leads to a preferential system based on favours granted to some nations and refused to others, for States which have amended their tariffs no longer have any equivalents to offer.¹⁶⁴

More recent practice and doctrinal views

(16) The Economic Committee of the League of Nations, basing its views on economic considerations, strongly favoured the use of unconditional most-favoured-nation clauses in customs matters. The following are excerpts from its conclusions of 1933 and 1936:

The most-favoured-nation clause implies the right to demand and the obligation to concede all reductions of duties and taxes and all privileges of every kind accorded to the most-favoured-nation, no matter whether such reductions and privileges are granted autonomously or in virtue of conventions with third parties.

Regarded in this way, the clause confers a whole body of advantages, the extent of which actually depends on the extent of the concessions granted to other countries. At the same time, it constitutes a guarantee, in the sense that it provides completely and, so to speak, automatically, for full and entire equality of treatment with the country which is most favoured in the matter in question.

However, in order that the clause may produce these results it must be understood to mean that a government which has granted most-favoured-nation treatment is bound to concede to the other contracting party every advantage which has been granted to any third country, immediately and as a matter of right, without the other party being required to give anything by way of compensation. In other words, the clause must be unconditional.

As is generally known, conditional most-favoured-nation clauses have in some cases been inserted in treaties, while in other cases existing most-favoured-nation clauses have been construed in a conditional sense, with the effect that a reduction of duties granted to a given country in exchange for a given concession may not be accorded to a third country except in exchange for the like or equivalent concessions. This opinion is based on the conception that a country which has not, in some given respect, made the same concessions as another is not entitled to obtain, in this respect, the same advantages, even if it has made wider concessions in other respects. It cannot, however, be too often repeated that a conditional clause of this kind—in justification of which it is argued that, if it does not grant equality of tariffs, it offers at any rate equality of opportunity—has nothing whatever in common with the sort of clause which the [1927] International Economic Conference and the Economic Consultative Committee recommended for the widest possible adoption.

It is in fact the negation of such a clause, for the very essence of the most-favoured-nation clause lies in its exclusion of every sort of discrimination, whereas the conditional clause constitutes, by its very nature, a method of discrimination; it does not offer any of the advantages of the most-favoured-nation clause proper, which seeks to eliminate economic conflicts, to simplify international trade and establish it on firmer foundations. Moreover, it is open to the very grave objection of being unfair to countries which have very few, or very low, duties and which are thus less favourably situated for negotiating than those which possess heavy or numerous duties.

¹⁶⁴ S. Basdevant, *loc. cit.*, pp. 479 and 480, para. 77, quoting, *inter alia*, P. L. E. Pradier-Fodéré, *Traité de droit international public européen et américain, suivant les progrès de la science et de la pratique contemporaines*, Paris, Durand et Pédone-Lauriel, 1888, vol. IV, p. 394.

Moreover, it has very rightly been observed that the granting of the conditional clause really amounts to a polite refusal to grant the most-favoured-nation clause, and that the real significance of this "conditional clause" is that it constitutes a *pactum de contrahendo*, by which the contracting States undertake to enter later into negotiations to grant each other certain advantages similar or correlative to those previously granted to third countries.

... We may therefore conclude that the first fundamental principle, implicit in the conception of most-favoured-nation treatment, is that this treatment must be unconditional.¹⁶⁵

(17) The Institute of International Law, in paragraph 1 of its 1936 resolution entitled "The effects of the most-favoured-nation clause in matters of commerce and navigation", expressed the view that:

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

Consequently, in matters of commerce and navigation, the clause confers upon the nationals, goods and ships of the contracting countries as a matter of right and without compensation, the régime enjoyed by any third country.¹⁶⁶

(18) Other sources state this rule in general terms not restricted to the sphere of commerce:

If there is any doubt, the most-favoured-nation clause should be considered unconditional.¹⁶⁷

Since it is liable to limit the application of the clause, the condition cannot be implied.¹⁶⁸

The clause is, in principle, unconditional ... Although the high contracting parties have the option of stating that the clause is conditional, its conditional nature is not presumed and is thus not an essential feature of the clause...¹⁶⁹

... If it is not expressly stated that the clause is conditional, it is agreed ... that it shall be considered unconditional.¹⁷⁰

(19) In the commercial treaty practice of the Soviet Union and other socialist countries the most-favoured-nation clause is always applied in its unconditional and gratuitous form. This is expressly provided for in many treaties, but even without express provision to this effect most-favoured-nation clauses are understood to grant most-favoured-nation treatment unconditionally and without compensation. This follows from the fact that the treaties in question do not contain any reservation concerning compensation or countervalue.¹⁷¹

¹⁶⁵ See *Yearbook ... 1969*, vol. II, pp. 175 *et seq.*, doc. A/CN.4/213, annex I.

¹⁶⁶ *Ibid.*, p. 181, doc. A/CN.4/213, annex II.

¹⁶⁷ Guggenheim, *op. cit.*, p. 211.

¹⁶⁸ Level, *loc. cit.*, p. 333, para. 5, citing the North Atlantic Coast Fisheries Case of 7 September 1910 before the Permanent Court of Arbitration (see United Nations, *Reports of International Arbitral Awards*, vol. XI (United Nations publication, Sales No. 61.V.4), p. 167), and J. Basdevant, "L'affaire des pêcheries des côtes septentrionales de l'Atlantique", *Revue générale de droit international public*, Paris, vol. XIX (1912), pp. 538 *et seq.*

¹⁶⁹ Level, *loc. cit.*, p. 338, para. 35.

¹⁷⁰ Vignes, *loc. cit.*, p. 219, who also quotes in support of this view D. P. O'Connell, *International Law*, London, Stevens, 1970, vol. I, p. 268, and J. Dehaussy, *Juris-classeur de droit international*, fasc. 12-B, *Sources du droit international - Les traités (Effets : Situation des États tiers et de leurs ressortissants)*, Paris, Editions techniques, 1959, vol. 5, p. 7, para. 15.

¹⁷¹ See State Institute of Law of the Academy of Sciences of the Soviet Union, *op. cit.*, p. 251.

(20) As to the British practice, it has been stated that:

... in principle, m.f.n. clauses ought to be interpreted unconditionally ... "those clauses have the same meaning whether that word [unconditionally] be inserted or not". ...

This rule of interpretation must, however, be qualified by the exception that it cannot be applied against a country which, as a matter of common knowledge, has adopted the conditional type of m.f.n. clause as part and parcel of its national treaty policy.¹⁷²

(21) On that matter another view was taken before the International Court of Justice by the agent of the United States in the *Case concerning rights of nationals of the United States of America in Morocco* (1952):

The United States is entirely in agreement that the meaning of the clause should be determined by reference to the intent of the parties at the time. The only difference that we have with our distinguished opponents is that they would construe the clause as conditional by referring only to the practice of the United States in interpreting *other* treaties signed under *other* circumstances, and not by what the United States and Morocco intended when they signed the treaties which are in issue before this court.¹⁷³

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

It is proper to advert to the fact that the so-called most-favoured-nation clause does not bear an invariable form. In two instances during the past twenty-five years the United States has been obliged to yield its interpretation when confronted with documentary proof that the most-favoured-nation clauses then in question were, during the negotiation of the particular treaties, expressly understood and agreed to have the wider effect claimed by the other contracting parties.¹⁷⁴

(22) It can be safely said that both doctrine and State practice today favour the presumption of the unconditionality of the most-favoured-nation clause.

Conditions of compensation

(23) In the previous paragraphs of the present commentary, as in the literature and practice concerning most-favoured-nation clauses generally, a clause is referred to as being "conditional" if it was couched in a form such as appeared in the practice of the United States until 1923. That this form, as has been shown above, has virtually disappeared, does not mean that States cannot agree to couple their most-favoured-nation agreement with conditions which make the existence of the right of the beneficiary State to most-favoured-nation treatment dependent upon the according by the beneficiary State to the granting State of an agreed form of compensation in exchange.

(24) An agreement by which, for example, most-favoured-nation treatment is promised to the beneficiary State on condition that the latter will accord certain

economic (e.g. a long-term loan) or political advantages to the granting State is perfectly feasible. Similarly, conditions can be set as to the beginning or the end of the enjoyment of most-favoured-nation treatment, etc. Obviously such or other conditions have to be inserted in the clause, or in the treaty containing it, or be otherwise agreed between the granting and beneficiary States.

(25) The articles adopted by the Commission do not deal explicitly with the so called American form of the conditional clause. However, in view of the possibility that exists for States to agree on conditions that are "separate from the favored interest and relating only to something the other party must do or not do to qualify as the most-favored-nation,"¹⁷⁵ the Commission decided to provide in the present draft for the effect of most-favoured-nation clauses made subject to a "condition of compensation", a term which has been defined in article 2. In particular, there is one type of clause made subject to a condition of compensation to which the Commission paid special attention, namely, the most-favoured-nation clause coupled with the condition of reciprocal treatment.

The clause and reciprocity

(26) When speaking of reciprocity in relation to the most-favoured-nation clause, it has to be kept in mind that normally most-favoured-nation clauses are granted on a reciprocal basis, i.e. both parties to a bilateral treaty or all parties to a multilateral treaty accord each other most-favoured-nation treatment in a defined sphere of relations. This form of reciprocity is a normal feature of the most-favoured-nation clause; it could be said to be the clause's essential ingredient. Unilateral most-favoured-nation clauses occur only exceptionally at the present time.

(27) A case in point is the treaty of 13 October 1909 by which Switzerland unilaterally granted most-favoured-nation treatment to Germany and Italy regarding the use of the railway built on the Gotthard, in Switzerland.¹⁷⁶ Such a unilateral clause can occur, as noted above,¹⁷⁷ in a treaty by which most-favoured-nation treatment is accorded to the ships of a land-locked State in the ports and harbours of the granting State. Thus in article 11 of the Treaty of Trade and Navigation between the Czechoslovak Republic and the German Democratic Republic of 25 November 1959, the latter State unilaterally granted most-favoured-nation treatment to "Czechoslovak merchant vessels and their cargoes ... on entering and leaving, and while lying in, the ports of the German Democratic Republic".¹⁷⁸ A similar situation may arise if the treaty regulates specifically the trade and the customs tariff regarding one particular kind of product only (e.g. oranges) in respect of which there is but one-way traffic between the two contracting parties.

(28) A unilateral promise, or rather a *pactum de contrahendo* concerning future agreements on unilateral

¹⁷² Schwarzenberger, *International Law and Order* (op. cit.), p. 137, quoting *British and Foreign State Papers, 1885-1886*, London, Ridgway, 1893, vol. 77, p. 796.

¹⁷³ Rejoinder of 26 July 1952, *I.C.J. Pleadings*, Morocco Case (France v. United States of America), 1950, vol. II, p. 318. For a fuller reference, see *Yearbook ... 1970*, vol. II, p. 208, doc. A/CN.4/228 and Add.1, para. 52.

¹⁷⁴ Hackworth, op. cit., p. 279.

¹⁷⁵ Snyder, op. cit., p. 21.

¹⁷⁶ Guggenheim, op. cit., p. 207.

¹⁷⁷ See article 4 above, para. (6) of the commentary.

¹⁷⁸ United Nations, *Treaty Series*, vol. 374, p. 120.

most-favoured-nation grants, is stipulated in annex F, part II, of the Treaty concerning the establishment of the Republic of Cyprus, signed at Nicosia on 16 August 1960, quoted above.¹⁷⁹

(29) Unilateral most-favoured-nation clauses, coupled with reciprocity, were included in the peace treaties which the Allied and Associated Powers concluded in 1947 with Bulgaria (article 29);¹⁸⁰ Hungary (article 33);¹⁸¹ Romania (article 31);¹⁸² Finland (article 30);¹⁸³ and Italy (article 82).¹⁸⁴ The same clause was included in the State Treaty for the re-establishment of an independent and democratic Austria (article 29).¹⁸⁵

(30) By the mere stipulation of reciprocity a unilateral clause does not become bilateral.¹⁸⁶ This can be illustrated by the following quotation from article 33 of the Hungarian Peace Treaty:

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

(a) In all that concerns duties and charges on ... the United Nations shall be granted unconditional most-favoured-nation treatment; ...¹⁸⁷

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

(31) While the American form of the conditional clause can now be deemed to have virtually disappeared, the most-favoured-nation clause coupled with the condition of reciprocal treatment still exists. It is to be noted, however, that the application of this category of clauses made subject to a condition of compensation is restricted to certain spheres, such as consular immunities and functions, matters of private international law and matters customarily dealt with by establishment treaties.

(32) It has been indicated that the shift in the policy of the United States from conditional to unconditional most-favoured-nation treatment with regard to commercial matters in the early 1920s was not accompanied by a shift in relation to consular rights and privileges, with respect to which the use of the conditional clause (or rather the clause conditional on reciprocal treatment) continued.¹⁸⁸

(33) In a letter dated 20 January 1967, the Department of State reported to the Senate Foreign Relations Com-

mittee that most of the consular agreements concluded by the United States of America contained a criminal immunity provision which was applicable to the consular personnel if the sending State concerned agreed to give "reciprocal treatment" to American consular officers.¹⁸⁹

(34) An example of this kind of clause based on reciprocal treatment is article 14 of the Italo-Turkish Consular Convention of 9 September 1929. It reads as follows:

The Consular officials of each of the High Contracting Parties shall further enjoy, subject to reciprocity, in the territory of the other Party, the same privileges and immunities as the Consular officials of any third Party of the same character and rank, so long as the latter enjoy such privileges.

The High Contracting Parties agree that neither of them shall be entitled to appeal to the advantages under a Convention with a third Party in order to claim for its Consular officials privileges or immunities other or more extended than those granted by the Party itself to the Consular officials of the other Party.¹⁹⁰

(35) A more recent instance of such a provision is the first paragraph of article 3 of the Convention on conditions of residence and navigation between the Kingdom of Sweden and the French Republic, signed at Paris on 16 February 1954:

Subject to the effective application of reciprocity, the nationals of each of the High Contracting Parties residing in the territory of the other Contracting Party shall have the right, in the territory of the other Contracting Party, under the same conditions as nationals of the most-favoured-nation, to engage in any commerce or industry, as well as in any trade or profession, that is not reserved for nationals.¹⁹¹

(36) Another recent example can be found in the Consular Convention between Poland and Yugoslavia, signed at Belgrade on 17 November 1958, article 46 of which reads as follows:

Each Contracting Party undertakes to accord the other Contracting Party most-favoured-nation treatment in all matters relating to the privileges, immunities, rights and functions of consuls and consular staff. However, neither Contracting Party may invoke the most-favoured-nation clause for the purpose of requesting privileges, immunities and rights other or more extensive than those which it itself accords to the consuls and consular staff of the other Contracting Party.¹⁹²

(37) The clause conditional upon reciprocity of treatment is a simplified form of the clause made subject to a condition of compensation.¹⁹³ According to one source:

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

From the purely logical point of view, this is quite satisfying intellectually, but not very satisfactory in practice. Quite apart from the difficulties which the interpretation of reciprocity always

¹⁷⁹ See article 4 above, para. (14) of the commentary.

¹⁸⁰ United Nations, *Treaty Series*, vol. 41, p. 21.

¹⁸¹ *Ibid.*, p. 135.

¹⁸² *Ibid.*, vol. 42, p. 3.

¹⁸³ *Ibid.*, vol. 48, p. 203.

¹⁸⁴ *Ibid.*, vol. 49, p. 3.

¹⁸⁵ *Ibid.*, vol. 217, p. 223.

¹⁸⁶ For a different view on the matter, see that of the Rapporteur of the Institute of International Law, P. Pescatore, « La clause de la nation la plus favorisée dans les conventions multilatérales », *Annuaire de l'Institut de droit international*, 1969, Basle, vol. 53, t. I, p. 204, foot-note 3.

¹⁸⁷ United Nations, *Treaty Series*, vol. 41, p. 204.

¹⁸⁸ See *Yearbook ... 1968*, vol. I, p. 186, 976th meeting, para. 8.

¹⁸⁹ Whiteman, *op. cit.*, pp. 752 and 753.

¹⁹⁰ League of Nations, *Treaty Series*, vol. CXXIX, p. 195.

¹⁹¹ United Nations, *Treaty Series*, vol. 228, p. 141.

¹⁹² *Ibid.*, vol. 432, p. 323.

¹⁹³ See *Yearbook ... 1969*, vol. II, pp. 166 and 167, doc. A/CN.4/213, para. 58.

entails, this system has the disadvantage of reducing the benefits, if any, of the most-favoured-nation clause, without eliminating the resulting disadvantages for the granting State. Of course, the beneficiary State cannot bring the clause into operation without offering the very advantages which it claims, but the unilateral nature of that step will almost always mean that the reciprocal benefits, although theoretically equivalent, will be very different in practice...¹⁹⁴

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

The most-favoured-nation clause combined with the condition of reciprocity does not seem to be conducive to the unification and simplification of international relations, a fact which deprives the clause of the few merits formerly attributed to it.¹⁹⁵

Text of the articles adopted by the Commission on the ground of the preceding considerations

(39) Article 11 describes the effect of an unconditional most-favoured-nation clause which, for the purposes of the present draft articles, is designated as a clause not made subject to a condition of compensation, a term defined in article 2. According to article 11, in the case of a most-favoured-nation clause not made subject to a condition of compensation the beneficiary State acquires the right to most-favoured-nation treatment (as defined in article 5) and the obligation to accord any compensation to the granting State does not arise for the beneficiary State. Article 12, on the other hand, describes the effect of a most-favoured-nation clause made subject to a condition of compensation. It states that, in the case of a most-favoured-nation clause made subject to a condition of compensation, the beneficiary State acquires the right to most-favoured-nation treatment only upon according the agreed compensation to the granting State. Article 13 describes the effect of a most-favoured-nation clause made subject to a condition of reciprocal treatment, a term which has also been defined in article 2. The Commission deemed it appropriate to provide separately for this type of condition in view of its being the most commonly found among the possible conditions of compensation. The rule of article 13 is an application of the general rule contained in article 12 to the specific case of most-favoured-nation clauses subject to the condition of reciprocal treatment.

(40) A most-favoured-nation clause can be made subject to the condition of reciprocal treatment by the wording of the clause itself, or by another provision of the treaty containing the clause or of any other treaty, or by any other kind of agreement between the granting and beneficiary States.

(41) The meaning of reciprocal treatment, as indicated in paragraph 1 (f) of article 2,¹⁹⁶ is "equivalent" treatment i.e. treatment of the same kind and of the same measure. For instance, if both the granting State and the beneficiary State permit each other's nationals access to their courts without depositing security for costs (*cautio judicatum solvi*), this constitutes reciprocal treatment, or similarly if they permit each other's nationals the free exercise of a certain kind of trade. This is called in French doctrine "réciprocité trait pour trait". As will be seen in connexion with article 20, a most-favoured-nation clause of such a kind does not possess the same automaticity as the unconditional form, because the beneficiary State can enjoy the treatment extended by the granting State to a third State only after assuring the granting State that it will accord to it or to persons or things in a determined relationship with it treatment of the same kind.

(42) The conditions of reciprocity in a most-favoured-nation clause can give rise to serious questions of interpretation, mainly if the relevant rules of the interested countries differ substantially from each other.¹⁹⁷ This inherent difficulty, however, does not alter the validity of the rule.

(43) The arising and the termination or suspension of rights under a most-favoured-nation clause combined with reciprocal treatment are dealt with later.¹⁹⁸

Article 14. Compliance with agreed terms and conditions

The exercise of rights arising under a most-favoured-nation clause for the beneficiary State or for persons or things in a determined relationship with that State is subject to compliance with the relevant terms and conditions laid down in the treaty containing the clause or otherwise agreed between the granting State and the beneficiary State.

Commentary

(1) As a result of the Commission's consideration of the articles dealing with most-favoured-nation clauses made subject to conditions, it emerged that there might be a gap in the draft if provision were not to be made, not only for conditions of compensation and, more specifically, of reciprocal treatment, but also for the case of conditions concerning the exercise of rights arising under a most-favoured-nation clause. It is apparent that the word "conditions" is used in practice to cover not only those according to which the right of the beneficiary State under the clause is made subject to its giving concessions in exchange to the granting State, but also those on whose fulfilment the exercise of such a right is made dependent. The latter conditions are common in practice and may be imposed by the internal law of the granting State or may be agreed between the granting and beneficiary States in the treaty containing the clause or otherwise.

¹⁹⁴ Piot, *loc. cit.*, pp. 9 and 10.

¹⁹⁵ Level, *loc. cit.*, p. 338, para. 37.

¹⁹⁶ See article 2 above, paras. (7) to (11) of the commentary.

¹⁹⁷ Batiffol, *op. cit.*, pp. 213 and 214, No. 188.

¹⁹⁸ See articles 20 and 21 below, and the commentaries thereto.

(2) As an authoritative source has explained:

The conditions attaching to the grant of a specific type of more favourable treatment claimed under the most-favoured-nation clause are not to be confused with the conditional form of the most-favoured-nation clause. What is involved here is not reciprocal treatment within the meaning of the conditional form of the most-favoured-nation clause but requirements relating to the factual content of the more favourable treatment itself (e.g. a certificate of qualification as a requirement for the licensing of an alien to engage in a particular trade, certificates of origin or of analysis for purposes of proof of origin and customs classification of goods). Such factual requirements must, however, be objectively related to the advantage which is to be granted and must not be used for the purpose of engaging in concealed discrimination.¹⁹⁹

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

(3) Article 22 (Compliance with the laws and regulations of the granting State) applies to the case of conditions that may be imposed by the internal law of the granting State. The present article is designed to cover the case of other conditions agreed upon between the granting and beneficiary States for the purpose of completeness of the draft. The wording of article 14 repeats that of the first sentence of article 22, with the necessary adjustments. In particular, the reference is to "terms and conditions", in order further to emphasize that what is involved is agreed stipulations regarding the exercise of rights under a most-favoured-nation clause.

Article 15. Irrelevance of the fact that treatment is extended to a third State against compensation

The acquisition without compensation of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause not made subject to a condition of compensation is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended against compensation.

Commentary

(1) It is not only most-favoured-nation promises that can be classified as unconditional or conditional on reciprocal treatment or on another kind of compensation; the favours extended by the granting State to third States can be classified in a similar manner; they can be granted unilaterally as a gift, in theory at least, or they can be accorded against some kind of compensation. For example, the granting State may reduce its tariffs on oranges imported from a third State unilaterally or it can bind this reduction to a tariff reduction by the third State on the textiles imported by the latter from the granting State. To give another example, the granting State can assure the third State that the consuls of the latter will have immunity from criminal jurisdiction uni-

laterally or it may agree with the third State that the grant of immunity from criminal jurisdiction will be reciprocal. If in such types of cases the granting State offers the most-favoured-nation treatment to a beneficiary State unconditionally, the question arises: are the rights of the beneficiary State affected by whether the promises of the granting State to the third State were made subject to certain conditions or not?

(2) There is a contradictory practice regarding the question just posed. In certain cases the courts reached conclusions different from the conclusion reflected in article 15. Thus in 1919 the highest Court of Argentina rejected an appeal against a decision of the High Court of Santa Fé and ruled that:

... neither the appellant's invocation of the powers conferred upon consuls under the treaties concluded with the United Kingdom in 1825 (article 13) and with the Kingdom of Prussia and the States of the German Customs Union in 1857 (article 9), which he claims extend to consuls of the Kingdom of Italy by virtue of the most-favoured-nation clause inserted in the agreements concluded with that Kingdom, nor precedent—if any—would affect the settlement of the point at issue under federal law. In the first place, since these were concessions granted subject to reciprocity, it would have been necessary to show that the Italian Government granted, or was prepared to grant, those same concessions to consuls of Argentina...²⁰⁰

(3) A German court in 1922 rejected an appeal by a French plaintiff against an order to deposit security for costs in an action brought by him against a German national. Section 110 of the German Code of Civil Procedure laid down that aliens appearing as plaintiffs before German courts must at the defendant's request deposit a security for costs. That provision did not apply to aliens whose own State did not demand security for costs from Germans appearing as plaintiffs. In article 291 (I) of the Treaty of Versailles, Germany undertook:

to secure to the Allied and Associated Powers, and to the officials and nationals of the said Powers, the enjoyment of all the rights and advantages of any kind which she may have granted to Austria, Hungary, Bulgaria or Turkey, or to the officials and nationals of these States by treaties, conventions or arrangements concluded before August 1, 1914, so long as those treaties, conventions or arrangements remain in force.

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

¹⁹⁹ Jaenicke, *loc. cit.*, p. 499. See the "Swiss Cow" case, cited in para. (20) of the commentary to articles 9 and 10 above.

²⁰⁰ See Secretariat Digest (*Yearbook ... 1973*, vol. II, p. 118, doc. A/CN.4/269, foot-note 2).

Bulgaria was based on reciprocity and that, as France did not grant such reciprocal treatment, its nationals were not entitled to an exemption from the duty to deposit security for costs.²⁰¹

(4) The following instance, although coloured with references to French internal legislation, reveals the various trends in French thinking on the problem at issue. The brothers Betsou, Greek nationals, in 1917 leased certain premises in Paris for commercial use. The lease expired in 1926. The lessors refused to renew the lease, whereupon the plaintiffs claimed 200,000 francs as damages for eviction. Their claim was based on the provisions of the law of 30 June 1926, which granted certain privileges to those engaged in business activities. In support of their claim to the privileges of this law in spite of their foreign nationality, they cited the Franco-Greek Convention of 8 September 1926, and through the operation of the most-favoured-nation clause contained therein, the Franco-Danish Convention of 9 February 1910, Denmark being in this regard the most-favoured-nation. Article 19 of the law of 1926 provided that aliens should be entitled to its privileges only subject to reciprocity. The Civil Tribunal of the Seine held for the plaintiffs and said that, through the operation of the most-favoured-nation clause, Greek nationals in France enjoyed the same privileges in commerce and industry as Danish nationals. The Franco-Danish Convention stipulated that in the exercise of their commercial activities Danes enjoyed all the privileges granted to French nationals by subsequent legislation. The law of 30 June 1926 undoubtedly conferred privileges upon those who were engaged in commerce. Although the terms of article 19 of the French law required reciprocity in legislation as an absolute and imperative rule, and although there was no legislation on commercial property in Denmark, the French law should be interpreted in accordance with the Franco-Danish Convention. Danish subjects could not be deprived of their rights and privileges by subsequent French legislation. The Tribunal said:

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

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

the rights of foreigners to hold commercial property in Denmark.²⁰²

(5) An important French source finds the solution of the lower court, the Civil Tribunal of the Seine, justified. According to this source:

Reciprocity (whether that of article 11 [of the Civil Code] or that deriving from a reciprocity clause) is concrete reciprocity. On the other hand, the most-favoured-nation clause, when it is bilateral, establishes a kind of abstract reciprocity: States mutually undertake to accord to each other the treatment which they accord to some more-favoured third States. Here the clause appears like one of those treaties referred to in article 11 [of the Civil Code] which grant exemption from the requirement of material reciprocity.²⁰³

(6) A convincing motivation for the solution proposed in article 15 can be found in a Greek decision reported as follows. The Convention concerning Establishment and Judicial Protection concluded between Greece and Switzerland on 1 December 1927 provides in article 9 that:

In no case shall the nationals of either of the Contracting Parties be subjected on the territory of the other Contracting Party to charges, customs duties, taxes, dues or contributions of any nature different from or higher than those which are or will be imposed on subjects of the most-favoured-nation.

Article 11, which relates to commercial, industrial, agricultural and financial companies duly constituted according to the laws of one of the Contracting Parties and having their headquarters on its territory, provides that the said companies

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

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

Whereas, in economic treaties in particular, the purpose of the most-favoured-nation clause is to avoid the danger that the subjects of Contracting States might possibly be placed in an unfavourable position compared with subjects of other States in the context of international economic competition. Through the operation of that clause, each of the two Contracting States grants to the other the favours which it has already granted to a third State and undertakes to grant it any favours which it may grant to a third State in future, for the duration of the treaty. Provided

²⁰¹ *Security for Costs (Treaty of Versailles) Case*, Germany, Upper District Court, Frankfurt-on-the-Main, 11 December 1922 (*ibid.*, p. 128, doc. A/CN.4/269, paras. 24 and 25).

²⁰² *Betsou v. Volzenlogel*, France, Civil Tribunal of the Seine, 23 December 1927; Court of Appeal of Paris (First Chamber), 24 December 1928 (*ibid.*, p. 129, doc. A/CN.4/269, paras. 28-30).

²⁰³ Level, *loc. cit.*, p. 338, para. 36.

that there is no stipulation to the contrary in the agreement, such latter favours accrue *ipso jure* to the beneficiary of the clause, which does not have to furnish any additional compensation, even where the concessions granted to the third State are not unilateral but are subject to reciprocity. When interpreted in that sense, the clause achieves the purpose for which it was designed, namely, assimilation in each of the two States, in respect of the matters to which the clause relates, of the subjects or enterprises of the other State to the subjects or enterprises of a third and favoured country.

Whereas, in the current case, the most-favoured-nation clause embodied in the convention between Greece and Switzerland is simply stated without restriction or onerous conditions, and as such confers upon Swiss enterprises operating in Greece the right to fiscal exemption under the conditions under which the same exemption is granted to British enterprises, even if Greek enterprises do not enjoy in Switzerland the favour which they enjoy in Great Britain. Consequently, the impugned decision ... should for that reason be set aside...²⁰⁴

(7) The Commission believes that the rule stated in article 15 is in conformity with modern thinking on the operation of the most-favoured-nation clause. If the clause is not made subject to a condition of compensation, then the beneficiary State and the persons or things in a determined relationship with it acquire automatically the favours extended by the granting State to a third State or to persons or things in a determined relationship with it in the manner and under the conditions described in articles 9 and 10. If the most-favoured-nation clause in question is not explicitly made subject to a condition of compensation or if it is silent concerning such a condition, then, in the view of the Commission, the beneficiary State cannot be refused the treatment extended by the granting State to a third State on the ground that that treatment has been given against reciprocal treatment or against any other compensation. This is obvious if it is considered that the American form of conditional clause has virtually gone out of use. It seems to be evident also in spheres other than trade. In these spheres the parties to a most-favoured-nation clause can freely agree on granting each other most-favoured-nation treatment subject to reciprocal treatment or any other kind of compensation. In such cases the question does not arise. If they fail to do so, however, it follows from the nature of an unconditional most-favoured-nation clause that the granting State cannot withhold from the beneficiary State the treatment extended by it to a third State on the ground that that latter treatment was not extended gratuitously but against reciprocity of treatment or any other kind of compensation.

(8) On the basis of the foregoing, the Commission found it appropriate to adopt a rule stating the irrelevance of the fact that treatment is extended to a third State against compensation. The use of the phrase "is not affected by the mere fact", in this and the following four articles, is intended to underline the "irrelevance" aspect of their provisions, which alone justifies their inclusion in the draft. In short, that phrase is intended to emphasize that the right to most-favoured-nation treatment exists, not-

withstanding the modalities of the extension of treatment by the granting State to the third State. The rule embodied in this article is in accordance with the basic purposes of a most-favoured-nation clause and also with the presumption of the unconditionality of that clause.

Article 16. Irrelevance of limitations agreed between the granting State and a third State

The acquisition of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended under an international agreement between the granting State and the third State limiting the application of that treatment to relations between them.

Commentary

(1) This rule clearly follows from the general rule regarding third States of the Vienna Convention (articles 34 and 35) and also from the nature of the most-favoured-nation clause itself. The statement of the rule is warranted, however, by the fact that there exist a number of agreements aiming more or less clearly at a result of the kind referred to in the article, notwithstanding the doubts about the effect of such agreements upon the rights of third States, beneficiaries of a most-favoured-nation clause. Such agreements can take the form of treaty provisions ("clauses réservées"), or they may be implied in certain multilateral treaties.

(2) The rule proposed in the article applies to most-favoured-nation clauses irrespective of whether they belong to the unconditional type or take the form of a clause conditional upon any form of compensation, in particular reciprocal treatment. The rule was formulated in paragraph 2 of the resolution adopted by the Institute of International Law at its fortieth session, in 1936, as follows:

This régime of unconditional equality [established by the operation of an unconditional most-favoured-nation clause] cannot be affected by the contrary provisions of ... conventions establishing relations with third States.²⁰⁵

(3) In the League of Nations Economic Committee there was a discussion of the question, originally raised at the Diplomatic Conference held at Geneva to draw up an international convention on the abolition of import and export prohibitions and restrictions, whether States not parties to the proposed convention could, by virtue of bilateral agreements based on the most-favoured-nation clause, claim the benefit of any advantages mutually conceded by the signatories to the international convention. At the Conference it was soon realized, however, that that question could not be answered in the convention, which could not affect the contents of bilateral agreements based on the most-favoured-nation clause. In

²⁰⁴ Fiscal Exemption Case in Greece; Greece, Conseil d'État, 1954. See Secretariat Digest, (*Yearbook ... 1973*, vol. II, p. 138, doc. A/CN.4/269, paras. 58 and 59).

²⁰⁵ See *Yearbook ... 1969*, vol. II, p. 181, doc. A/CN.4/213, annex II.

the Economic Committee, a proposal was made to adopt a provision designed to restrict the stipulations of the convention to the contracting parties.²⁰⁶

(4) There are a number of conventions that contain clauses by which the parties intend to restrict certain benefits to the relations established between themselves. Thus the first paragraph of article 6 of the International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels, signed at Brussels on 10 April 1926,²⁰⁷ reads as follows:

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

The following remark has been made by an author concerning this provision:

Such a provision has the disadvantage of failing to release contracting States from their obligations under previous clauses, of having the status of *res inter alios acta* for the other States which are parties to those clauses and thus placing the States which subscribe to it in the position of being potential violators of the clause.²⁰⁸

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

(5) A somewhat milder version of the clause was inserted in the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, also signed at Brussels on 10 April 1926.²⁰⁹ Article 14 of the Convention reads as follows:

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

Nevertheless the principle formulated in the preceding paragraph does not affect the right of the contracting States not to apply the provisions of this Convention in favour of the nationals of a non-contracting State.

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

Nothing in this Charter shall be interpreted to require a Member to accord to non-Member countries treatment as favourable as that which it accords to Member countries under the provisions of the Charter, and failure to accord such treatment shall not be regarded as inconsistent with the terms of the spirit of the Charter.²¹⁰

²⁰⁶ *Ibid.*, pp. 179 and 180, doc. A/CN.4/213, annex I, under the heading "Relations between bilateral agreements based on the most-favoured-nation clause and economic plurilateral conventions".

²⁰⁷ League of Nations, *Treaty Series*, vol. CLXXVI, p. 209.

²⁰⁸ Vignes, *loc. cit.*, p. 291.

²⁰⁹ League of Nations, *Treaty Series*, vol. CXX, p. 209.

²¹⁰ *United Nations Conference on Trade and Employment* (Havana, November 1947-March 1948), *Final Act and Related Documents* (United Nations publication, Sales No. 1948.II.D.4), p. 51.

Although this provision is not a "clause réservée", it was severely criticized as long ago as 1948. The representative of the Soviet Union stated in the Economic and Social Council that:

Such a provision was equivalent to authorization of a departure from the most-favoured-nation principle in reciprocal relations with non-member countries, and was in patent contradiction to the purpose of expanding world trade...²¹¹

(7) From a strictly legal point of view, paragraph 4 of article 98 of the ITO Charter is an empty provision because it states only the obvious, namely, that the Charter does not impose obligations upon the members vis-à-vis non-members. The provision has, however, a certain propagational effect, even if it is not assumed that it indirectly encourages the parties to the Charter to break the obligations which may exist for them under bilateral most-favoured-nation clauses with non-members. However, the ITO provision is not, and never was, in force and can hardly be considered as having any effect at present, not even through article XXIX of the General Agreement on Tariffs and Trade, paragraph 1 of which states that:

The Contracting Parties undertake to observe to the fullest extent of their executive authority the general principles ... of the Havana Charter...²¹²

(8) According to one source,²¹³ the idea of the provision contained in article 98 of the Havana Charter is reminiscent of the old conditional most-favoured-nation clause, in that countries that refuse to become parties to the General Agreement—and to make the tariff concessions that such participation would entail—may not be allowed to enjoy freely the benefits of that Agreement.

(9) No author expressly denies the rule proposed in article 16. As stated by one writer:

The validity of the "clause réservée" is difficult to assess. Since the "clause réservée" is *res inter alios acta* as far as the beneficiary State entitled to claim most-favoured-nation treatment is concerned, it is hard to see how that clause, to which the State in question has not acceded, can reduce the scope of the commitments assumed towards it by the granting State.²¹⁴

The same writer tries to distinguish between two situations:

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

²¹¹ See *Official Records of the Economic and Social Council, Seventh Session*, 195th meeting, p. 329.

²¹² GATT, *Basic Instruments and Selected Documents*, vol. IV (*op. cit.*), p. 49. For a contrary view, see Jackson, *op. cit.*, p. 118.

²¹³ Hawkins, *op. cit.*, p. 85.

²¹⁴ Level, *loc. cit.*, p. 336, para. 20.

avoid their application by virtue of a commitment entered into with the favoured State to which the granting State has not been a party.²¹⁵

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

We know the solution ... given by the International Court of Justice [in the *Anglo-Iranian Oil Co. case*]. The legal basis for most-favoured-nation treatment lies in the treaty which provides for such treatment, and the advantages accorded to the third State apply to the beneficiary State only by reference. Consequently, the "clause réservée" cannot be invoked against the State which is a beneficiary of the most-favoured-nation clause, since the rights of that State do not derive from the treaty containing the "clause réservée".²¹⁶

Article 17. Irrelevance of the fact that treatment is extended to a third State under a bilateral or a multilateral agreement

The acquisition of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended under an international agreement, whether bilateral or multilateral.

Commentary

(1) The Commission has stated above that:

It is not necessary ... that the treatment actually extended to the third State, with respect to itself or the persons or things concerned, be based on a formal treaty or agreement. The mere fact of favourable treatment is enough to set in motion the operation of the clause. However, the fact of favourable treatment may consist also in the conclusion or existence of an agreement between the granting State and the third State by which the latter is entitled to certain benefits. The beneficiary State, on the strength of the clause, may also demand the same benefits as were extended by the agreement in question to the third State.²¹⁷

It would seem obvious that, unless the clause otherwise provides or the parties to the treaty otherwise agree, the acquisition of rights by the beneficiary of the clause is not affected by the mere fact that the granting State extended the favoured treatment to a third State under an international agreement, whether bilateral or multilateral.

The most-favoured-nation clause and multilateral agreements

(2) However, the question whether a most-favoured-nation clause attracts benefits arising from a multilateral agreement is not without its own history. The relation

between bilateral agreements based on the most-favoured-nation clause and "economic plurilateral conventions" was already a matter of discussion in the period of the League of Nations. The following is an excerpt from the conclusions of the Economic Committee of the League of Nations:

During the Diplomatic Conference held at Geneva to draw up an International Convention on the Abolition of Import and Export Prohibitions and Restrictions, the question arose whether States not parties to that Convention could, by virtue of bilateral agreements based on the most-favoured-nation clause, claim the benefit of any advantages mutually conceded by the signatories of the International Convention. In deference to this consideration, it was even proposed to include a clause to that effect in the Convention. It was soon realized, however, that this question could not be answered in the Convention, which could not affect the contents of bilateral agreements based on the most-favoured-nation clause. The Conference realized the great importance of the problem, both for the general economic work of the League and for the conclusion of future economic agreements under the League's auspices, and the nature and field of application of such agreements. It was urged at the Conference that the conclusion of plurilateral conventions would be hindered if countries, while not acceding to such agreements, could still, without giving any counter-engagements, avail themselves of the engagements undertaken by the signatory States of such conventions.

The Economic Committee of the League was asked to make an exhaustive study of the most-favoured-nation clause in commercial treaties and to put forward proposals regulating it in as comprehensive and as uniform a manner as possible, and it has carefully considered the question, which is the subject of the present report. It took the view that the World Economic Conference of Geneva, when it recommended the conclusion of plurilateral economic conventions with the object of improving the world economic situation and the application of the most-favoured-nation clause in the widest and most unconditional form, probably did not quite realize that—up to a point—these two recommendations might clash. One argument—and a very sound one—brought up in the Economic Committee was that in certain cases countries would have little or no interest in acceding to a plurilateral economic convention or in undertaking the commitments it entailed if, by invoking the most-favoured-nation clause, as embodied in bilateral agreements, they could claim as of right and without incurring corresponding obligations, that the obligations contracted by the signatory States of the plurilateral convention should apply to themselves. It was strongly urged, indeed, that such possibility might seriously impair the whole future economic work of the League and that the only means of averting the danger would be to adopt a provision whereby the most-favoured-nation clause embodied in bilateral commercial treaties would not, as a rule, affect plurilateral economic conventions.

It was objected, however, that a clause of this kind, instead of leading, as the World Economic Conference recommended, to the unlimited application of the most-favoured-nation clause, would actually check it, and that, more especially in countries where the unlimited application of this clause is the basis of commercial relations with foreign countries, such a reservation would probably be misunderstood and might give rise to a hostile attitude towards the League's economic work. It was further argued that a State might quite conceivably, on wholly serious and genuine grounds, be unable to undertake the commitments involved by an international economic convention; that the final decision whether it could do so or not would lie with the State itself; and that it could hardly be asked, as a result of a most-favoured-nation clause drafted *ad hoc* in bilateral commercial treaties, to give up the right in cases of this kind to refuse to accept differential treatment on the part of one or more other States.

²¹⁵ *Ibid.*, para. 21.

²¹⁶ *Ibid.*

²¹⁷ See article 5 above, para. (6) of the commentary.

The arguments advanced on both sides are so cogent that the Economic Committee has not found it possible at this moment to find a general and final solution for this difficult problem.

It is unanimously of opinion, however, that, although this reservation in plurilateral conventions may appear in some cases legitimate, it can only be justified in the case of plurilateral conventions of a general character and aiming at the improvement of economic relations between peoples, and not in the case of conventions concluded by certain countries to attain particular ends the benefits of which those countries would, by such a procedure, be refusing to other States when the latter might, by invoking most-favoured-nation treatment, derive legitimate advantages.

The said reservation should also be expressly stipulated and should not deprive a State not a party to the plurilateral convention of advantages it enjoys either under the national laws of the participating State or under a bilateral agreement concluded by the latter with a third State itself not a party to the said plurilateral convention.

Finally, this reservation should not be admitted in cases in which the State claiming the advantages arising under the plurilateral convention, though not acceding to it, would be prepared to grant full reciprocity in the matter.

The Economic Committee expresses the view that countries which, with reference to the terms of plurilateral economic conventions, agreed to embody in their bilateral agreements based on the most-favoured-nation clause a reservation defined in accordance with the principles set forth above would not be acting contrary to the recommendations of the World Economic Conference of Geneva, and consequently will not be acting in a manner inconsistent with the objects which the League has set itself to attain.²¹⁸

(3) Reservations of this kind were indeed embodied in several European treaties in the following years. One example is the following provision of a commercial treaty concluded between the Economic Union of Belgium and Luxembourg and Switzerland on 26 August 1929:

It is furthermore understood that the most-favoured-nation clause may not be invoked by the High Contracting Parties in order to obtain new rights or privileges which either of them may hereafter grant under collective conventions to which the other is not a party, provided that the said conventions are concluded under the auspices of the League of Nations or registered by it and open for the accession of the States. Nevertheless, the High Contracting Party concerned may claim the benefit of the rights or privileges in question if such rights or privileges are also stipulated in conventions other than collective conventions which fulfil the aforementioned conditions, or if the Party claiming such benefits is prepared to grant reciprocal treatment."²¹⁹

(4) In the era preceding the World Monetary and Economic Conference held at London in 1933, proposals for reaching agreement as to preferred status for collective arrangements came from Europe and were intended in some form or another to cope with American competition in foreign trade on the European market.²²⁰ Such proposals met with strong opposition from the United States.

²¹⁸ League of Nations, "Recommendations of the Economic Committee relating to Tariff Policy and the Most-Favoured-Nation Clause" (E.805.1933.II.B.1), pp. 102-104.

²¹⁹ League of Nations, *Treaty Series*, vol. CV, p. 13.

²²⁰ See details in J. Viner, *The Customs Union Issue*, Studies in the administration of international law and organization, No. 10, New York, Carnegie Endowment for International Peace, 1950, pp. 22 *et seq.*

The situation changed somewhat at the 1933 Conference, where the United States Secretary of State, Mr. Cordell Hull, outlined the conditions under which the United States would be willing to accept the exception of multilateral arrangements from most-favoured-nation commitments. The provision proposed by Mr. Hull for adoption by the Conference read as follows:

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

- (a) Include a trade area of substantial size;
- (b) Call for reductions that are made by uniform percentages of all tariff rates or by some other formula of equally broad applicability;
- (c) Are open to the accession of all countries;
- (d) Give the benefit of the reductions to all countries which in fact make the concessions stipulated; and
- (e) When the countries party to the plurilateral agreement do not, during the term of the plurilateral treaty, materially increase trade barriers against imports from countries outside of such agreement.²²¹

The London Conference, however,

was not only fated to be an addition to the already long list of abortive international economic conferences but, as the result of President Roosevelt's famous message blasting the currency stabilization proposals before the Conference, it was destined to collapse without even the standard amount of pretence that it had succeeded in accomplishing anything of consequence.²²²

Later in 1933, at the Seventh International Conference of American States, held at Montevideo, Mr. Hull submitted and obtained the adoption in principle of a draft agreement having much in common with the proposal he had submitted to the London Conference.

(5) The United States proposal led to the opening for signature on 15 July 1934 of an Agreement concerning non-application of the most-favoured-nation clause to certain multilateral economic conventions.²²³ The substantive provisions of the Agreement provide:

Article I

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

²²¹ League of Nations, Monetary and Economic Conference, *Reports Approved by the Conference on 27 July 1933, and Resolutions Adopted by the Bureau and the Executive Committee* (C. 435.M.20.1933.II [Conf. M.E.22(1)]), p. 43.

²²² Viner, *op. cit.*, p. 36.

²²³ Agreement between the United States of America, Economic Union of Belgium and Luxembourg, Colombia, Cuba, Greece, Guatemala, Nicaragua and Panama to refrain from invoking the Obligations of the Most-favored-nation clause for the purpose of obtaining the Advantages or Benefits established by Certain Economic Multilateral Conventions (League of Nations, *Treaty Series*, vol. CLXV, p. 9).

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

Article II

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

(6) Notwithstanding the 1935 statement of Secretary of State Hull, quoted in the Commission,²²⁴ this Agreement can hardly be interpreted otherwise than as an expression of the view that a most-favoured-nation pledge, unless otherwise provided, extends the benefits granted under a multilateral agreement. It would seem that the position taken by the United States at the time has been similarly interpreted by an American source.²²⁵ The intention of the Agreement obviously was to create by common consent a conventional and if possible widely accepted exception to the general rule. The experiment failed because only three States became parties to the Agreement: Cuba, Greece and the United States. Little significance can be attributed to the fact that when signing the Agreement, *ad referendum*, the Belgian Ambassador took the attitude that it did not constitute a new rule but merely stated that which was already international law.²²⁶ What the Belgian Ambassador considered settled law in 1935 was put forward by the Belgian Premier in 1938 as a proposal. Mr. van Zeeland, in his report submitted upon the request of the British and French Governments, recommended that:

Exceptions to MFN ... be admitted in order to allow the formation of group agreements aimed at lowering tariff barriers, provided these are open to the accession of other States.²²⁷

(7) The idea that the most-favoured-nation clause should not attract benefits resulting from provisions of multilateral trade conventions open for all States found its way into the resolution adopted by the Institute of International Law at its fortieth session (Brussels, 1936). Paragraph 7 of that resolution states *inter alia*:

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

...

to the treatment resulting from the provisions of conventions open for signature by all States whose purpose is to facilitate and stimulate international trade and economic relations by a systematic reduction of customs duties.²²⁸

(8) With regard to theory, one writer proposed that a distinction be made in the sphere of international trade

and customs tariffs between "collective treaties of special interest" and "collective treaties of general interest".²²⁹ Most-favoured-nation clauses embodied in bilateral treaties would attract the benefits stipulated in the former but would not give the right to advantages promised in treaties of the latter type because, the argument went, those treaties being open to all States, their advantages could be easily acquired by accession. In that way acceding States would assume also the obligations imposed by the treaty and put themselves in a position of equality with the other parties to it, whereas through the operation of a most-favoured-nation clause they would claim only the advantages of the multilateral treaty without submitting to its obligations.²³⁰

(9) This theory received strong criticism from another writer. Referring to the argument based on the openness of the multilateral treaties in question, he wrote:

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

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

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

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

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

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

²²⁴ Secretary of State Cordell Hull to President Roosevelt, 10 May 1935, MS. Department of State, File 710G, Commercial Agreement/108 (see *Yearbook ... 1968*, vol. I, p. 186, 976th meeting, para. 11 and foot-note 4).

²²⁵ Whiteman, *op. cit.*, p. 765.

²²⁶ Hackworth, *op. cit.*, p. 293.

²²⁷ League of Nations, *Commercial Policy in the Interwar Period: International Proposals and National Policies* (Ser. L.O. N.P.1942.II.A.6), p. 84.

²²⁸ *Yearbook ... 1969*, vol. II, p. 181, doc. A/CN.4/213, annex II.

²²⁹ N. Ito, *La clause de la nation la plus favorisée*, Paris, les Editions internationales, 1930.

²³⁰ Similarly, G. Scelle, *Précis de droit des gens - Principes et systématique*, Paris, Sirey, 1934, vol. II, p. 390.

We are thus led to conclude that the most-favoured-nation clause is indeed an obstacle to the negotiation of plurilateral treaties and that that obstacle can be removed only by an express reservation in the instrument embodying the clause or by the amicable agreement of the States beneficiaries of the clause.²³¹

(10) The preceding views have received support from another authority, who writes:

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

...

It must be recognized that, from the point of view of legal technique, the latter solution [an express reservation or the amicable agreement of the States beneficiaries of the clause] was more correct, since it shows greater concern to respect the concordance of the will of States, which is the only sound basis for positive law.²³²

GATT and non-member States

(11) The General Agreement on Tariffs and Trade does not include a provision on the lines of articles 98, paragraph 4, of the Havana Charter.²³³ The cornerstone of the General Agreement is an unconditional most-favoured-nation clause. The Agreement is open to accession by all States, or at least that is how certain authors²³⁴ interpret the text of article XXXIII, which reads as follows:

A government not party to this Agreement ... may accede to this Agreement ... on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority.²³⁵

(12) What is the position of third States, not members of GATT? Can they claim GATT advantages through the operation of a most-favoured-nation clause concluded with a GATT member State? That question has been answered in the affirmative by a recognized authority on GATT matters, who has written:

Any advantage granted by a GATT contracting party to any other country must be granted to all contracting parties. Thus advantages granted by a contracting party to a non-GATT member must also be granted to all contracting parties. Consequently, if A and B are GATT members but X is not and A concludes a bilateral trade agreement with X, all advantages given to X in that agreement must also be extended to B. And *vice versa*, if the A-X treaty has a MFN clause, X derives all the

advantages that A owes GATT members by virtue of the entire GATT agreement. Thus the impact of GATT goes well beyond its membership. Some suggestion was made at the 1947 Geneva meetings that GATT benefits should apply only to GATT members, but this idea was rejected.⁹ In some instances the net result is greatly to reduce the incentive for a nation to enter GATT since, if it has a most-favoured-nation bilateral treaty with its principal trading partners and these partners are GATT members, it obtains most of the advantages of GATT without granting anything to those GATT members with which it has no trade agreements.¹⁰

⁹ United Nations document E/PC/T/C.II/3 (1946), p. 14.

¹⁰ ... This may explain why relatively few Latin American countries have become members of GATT. Among those which are not members are Costa Rica, Ecuador, El Salvador, Paraguay and Venezuela.²³⁶

(13) The Working Group on organizational and functional questions of GATT considered in 1955 the question of the extension by contracting parties to non-contracting parties of the benefits of the Agreement by means of bilateral agreements. It was pointed out in the discussion that non-contracting parties frequently received all the benefits of the Agreement without having to undertake its corresponding obligations. Despite some dissatisfaction with that situation, the majority consensus was that the attitude which the contracting party wished to adopt in that respect was a matter for each contracting party to decide.²³⁷

(14) According to the Soviet textbook of international law, Austria after its accession to the General Agreement did not immediately extend GATT rates of customs duties to the Soviet Union, notwithstanding the most-favoured-nation treatment provided for by treaty between the two countries. The extension of such rates took place only upon the express demand of the USSR. Other Western European countries having concluded treaties of the same type with the Soviet Union extended GATT benefits to Soviet products automatically.²³⁸

Other open multilateral agreements and States not parties

(15) Before the United States became a party to the Agreement on the importation of educational, scientific and cultural materials of 22 November 1950 (Florence Agreement),²³⁹ it claimed, under most-favoured-nation clauses, the same treatment for United States products as was accorded by a party to the Agreement to the products of another party. Thus, on 12 June 1963, the Department of State instructed the United States Embassy at Rome:

In view of the disadvantageous competitive position in which United States exports of scientific equipment have been put by the Italian Government's action, it is suggested that the Embassy take the matter up informally with the proper Italian authorities. The objective of such discussions should be to obtain duty-free treatment of such equipment if imported from the United States

²³¹ E. Allix, "Les aspects juridiques de la clause de la nation la plus favorisée", *Revue politique et parlementaire*, Paris, vol. 148 (July-September 1931), pp. 231 and 232.

²³² Ch. Rousseau, *Principes généraux du droit international public*, Paris, Pédone, 1944, vol. I, pp. 777 and 778.

²³³ See article 16 above, para. (6) of the commentary.

²³⁴ Sauvignon, *op. cit.*, p. 267.

²³⁵ GATT, *Basic Instruments and Selected Documents*, vol. IV (*op. cit.*), p. 51.

²³⁶ Jackson, *op. cit.*, pp. 257 and 258.

²³⁷ GATT document L/327, quoted in K. Hasan, *op. cit.*, p. 78, foot-note 2. See also *Yearbook ... 1970*, vol. II, p. 230, doc. A/CN.4/228 and Add.1, para. 187.

²³⁸ State Institute of Law of the Academy of Sciences of the Soviet Union, (*op. cit.*), p. 270.

²³⁹ United Nations, *Treaty Series*, vol. 131, p. 25.

for sale to approved institutions. In its approach to the Italian Government, the embassy might point out that article XIV-1 of our FCN Treaty with Italy^[240] and article I:1 of GATT^[241] provide for unconditional most-favored-nation treatment of United States products. Although such treatment is subject to specified exceptions, the Florence Agreement does not appear to fall within any of these exceptions. If Italy accords duty-free treatment under certain circumstances to scientific equipment of any other country, then it must accord the same treatment to imports of United States scientific equipment.²⁴²

In connexion with its presentation to Congress of proposed implementing legislation of the United States for this Agreement, the Executive prepared an affirmative reply to the question whether a country not a party to the Agreement would "be entitled under the most-favoured-nation clause to the duty-free treatment accorded by a party to the Agreement to another such party", and it was explained that "the United States considers that legally a country not a party to the agreement would be entitled to such treatment pursuant to an unconditional most-favoured-nation clause with a party thereto", although it was recognized that some parties to the agreement might give a negative answer to the question.²⁴³

(16) In a discussion on 21 October 1957, at a Meeting of Governmental Experts on the Agreement on the Importation of Educational, Scientific and Cultural Materials, held at Geneva from 21 to 29 October 1957, it was reported that the French representative;

... recalled that the provisions of paragraph 1 of article 1 were applicable only to materials mentioned in annexes A, B, C, D and E of the Agreement which were the products of another Contracting State. France, however, granted duty-free entry for such materials, irrespective of the country of origin or exportation, for it considered that, by virtue of the unconditional "most-favoured-nation" clause included in the trade agreements which it had concluded with most countries, and having regard to the obligations mentioned in article IV, subparagraph (a), of the Agreement, no distinction as to country of origin or exportation should be made with regard to the materials concerned. The French Government wished to know whether such an interpretation was accepted by the other Contracting States.²⁴⁴

(17) Article IV (a) of the Florence Agreement, referred to above, states that the parties "undertake that they will as far as possible ... continue their common efforts to promote by every means the free circulation" of the materials to which the Agreement relates, "and abolish or reduce any restrictions to that free circulation which are not referred to in this Agreement".²⁴⁵

(18) The following three cases further illustrate the point. In the first case, the Asia Trading Company of Djakarta brought an action in the District Court of Amsterdam against the firm of Biltimex of Amsterdam. The defendant applied for an order that the plaintiff,

being a foreign company, should deposit security for costs (*cautio judicatum solvi*). The plaintiffs opposed the application. The Court held that the order for the security (*cautio*) must be refused. This followed from article 24 of the Netherlands-Indonesian Union Statute agreed upon on 2 November 1949, which promised the nationals of each partner to the Union treatment on a footing of substantial equality with the other's own nationals, and in any case most-favoured-nation treatment. The latter provision guaranteed to Indonesians exemption from the security for costs (*cautio judicatum solvi*), because the Netherlands had previously exempted other foreigners and foreign countries from the security (*cautio*) under the Hague Convention on Procedure in Civil Cases of 17 July 1905.²⁴⁶

(19) The second case serves as negative proof to the above proposition. Although the claim based upon the most-favoured-nation clause is rejected, this is done on the ground that the subject-matter of the multilateral treaty in question (the Hague Convention on Procedure in Civil Cases of 17 July 1905) is not *ejusdem generis* as that of the clause upon which the appellant relied. Thus the judgement implicitly acknowledges that, in the case where the clause and the multilateral treaty covered the same ground, appellant could not have been denied the benefits of the latter. The appellant, a United States citizen domiciled in Belgium, owed an acknowledged debt to the respondent. When in the Netherlands, he was imprisoned for his debt under an order given by the President of the District Court of Zutphen. The appellant sought to be released by the President of the District Court of The Hague, but his appeal failed. He appealed further to the Court of Appeal of The Hague, relying, *inter alia*, on two treaty provisions by virtue of which, he argued, he should be set free. The first of these was article 24 of the Convention relating to Civil Procedure of 17 July 1905.²⁴⁷ The appellant further relied on article III, section I, of the Netherlands-United States Treaty of Friendship, Commerce and Navigation of 27 March 1956.²⁴⁸ The appellant submitted that he was entitled to benefit from article 24 of the Hague Convention on Procedure in Civil Cases through the operation of the

²⁴⁶ *Asia Trading Co. Ltd., v. Biltimex, Netherlands, District Court of Amsterdam, 17 October 1951*. See Secretariat Digest, Yearbook ... 1973, vol. II, p. 137, doc. A/CN.4/269, para. 55.

²⁴⁷ The article reads [translation from the official French text]: "Civil imprisonment, whether as a means of enforcement or as a simple preventive measure, may not, in civil or commercial proceedings, be imposed on aliens who are nationals of one of the contracting States in cases where it would not be imposed on nationals of the country. A circumstance which may be invoked by a national domiciled within the country to secure the ending of civil imprisonment must produce the same effect for the benefit of a national of a contracting State, even if that circumstance arises outside the country."

²⁴⁸ This provision reads:

"Nationals of either Party within the territories of the other Party shall be free from molestations of every kind, and shall receive the most constant protection and security. They shall be accorded in like circumstances treatment no less favorable than that accorded nationals of such other Party for the protection and security of their persons and their rights. The treatment accorded in this respect shall in no case be less favorable than that accorded nationals of any third country or that required by international law."

²⁴⁰ Treaty of Friendship, Commerce and Navigation, signed at Rome on 2 February 1948 (*ibid.*, vol. 79, pp. 190 and 192).

²⁴¹ Quoted above, article 4, para. 10 of the commentary.

²⁴² Whiteman, *op. cit.*, pp. 776 and 777.

²⁴³ *Ibid.*, p. 767.

²⁴⁴ Document UNESCO/MC/34/SR.I-II, p. 9, quoted by Whiteman, *op. cit.*, p. 768.

²⁴⁵ United Nations, *Treaty Series*, vol. 131, p. 30.

most-favoured-nation clause. The Court, which held that the appeal must be dismissed, stated:

The appellant deems his imprisonment to be illegal on account of its being contrary to Article III, section I, of the Netherlands-United States Treaty of Friendship, Commerce and Navigation, which was ratified by the (Netherlands) Act of 5 December 1957... This provision, assuming it is binding upon everyone, does not prevent a citizen of the United States from being imprisoned in this country under article 768 of the Code of Civil Procedure. Civil imprisonment, indeed, does not run counter to the protection of rights which the Kingdom of the Netherlands under the Treaty owes to citizens of the United States. Moreover, from Article V of the Treaty, as from Article 5 of the annexed protocol of signature, it becomes clear that the Treaty is of limited purport only as far as civil procedure is concerned: civil imprisonment is not referred to, still less precluded. A more liberal interpretation of Article III, section I, as sought by the appellant and under which in this country a citizen of the United States would enjoy the protection of Article 24 of the Convention on Civil Procedure without the United States having acceded to it, is therefore unacceptable to the Court.²⁴⁹

(20) In the third case, it was expressly recognized that privileges provided pursuant to a "multiple or bipartite international treaty" could be claimed on the basis of a most-favoured-nation clause.²⁵⁰

(21) As regards the so-called open multilateral treaties, it has been found that there is no such constant and uniform usage, accepted as law, which would warrant a proposal for a rule excepting open-ended multilateral treaties, i.e. the favours resulting from such treaties, from the operation of most-favoured-nation clauses. A recent thorough study has come to the same conclusion:

At present there seems to be no justification in law for saying that a customary usage may exempt open multilateral conventions from the scope of the clause. Neither the material element—the usual practice of States—nor the *opinio juris* affect the issue. At least, the prevailing feeling allows that the question may be approached from various angles, and it is concerned to give due weight to the elements which might lead to an opposing conclusion.

... as international law stands at present, the only legal solution is to insert a specific exception in the clause.²⁵¹

(22) As regards the so-called closed multilateral treaties, it has also been found that the advantages accorded under such treaties do not escape the operation of a most-favoured-nation clause. The argument has been put forward that the main reason²⁵² for exempting the favours of an open multilateral treaty from the operation of a most-favoured-nation clause is that States can easily acquire the advantages of such treaties by acceding to them. In this way acceding States also assume the obligations arising from the treaty and put themselves in a position of equality with the other parties to the treaty, whereas through the operation of a most-favoured-

nation clause they would claim only the advantages of the open multilateral treaty without submitting to its obligations. It follows from this reasoning that, in the case of a closed multilateral treaty, the possibility of an easy accession falls and —*cessante causa cessat effectus*— there remains no reason why the advantages of a closed multilateral treaty should not fall under the operation of a most-favoured-nation clause.

(23) On the basis of the foregoing considerations the Commission adopted article 17, which provides that the acquisition of rights by the beneficiary State is not affected by the mere fact that the treatment by the granting State of a third State has been extended under an international agreement, whether bilateral or multilateral. This, of course, cannot be understood to mean that a bilateral or multilateral agreement is always needed for the operation of the clause. In this respect reference is made to paragraph (1) of this commentary.

Article 18. Irrelevance of the fact that treatment is extended to a third State as national treatment

The acquisition of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended as national treatment.

Commentary

(1) This rule seems to be at first sight self-evident. When two States promise each other national treatment (inland parity) and then promise other States most-favoured-nation treatment, the latter group may legitimately claim that they are also entitled to be treated on a "national basis", for otherwise they are not being treated as favourably as the most-favoured-nation (assuming that there is a material difference in treatment as a result of different promises made).²⁵³

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

... the m.f.n. standard fulfils the function of generalizing the privileges granted under the national standard to any third State among the beneficiaries of m.f.n. treatment in the same field.²⁵⁴

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

Since national treatment generally embraces a maximum of rights and the rights accorded are clearly defined, States often seek to have their nationals placed on an equal footing with those of other countries. If national treatment is thus granted to the most-favoured-nation, all other entitled States can also claim it for their nationals by invoking the most-favoured-nation clause.²⁵⁵

²⁴⁹ *McLane v. N.V. Koninklijke Vleeswarenfabriek B. Linthorst en Zonen*, Netherlands, Court of Appeal of The Hague, 4 February 1959. See Secretariat Digest, *Yearbook ... 1973*, vol. II, p. 142, document A/CN.4/269, para. 68.

²⁵⁰ *Taxation Office v. Fulgor (Greek Electricity Company)*, Greece, Council of State, 28 May 1969, (*ibid.*, p. 148, para. 87).

²⁵¹ Sauvignon, *op. cit.*, pp. 267 and 268.

²⁵² Although a false one (see in this regard E. Allix, quoted in para. (9) above).

²⁵³ Snyder, *op. cit.*, pp. 11 and 12.

²⁵⁴ Schwarzenberger, "The most-favoured-nation standard in British State practice", *loc. cit.*, p. 119.

²⁵⁵ K. Becher, "Das Prinzip der Meistbegünstigung und die Völkerrechtskommission der Vereinten Nationen", *Deutschen Ausenpolitik* (East Berlin), 17th year, No. 4 (July-August 1972), p. 774.

(4) This effect of the most-favoured-nation clause has been explicitly recognized in France. The French Foreign Minister, in a letter of 22 July 1929,²⁵⁶ published a list of countries enjoying national treatment in France. The Minister added:

A greater number of conventions were entered into on the basis of the treatment reserved for the nationals of the most-favoured-nation. Aliens capable of availing themselves of a convention of that nature are entitled to be treated in France as the nationals of the above-listed countries.²⁵⁷

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

(5) This position is also manifested in the practice of French courts:

... [French] legal thinking has, on the whole, taken the view that national treatment is to be applied to those who invoke it on the strength of a most-favoured-nation clause.²⁵⁸

Thus a French court, the Tribunal correctionnel de la Seine, in one case among many others, stated:

Whereas Sciama, being of Italian nationality, may legitimately claim the benefit of article 2 of the treaty of establishment of 23 August 1951 between France and Italy, which provides: "The nationals of each of the High Contracting Parties shall enjoy in the territory of the other party most-favoured-nation treatment with regard to ... the practice of trade..."; and whereas, consequently, he is entitled to rely on the provisions of article 1 of the convention concluded on 7 January 1862 between France and Spain, which provides that: "The subjects of both countries may travel and reside in the respective territories on the same footing as nationals ... practise both wholesale and retail trade operation..."²⁵⁹

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

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

Within these limits, and under the same conditions as the subjects of the most-favoured-nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament, inheritance, or in any other manner whatever, without being subject to any taxes, imposts or charges whatever, other or higher than those which are or shall be levied on natives or on the subjects of the most favoured State...²⁶⁰

²⁵⁶ *Journal officiel de la République française, Lois et décrets*, Paris, 12-13 August 1929, 61st year, No. 189.

²⁵⁷ A. Piot, "Of realism in conventions of establishment", *Journal du droit international*, 88th year, No. 1 (January-March 1961), p. 45.

²⁵⁸ Level, *loc. cit.*, p. 338.

²⁵⁹ *In re : Sciama and Soussan*, France, Tribunal correctionnel de la Seine, 27 November 1962. See Secretariat Digest (*Yearbook ... 1973*, vol. II, p. 145, doc. A/CN.4/269, para. 77).

²⁶⁰ *British and Foreign State Papers, 1880-1881*, London, Ridgway, 1888, vol. 72, p. 1131.

The Supreme Court stated:

The 1881 Treaty clearly declares its basic purpose to bring about "reciprocally full and entire liberty of commerce and navigation" between the two signatory nations so that their citizens "shall be at liberty to establish themselves freely in each other's territory". Their citizens are also to be free to receive, hold and dispose of property by trading, donation, marriage, inheritance or any other manner "under the same conditions as the subjects of the most favored nation". Thus, both paragraphs of Art. II of the treaty which have pertinence here contain a "most favored nation" clause with regard to "acquiring, possessing or disposing of every kind of property". This clause means that each signatory grants to the other the broadest rights and privileges which it accords to any other nation in other treaties it has made or will make. In this connexion we are pointed to a treaty of this country made with Argentina [²⁶¹] before the 1881 Treaty with Serbia, and treaties of Yugoslavia with Poland and Czechoslovakia, all of which unambiguously provide for the broadest kind of reciprocal rights of inheritance for nationals of the signatories which would precisely protect the right of these Yugoslavian claimants to inherit property of their American relatives...

We hold that under the 1881 Treaty, with its "most favored nation" clause, these Yugoslavian claimants have the same right to inherit their relatives' personal property as they would if they were American citizens living in Oregon...²⁶²

(7) The solution sustained in practice and proposed in article 18 has been questioned in the writings of several authors. According to one source:

It may be argued against the affirmative solution that, among the concessions mutually granted by the High Contracting Parties, the most-favoured-nation clause is of a lower order than the national treatment clause and that it is paradoxical for the former to produce the same effects as the latter. It may also be asked whether the special nature of the two clauses does not bar their cumulative application. As clauses which grant equal treatment, in one case, with the most-favoured foreigner and, in the other case, with nationals, they have no effect by virtue of their content but by mere reference. Is the intent of the contracting States truly reflected by thus linking one clause to the other to the point of producing an effect which is not in keeping with the meaning of the first of the two clauses? ... Although this argument has its relevance, [French] legal thinking has, on the whole, taken the view that national treatment is to be applied to those who invoke it on the strength of a most-favoured-nation clause.²⁶³

(8) Basing its views on the practice of States, the Commission has no reason to depart from the conclusion which follows from the ordinary meaning of the clause which assimilates its beneficiary to the nation most

²⁶¹ The national treatment clause (article IX) of the Treaty of Friendship, Commerce and Navigation between the United States and the Argentina Confederation of 1853 provided:

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

^a "United States of America, *The Statutes at Large and Treaties of the United States of America from December 1925 to March 1927* (Washington, D.C., United States Government Printing Office, 1927), vol. X, p. 1009. Text also in *British and Foreign State Papers, 1852-1853* (London, Ridgway, 1864), vol. 42, p. 772."

²⁶² *Kolovrat et al. v. Oregon*, United States Supreme Court, 1 May 1961. See Secretariat Digest (*Yearbook ... 1973*, vol. II, p. 144, doc. A/CN.4/269, para. 73).

²⁶³ Level, *loc. cit.*, p. 338.

favoured: if the best, the highest, favour extended to a third State consists in national treatment, then it is this treatment that is in conformity with the promise due to the beneficiary. If a State wishes to exclude previous or future national treatment grants from its most-favoured-nation pledge, it is free to do so. If such exception is not written in the treaty, then the consequences are that the national treatment promise follows the treaty containing the most-favoured-nation clause. This situation requires nothing but a certain circumspection from those involved in treaty-making.

Article 19. Most-favoured-nation treatment and national or other treatment with respect to the same subject-matter

1. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause is not affected by the mere fact that the granting State has agreed to accord as well to that beneficiary State national treatment or other treatment with respect to the same subject-matter as that of the most-favoured-nation clause.

2. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause is without prejudice to national treatment or other treatment which the granting State has accorded to that beneficiary State with respect to the same subject-matter as that of the most-favoured-nation clause.

Commentary

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

that the subjects of the Most Renowned King of Great Britain ... shall [not] be more burdened with customs, impositions, or other taxes other than the inhabitants and subjects of the said lands [kingdoms, provinces, territories and islands of the King of Portugal, in Europe], or other subjects of any nation whatsoever in league with the Portugals..."²⁶⁴

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

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

²⁶⁴ B. Nolde, "La clause de la nation la plus favorisée et les tarifs préférentiels", *Recueil des cours...*, 1932-I, Paris, Sirey, 1932, vol. 39, p. 27.

operations, the taking-on and setting-down of passengers, and the use of navigation services.²⁶⁵

(2) In some clauses it is specified that the basis of the treatment in question shall be that of the granting State's nationals or the nationals of the most-favoured-nation, "whichever is more favourable".²⁶⁶

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

... The problem of the compatibility of general most-favoured-nation treatment and the grant of "national treatment" to commercial shipping does not, in fact, appear to arise. Where both these systems exist side by side, the provision for "national treatment" has overriding force—always provided that no more favourable concession has been made to a third country. In such a case, it is this more favourable treatment which must be granted to shipping of the country eligible for both "national treatment" and most-favoured-nation treatment. Such a solution, undoubtedly prevailing in treaties of commerce which, like that between Norway and the USSR, contain the "national treatment" clause for commercial shipping side by side with a general most-favoured-nation clause, seems equally applicable both in the case of a multilateral convention containing both clauses and in the case of a multilateral convention containing only the general most-favoured-nation clause faced with bilateral conventions containing the "national treatment" clause for particular questions relating to commerce or navigation.²⁶⁷

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

It is understood that, wherever the present treaty stipulates national treatment, this implies the treatment of the most-favoured foreign country, the intention of the high contracting parties clearly being that national treatment in their respective territories is at least equal or superior to treatment of the "most-favoured foreign country".²⁶⁸

The presumption is, however, open to rebuttal. There may be cases where foreigners enjoy advantages not granted to nationals. Should such a case occur, most-favoured-nation treatment surpasses national treatment. A specific stipulation to this effect may be found in the United Kingdom-Switzerland Treaty on Friendship, Commerce and Reciprocal Establishment of 6 September 1855, article VIII of which reads as follows:

In all that relates to the importation into, the warehousing in,

²⁶⁵ *Sbornik deistvuyshchikh dogovorov, soglasheny i konventsy, zaklyuchennykh SSS s inostrannymi gosudarstvami, vol. XXIX, Deistvushchie dogovory, soglashenia i konventsi, vstupivshie v silu mezhdru 1 yanvaraya i 31 dekabrya 1973 goda* (Treaties, agreements and conventions in force between the USSR and foreign countries, vol. XXIX, Treaties, agreements and conventions which came into force between 1 January and 31 December 1973), Moscow, Mezhdunarodnye otnoshenia, 1975, pp. 364 and 365.

²⁶⁶ See e.g. article 38 of the Treaty on Friendship, Commerce and Navigation between the Federal Republic of Germany and Italy of 21 November 1957 (Strupp, *op. cit.*, p. 500).

²⁶⁷ E/ECE/270, part II, para. 42(h).

²⁶⁸ League of Nations, *Treaty Series*, vol. CVIII, p. 432.

the transit through, and the exportation from, their respective territories, of any article of lawful commerce, the two contracting parties engage that their respective subjects and citizens shall be placed upon the same footing as subjects and citizens of the country, or as the subjects and citizens of the most favoured nation in any case where the latter may enjoy an exceptional advantage not granted to natives.²⁶⁹

(5) According to one source:

[National treatment] is sometimes granted concurrently with the most-favoured-nation clause. In such cases, it is the more favourable of the two types of treatment—normally national treatment—that applies. In exceptional cases, however, most-favoured-nation treatment may be more advantageous than national treatment. This is the case when a State which wishes to expand its industrial production grants foreign enterprises tax exemptions and other advantages greater than those accorded to national enterprises. It would therefore be quite false to suppose that the granting of national treatment automatically encompasses most-favoured-nation treatment.²⁷⁰

(6) According to another writer:

Two or more of the standards may also be employed in the same treaty for the better attainment of the same or different objectives. Thus, the coupling of m.f.n. and national-treatment clauses may lead to treatment more advantageous to nationals of the other contracting party than could be achieved by the employment of one or the other standard in relation to, for instance, exemption from civil defence duties. In such cases, the typical intention of contracting parties is that the application of several standards should be cumulative. Therefore a presumption exists in favour of their cumulative interpretation.²⁷¹

(7) It must be clearly seen that most-favoured-nation treatment and national treatment are of a different character. The first operates only on condition that a certain favoured treatment has been extended to a third State (and if this is not the case the grant remains empty). The other is a direct grant which confers an advantage upon the beneficiary independently of the fact that treatment has been extended to a third State or not. It may happen, however, that a most-favoured-nation pledge is coupled with another direct grant which is not national treatment. The granting State, for example, may undertake to accord certain determined treatment to the beneficiary State, to its nationals, to its ships, etc., which may not be the same as the treatment of its own nationals. Article 19 envisages this situation also by means of the expression "or other treatment".

(8) The Commission is aware that a situation in which the beneficiary State on the basis of one or more treaties or other commitments is entitled to different types of treatment concerning the same subject-matter can involve great difficulties of implementation. Can the beneficiary State freely change its preference from one to another type of treatment? Can different types of treatment be demanded for one or another subject to the beneficiary State? For example, can different shipping companies of the beneficiary State demand different types of treatment for their vessels?

Can the advantages be demanded cumulatively? Because of the difficulties involved, the Commission found it preferable to formulate the rule as a saving clause.

(9) The Commission agreed that, at any rate, in the presence of most-favoured-nation treatment, national treatment and any other treatment accorded by the granting State with respect to the same subject-matter, the beneficiary State not only had an "either/or" choice, but might also be in a position to opt for the cumulative enjoyment of all, some, or parts of the various treatments concerned. The article has therefore been drafted in such a manner so as not to prejudge that second possibility, which may be open in practice to the beneficiary State. To this effect an appropriate reference has been made to the lack of effect on the beneficiary State's actual enjoyment of its right to most-favoured-nation treatment by the mere fact that national or other treatment had been accorded to it as well by the granting State. As now drafted, *paragraph 1* states the general rule, placing the emphasis on the right to most-favoured-nation treatment. As that rule is similar in character to those embodied in the four previous articles, that is to say that it amounts to an "irrelevancy" type of rule, the Commission deemed it appropriate to use for that paragraph the expression "is not affected by the mere fact". *Paragraph 2* relates to the converse aspect of the provision of paragraph 1, emphasizing that the right of the beneficiary State to most-favoured-nation treatment is without prejudice to national or other treatment accorded by the granting State to that beneficiary State with respect to the same subject-matter. The two paragraphs read together should make it clear that, whenever the beneficiary State is accorded different types of treatment with respect to the same subject-matter, it shall be entitled to whichever treatment or combination of treatments it prefers in any particular case.

Article 20. Arising of rights under a most-favoured-nation clause

1. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause not made subject to a condition of compensation arises at the moment when the relevant treatment is extended by the granting State to a third State or to persons or things in the same relationship with that third State.

2. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of compensation arises at the moment when the relevant treatment is extended by the granting State to a third State or to persons or things in the same relationship with that third State and the agreed compensation is accorded by the beneficiary State to the granting State.

3. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of reciprocal treatment arises at the moment when the relevant

²⁶⁹ United Kingdom, Foreign Office, *Handbook of Commercial Treaties etc. with Foreign Powers*, 4th ed., London, H.M. Stationery Office, 1931, p. 669.

²⁷⁰ Sauvignon, *op. cit.*, p. 6.

²⁷¹ Schwarzenberger, "The principles and standards ...", *loc. cit.*, p. 69.

treatment is extended by the granting State to a third State or to persons or things in the same relationship with that third State and the agreed reciprocal treatment is accorded by the beneficiary State to the granting State.

Commentary

(1) Article 20 deals with the moment when the right of the beneficiary State to most-favoured-nation treatment arises. The presence of two elements is necessary to put into action an unconditional most-favoured-nation clause: (a) a valid clause contained in a treaty in force, and (b) an extension of treatment by the granting State to a third State. A third element is needed in the case of a clause subject to a condition of compensation or reciprocal treatment: (c) the according of that compensation or reciprocal treatment. If one of the necessary elements is lacking, there is no such thing as an operating or a functioning clause.²⁷² In the case of a clause not made subject to a condition of compensation, the moment of the arising of the beneficiary State's right is the one when the relevant treatment is extended by the granting State to a third State. In the case of a clause made subject to a condition of compensation or reciprocal treatment, the moment of the beginning of a functioning clause is the one when the last two elements coexist, that is, when the relevant treatment is extended and the agreed compensation or reciprocal treatment is accorded. As to the first element, the validity and the being in force of the treaty are taken for granted and they are therefore not mentioned in article 20.

(2) A most-favoured-nation clause, unless otherwise agreed, obviously attracts benefits extended to a third State both before and after the entry into force of the treaty containing the clause. The reason for this rule has been explained as follows:

... since the purpose of the clause is to place the beneficiary State on an equal footing with third States, it would be an act of bad faith to confine that equality to future legal situations. A *pro futuro* clause or a clause directed towards the past cannot be deemed to exist unless it is worded in unequivocal fashion. Otherwise, the clause must extend to the beneficiary all advantages granted both in the past and in the future.²⁷³

(3) This view is sustained in practice, as evidenced by the following case. The special legislation of Belgium regulating the duration of tenancies rendered nationals of countries that were either neutral or allied to Belgium during the First World War eligible to share in its benefits, on condition of reciprocal treatment. The claimant complained that the privilege of the legal extension of her tenancy had been denied her because of her French nationality and because of the lack of reciprocal treatment of Belgian nationals in France. The Court held for the claimant. Pursuant to the Franco-Belgian convention of 6 October 1927, the nationals of each of the High Contracting Parties "shall enjoy in the territory

of each other most-favoured-nation treatment in all questions of residence and establishment, as also in the carrying on of trade, industry and the professions" (article 1). This privilege was extended to cover the possession, acquisition and leasing of real or personal property (article 2). The treaty concluded between Belgium and Italy on 11 December 1882 provided (article 3) that the nationals of each of the High Contracting Parties should enjoy within each other's territory full civil rights on an equal footing. The Court stated:

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

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

The claimant, as a French national, is therefore entitled to claim a legal extension of her tenancy of the premises by virtue of the treaty of 6 October 1927.²⁷⁴

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

What is at issue here is whether the clause follows the time-of-application provisions of the treaty from which it derives its content or those of the treaty which provides for most-favoured-nation treatment. In the latter case, nationals of the beneficiary State can also claim the advantages previously granted to the favoured State, but this treatment takes effect only on the date of the entry into force of the treaty containing the most-favoured-nation clause... If the first assumption is correct and the clause is also *subject* to the time-of-application provisions of the treaty concluded with the favoured State, nationals of the beneficiary State are in exactly the same position as those of the favoured State, and are thus entitled to claim that the advantages in question were applicable to them prior to the publication of the treaty containing the clause, i.e. as from the entry into force of the treaty concluded between the favoured State and the granting State. Thus, in the second of the two posited cases, nationals of the beneficiary State would be entitled to retroactive application—in relation to the date of publication of the treaty containing the clause—of most-favoured-nation treatment.

French legal thinking has rejected the idea of giving the clause this kind of retroactive effect. Nationals of the beneficiary State can claim the advantages granted to the favoured State only on the date of the entry into force of the treaty containing the clause. "The actual formulation of the clause does not warrant retroactive assimilation to foreigners who already enjoy favoured status." ... "If existing advantages are automatically made applicable, this applies only to the future." ... Of course, under the rule governing time of application, the High Contracting Parties may, by expressly so stipulating, provide for retroactive application of the clause. The view upheld by French legal thinking is

²⁷² As Schwarzenberger puts it, "In the absence of undertakings to third States, the m.f.n. standard is but an empty shell" (*International Law and Order* (*op. cit.*), p. 130).

²⁷³ Sauvignon, *op. cit.*, p. 21, note 1. See, in the same sense, Basdevant, "Clause de la nation la plus favorisée" (*loc. cit.*), p. 488.

²⁷⁴ *Trossy v. Dumortier*, Belgium, Brussels Civil Court (Chamber of Rent Restriction Appeals), 31 May 1928. See Secretariat Digest, (*Yearbook* ... 1973, vol. II, pp. 129 and 130, doc. A/CN.4/269, para. 31).

in keeping with the analysis of the nature of the clause contained in the judgement rendered by the International Court of Justice in the Anglo-Iranian cases. The enjoyment of advantages under the clause derives from the clause itself and not from the treaty containing the substantive provisions whose application is sought. Although the clause permits enjoyment of the advantages granted to nationals of the favoured State, it does not retroactively make the beneficiary State a party to the treaty concluded between the granting State and the favoured State.²⁷⁵

(5) In the same sense, another author writes:

The clause does not do away with past differences between the various national legal systems. The "standard" rule, which calls for an "inopportune" international legal situation to cease to exist at the earliest possible time ... does not prevail against the international legal principle of non-retroactivity... Most-favoured-nation treatment is, as Scelle puts it, automatically communicated, but this applies only to the future. It should be noted that the same reasoning can be employed in determining the application in time of a treaty containing a reciprocity clause. The advantages granted on this basis to nationals of a given State also do not extend back to the time when our nationals first enjoyed this right (*de facto, de jure* or by treaty) in the country concerned.²⁷⁶

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

(6) The question whether the operation of a most-favoured-nation clause is contingent upon a third State merely becoming entitled to claim certain treatment, or whether it operates only when the third State actually claims and begins to enjoy the treatment, has been examined by an authority in the following manner:

Supposing that Great Britain is entitled to most-favoured-nation treatment under a treaty with State A, and by reason of a treaty between State A and State B the latter is or becomes entitled to claim for itself or its nationals certain treatment from A, e.g. exemption from income tax or from some legislation affecting the occupation of houses, when is Great Britain entitled to claim from A the treatment due to B? At once or only when B has succeeded in asserting its treaty right to this treatment? In answer to this question two views are possible. The first is that Great Britain has no *locus standi* to claim the treatment until she can point to its actual exercise and enjoyment by B or B's nationals. This view places Great Britain at the mercy of the degree of vigilance exerted by B or the degree of importance of the matter to B; for instance, B might have no nationals residing in the territory of A and earning a taxable income. The second view is that the most-favoured-nation clause in the treaty with Great Britain, automatically and absolutely, invests her and her nationals with all rights in *pari materia* which may be possessed at any time when the treaty is in force by B and its nationals, irrespective of the question whether those rights are in fact being exercised and enjoyed or not, that is, irrespective of the question whether B has claimed them or neglected to claim them or had no occasion to claim them. The United Kingdom Government has been advised by its law officers that the second view is the right one, that is to say, that while the question "must depend upon the true construction of the most-favoured-nation clause upon which it may arise, ... speaking generally ... the right extends to the treatment which the most-favoured-nation is entitled to, whether actually claimed or exercised or not". The United Kingdom has asserted, and succeeded in maintaining, this second view.²⁷⁷

²⁷⁵ Level, *op. cit.*, pp. 336 and 337.

²⁷⁶ Ch. Gavalda, note on a decision of the Court of Cassation of 12 October 1960, *Revue critique de droit international privé*, Paris, No. 3 (July-Sept. 1969), p. 538.

²⁷⁷ McNair, *op. cit.*, pp. 278 and 279.

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

On 11 April 1906, on a question relating to the right of aliens to receive British pilotage certificates, the law officers, when asked whether the right claimable by subjects of the nations indicated was an absolute right by reason of the operation of the most-favoured-nation clause, or whether the right was one which was claimable only if and when the subjects of States who had been granted national treatment had claimed and received the particular privilege then under consideration, said that the answer to this question "must depend upon the true construction of the particular most-favoured-nation clause upon which it may arise; but speaking generally, we are of the opinion that the right extends to the treatment which the most-favoured-nation is entitled to, whether actually claimed or not. On the other hand, the treatment accorded in actual practice would be very material upon the construction of the treaty upon which it depends."²⁷⁸

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

In 1943 the American Embassy in Santiago took the position that the unconditional most-favoured-nation clause in the United States-Chilean commercial agreement gave the right to duty-free importation of United States lumber "of those species of woods specified in the memoranda exchanged between the Peruvian and Chilean Governments [providing duty-free treatment for such species of Peruvian lumber imported into Chile] and [that] this position holds regardless of whether there have been any imports into Chile from Peru or any other country of the particular species of wood specified in the memoranda." Thus, the most-favoured-nation clause was interpreted to accord those rights legally accorded to products of another country, whether or not there was in fact any enjoyment of such right with reference to such products.²⁷⁹

(7) As provided for in article 20, it is the extension of benefits to the third State that brings the clause into action. This "extension" can also take place by the conclusion of a treaty or by any other kind of agreement reached between the granting State and the third State. Is the effect the same if the grant is not based on a treaty but on the internal law of the granting State? According to one writer:

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

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

On the other hand, where the treaty merely provides that the nationals of A are entitled to whatever rights and privileges B may "grant" to the nationals of C, the question may arise whether the clause refers to grant by treaty or to grant by any means whatever. The British answer to this question is that the clause includes grant by any means whatever.²⁸⁰

(8) For another author, "it is quite immaterial whether the advantages granted to 'any third contry' derive from the domestic law of the other Contracting Party or from

²⁷⁸ *Ibid.*, pp. 279 and 280.

²⁷⁹ Whiteman, *op. cit.*, p. 750.

²⁸⁰ McNair, *op. cit.*, p. 280.

agreements concluded by the latter with 'any third country'.²⁸¹ Further, he calls this rule "a rule which has long been established and is absolutely unchallengeable".²⁸²

(9) The 1936 resolution of the Institute of International Law is also explicit:

The most-favoured-nation clause confers upon the beneficiary the regime granted by the other contracting party to the nationals, goods and ships of any third country by virtue of its municipal law and its treaty law.²⁸³

(10) It is obvious that the answer to the question dealt with in the previous paragraphs depends on the interpretation of a given clause. The purpose of the proposed rule is precisely to give guidance in cases where the working of the clause is such that it refers purely and simply to most-favoured-nation treatment without containing details as to its functioning. It is believed that in such cases it can be presumed that the intention of the parties consists in bringing the beneficiary into the same legal position as the third State. This idea and the theory adopted by the Commission in article 8, according to which the source of the beneficiary's right ultimately lies in the treaty or international agreement containing the clause, sufficiently warranted the adoption of the rule as proposed in article 20.

(11) Paragraph 1 of article 20 accordingly provides that the right of the beneficiary State under a most-favoured-nation clause not made subject to a condition of compensation to the treatment enjoyed by the third State arises at the moment when that treatment is extended by the granting State to a third State. It is to be understood that, if the third State enjoys that treatment already at the moment of the entry into force of the clause, i.e. the treaty or international agreement containing it, then the beneficiary State becomes immediately entitled to the same treatment. If, however, the relevant treatment is extended to the third State later, it is at that later time that the right of the beneficiary State arises.

(12) In the case of a most-favoured-nation clause made subject to a condition of compensation or of reciprocal treatment, the presence of a third element is needed for the right of the beneficiary State to the treatment in question to arise: the beneficiary State's right will arise at the moment when the relevant treatment is extended by the granting State to a third State and the agreed compensation or reciprocal treatment is accorded by the beneficiary State to the granting State. Paragraphs 2 and 3 of article 20 deal respectively with cases involving one or other conditional clause.

Article 21. Termination or suspension of rights under a most-favoured-nation clause

1. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-

favoured-nation clause is terminated or suspended at the moment when the extension of the relevant treatment by the granting State to a third State or to persons or things in the same relationship with that third State is terminated or suspended.

2. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of compensation is equally terminated or suspended at the moment of termination or suspension by the beneficiary State of the agreed compensation.

3. The right of the beneficiary State for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of reciprocal treatment is equally terminated or suspended at the moment of termination or suspension by the beneficiary State of the agreed reciprocal treatment.

Commentary

(1) It follows from the very nature of the most-favoured-nation clause that the right of the beneficiary State—and hence the functioning of the clause—ceases when the third State loses its privileged position. The privilege having disappeared, the fact which put the clause into operation no longer exists, and therefore the clause ceases to have effect.²⁸⁴

(2) Thus the Supreme Court of Administration of Finland, in the case of the application of the trade agreement between Finland and the United Kingdom, passed a judgement on 12 March 1943 in the following sense:

The duties imposed on certain goods in the trade agreement between Finland and the United Kingdom were to be applied also to goods imported from Germany in accordance with the most-favoured-nation clause between Finland and Germany. The court decided that after the United Kingdom had declared war on Finland, the most-favoured-nation clause was no longer applicable to Germany, and consequently the duties imposed on goods imported from Germany should be treated autonomously and not according to the trade agreement between Finland and England.²⁸⁵

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

The duration of the effects of the most-favoured-nation clause is limited by that of the conventions with third States which led to the application of that clause.²⁸⁶

In the course of the Commission's discussion on the codification of the law of treaties, the following draft provision was submitted by a member:

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

²⁸¹ Nolde, "La clause de la nation la plus favorisée ..." (*loc. cit.*), p. 48.

²⁸² *Ibid.* Similarly, Sauvignon, *op. cit.*, p. 22.

²⁸³ See *Yearbook ... 1969*, vol. II, p. 181, doc. A/CN.4/213, annex II.

²⁸⁴ Snyder, *op. cit.*, p. 37; Sibert, *op. cit.*, pp. 255 *et seq.*

²⁸⁵ Application of the trade agreement between Finland and the United Kingdom of Great Britain and Northern Ireland, Finland: Supreme Court of Administration, 12 March 1943. See Secretariat Digest (*Yearbook ... 1973*, vol. II, p. 124, doc. A/CN.4/269, para. 13).

²⁸⁶ *Yearbook ... 1969*, vol. II, p. 181, doc. A/CN.4/213, annex II.

longer be relied upon by a third State by virtue of a most-favoured-nation clause.²⁸⁷

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

(4) The will of the parties can of course under special circumstances change the operation of the clause. That such special circumstances existed was contended by the American party before the International Court of Justice in the *Case concerning rights of nationals of the United States of America in Morocco*.²⁸⁸ The Court interpreted the most-favoured-nation clauses in the treaties between the United States and Morocco in accordance with the general nature and purpose of the most-favoured-nation clauses. In the words of the Court:

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

From either point of view, this contention is inconsistent with the intentions of the parties now in question. This is shown both by the wording of the particular treaties, and by the general treaty pattern which emerges from the examination of the treaties... These treaties show that the intention of the most-favoured-nation clauses was to establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned.²⁸⁹

In the same judgment, the Court held also:

It is not established that most-favoured-nation clauses in treaties with Morocco have a meaning and effect other than such clauses in other treaties or governed by different rules of law. When provisions granting fiscal immunity in treaties between Morocco and third States have been abrogated or renounced, these provisions can no longer be relied upon by virtue of a most-favoured-nation clause.²⁹⁰

(5) A notable instance of changing the general pattern of the operation of the clause is that of the general Agreement on Tariffs and Trade. The key provision of the General Agreement is a general most-favoured-nation clause in respect of customs duties and other charges in article I, paragraph 1.²⁹¹ Article II, paragraph 1 (a) of the General Agreement, however, provides:

Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate part of the appropriate schedule annexed to this Agreement.²⁹²

²⁸⁷ Mr. Jiménez de Aréchaga. See *Yearbook ... 1964*, vol. I, p. 184, 752nd meeting, para. 1.

²⁸⁸ *I.C.J. Reports 1952*, p. 176.

²⁸⁹ *Ibid.*, pp. 191 and 192.

²⁹⁰ *Ibid.*, pp. 204 and 205.

²⁹¹ See article 4 above, para. (10) of the commentary.

²⁹² GATT, *Basic Instruments and Selected Documents*, vol. IV (*op. cit.*), p. 3.

According to one writer:

It can even be maintained that article II (1)—safeguarding of schedules—is of greater significance than the most-favoured-nation clause itself... This paragraph of article II is a completely new phenomenon in international commercial legislation and an addition to the most-favoured-nation clause of no mean import. The “Schedules” are the consolidated list of all concessions made by all contracting parties in their negotiations with their trading partners and maximum rates. The difference this addition makes to the most-favoured-nation clause is the protection it offers against the raising of the tariff on scheduled items. The traditional clause, while ensuring unconditional most-favoured-nation treatment, only provides equality of treatment against tariff changes.²⁹³

According to another author, the General Agreement.

goes beyond the most-favored-nation principle in this respect. Each member giving a concession is directly obligated to grant the same concession to all other members in their own right; this is different from making the latter rely on continued agreement between the Party granting the concession and the Party that negotiated it.²⁹⁴

(6) One authority gives the following picture of the operation of the clause:

... The clause can be pictured as a float, which enables its possessor to maintain itself at the highest level of the obligations accepted towards foreign States by the grantor State; if that level falls, the float cannot turn into a balloon so as to maintain the beneficiary of the clause artificially above the general level of the rights exercised by other States.²⁹⁵

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

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

The Italo-Abyssinian war provides a final example of the preservation of an advantage for a State benefiting from the clause beyond the duration of the treatment of the favoured third

²⁹³ G. Curzon, *Multilateral Commercial Diplomacy: The General Agreement on Tariffs and Trade and its Impact on National Commercial Policies and Techniques*, New York, Praeger, 1966, p. 64.

²⁹⁴ Hawkins, *op. cit.*, p. 226, note 4 on chapter VIII.

²⁹⁵ C. Rossillion, “La clause de la nation la plus favorisée dans la jurisprudence de la Cour internationale de Justice”, *Journal du droit international*, Paris, 82nd year, No. 1 (January-March, 1955), p. 106.

country. The sanctions against Italy resulted in the denunciation by States Members of the League of Nations of their trade treaties with Rome. The advantages conferred by those treaties should normally have ceased at the same time to accrue to third countries benefiting from the clause. They were, however, preserved for the countries in question on the basis of Article 16, paragraph 3, of the Covenant, under which the Members of the League agreed that they would mutually support one another in the financial and economic measures taken as sanctions "in order to minimize the loss and inconvenience resulting from the above measures."²⁹⁶

The author quoting the case adds the following remark:

Article 49 of the United Nations Charter [mutual assistance in carrying out measures decided upon by the Security Council] can also justify a request along these lines by a beneficiary State, perhaps after the latter has undertaken the consultation envisaged by Article 50.²⁹⁷

(8) *Paragraph 1* of article 21 applies to all kinds of most-favoured-nation clauses, whether or not made subject to a condition of compensation. The right of the beneficiary State to the favoured treatment obviously expires or is suspended at the moment when the relevant treatment by the granting State of the third State terminates or is suspended, as the case may be. In cases where treatment that is within the limits of the subject-matter of the clause is extended by the granting State to more than one third State, it is to be understood that the right of the beneficiary State to the favoured treatment terminates or is suspended upon the termination or suspension of the extension of the relevant treatment to all the third States concerned.

(9) *Paragraphs 2 and 3* of article 21 envisage the cases of most-favoured-nation clauses made subject to the conditions of compensation and of reciprocal treatment. In such cases, the right of the beneficiary State to the benefits enjoyed by the third State will also be terminated or suspended at the time when the beneficiary State withdraws permanently or temporarily its consent to accord the agreed compensation or reciprocal treatment, notwithstanding the fact that the third State continues to enjoy the favoured treatment in question.

(10) The provisions of article 21 are not of an exhaustive character. Other events can also terminate the enjoyment of the rights of the beneficiary State: expiration of the time-limit inserted in the clause; agreement of the granting State and the beneficiary State as to termination; uniting of the granting State and the third State.

Article 22. Compliance with the laws and regulations of the granting State

The exercise of rights arising under a most-favoured-nation clause for the beneficiary State or for persons or things in a determined relationship with that State is subject to compliance with the relevant laws and regulations of the granting State. Those laws and regulations, however, shall not be applied in such a manner that the treatment of the beneficiary State or of persons or things in a determined

relationship with that State is less favourable than that of the third State or of persons or things in the same relationship with that third State.

Commentary

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

(2) The following case, decided by the French Court of Cassation, explains fully the underlying idea of article 22. The appellant, an Italian citizen, was convicted under article 1 of the Decree of 12 November 1938 for having failed, as an alien, to obtain a trader's permit. He maintained that he was not required to be in possession of a trader's permit because, by virtue of the most-favoured-nation clause contained in the Franco-Italian agreement of 17 May 1946, he was entitled to rely on the Franco-Spanish treaty of 7 January 1862, which gave Spanish citizens the right to carry on trade in France. The public Prosecutor contended that the Franco-Spanish treaty did not exempt Spanish citizens from the requirements of obtaining a trader's permit, and that a letter of the French Minister for Foreign Affairs dated 15 April 1957, which stated that foreign nationals entitled to rely on treaties conferring the right to trade in France were not exempt from the requirements of obtaining traders' permits, was binding on the courts. The appeal was dismissed. The Court said:

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

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

Notwithstanding that international agreements can only be interpreted by the Contracting Parties, the interpretation thereof, as far as France is concerned, is within the competence of the French Government, which alone is entitled to lay down the meaning and scope of a diplomatic document. The Franco-Italian agreement of 17 May 1946 provides that Italian nationals are entitled to the benefit of the most-favoured-nation clause, and the treaty of 7 January 1862, between France and Spain, on which the appellant relies and which applies to Italian nationals with regard to the exercise of trading activities must, according

²⁹⁶ Sauvignon, *op. cit.*, pp. 96 and 97.

²⁹⁷ *Ibid.* For details of the Ethiopian-Italian case, see League of Nations, *Official Journal, Special Supplement No. 145*, p. 26, and *Special Supplement No. 150*, pp. 11 and 12.

to the interpretation given by the Minister for Foreign Affairs, be understood as follows: although the provisions which are applicable to foreign nationals must not, if they are not to violate the provisions of the international agreements, result in restricting the enjoyment of the rights which the treaty confers on Spanish nationals, the duty imposed upon a Spanish trader to be in possession of a special trader's permit does not affect the enjoyment of those rights but only the conditions of their exercise. To be in possession of a trader's permit is therefore a necessary as well as sufficient condition, which must be satisfied where a foreign national is to be entitled to rights which are granted to French nationals.²⁹⁸

(3) In some cases the clause itself contains a reference to the laws of the granting State and expressly stipulates that the rights in question must be exercised "in conformity with the laws" of that State. Such a case was dealt with in the following instance. The decedent was at the time of this death a resident of New York state. He died intestate. He was a citizen and subject of the Kingdom of Italy, and all his next of kin were residents of Italy. He left no next of kin residing in the state of New York, and it was alleged in the petition that there were no creditors. The consul-general of the Kingdom of Italy filed a petition to administer the decedent's estate. The public administrator, although duly served, did not appear. The petitioner asserted a right to administration without giving any security and in preference to the public administrator, and based his claim on treaty provisions in the consular treaty of 1878 between the United States and Italy. The letters of administrations were granted. The court said:

Conceding that, under the "most-favored-nation" clause in the provision of the treaty with Italy relating to the rights, prerogatives, immunities, and privileges of consuls general, the stipulation contained in the treaty of 27 July 1853 with the Argentine Republic [299] becomes a part of the treaty with Italy, I do not find in that stipulation any justification for the conclusion sought. A right to intervene "conformably with the laws" of the state of New York is something different from a right to set aside the laws of the state, and take from a person who, by those laws, is the officer entrusted with the administration of estates of persons domiciled here, and who leave no next of kin within the jurisdiction, the right and duty of administering their assets. And, when the laws of the state required an administrator to give a bond to be measured by the value of assets, nothing in the treaty provisions grants to the consul an immunity from this requirement to be obtained merely by asserting, in substance, that he has no knowledge of the existence of any debts... Therefore, the petitioner may have letters on giving the usual security, but that this is done pursuant to our local law, and because the public administrator has refused to act.³⁰⁰

²⁹⁸ Corneli Case, France, Court of Cassation, 2 July 1958. See Secretariat Digest (*Yearbook ... 1973*, vol. II, p. 139, doc. A/CN.4/269, para. 63).

²⁹⁹ Article IX of the Treaty between the United States of America and Argentina reads:

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

³⁰⁰ *In re*: Logiorato's Estate, United States of America, State of New York, New York County Surrogate's Court, February 1901. See Secretariat Digest, *Yearbook ... 1973*, vol. II, p. 149, doc. A/CN.4/269, para. 89.

(4) In other cases the duty of respecting the internal laws of the granting State is laid down in a separate provision of the treaty containing the most-favoured-nation clause. Thus, for example, the Long-Term Trade Agreement of 23 June 1962 between the Union of Soviet Socialist Republics and the United Arab Republic contains the following provisions (article 6):

The circulation of goods between the USSR and the United Arab Republic shall take place in accordance with the provisions of this Agreement and with the import and export laws and regulations in force in the two countries provided that these laws and regulations are applied to all countries.³⁰¹

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

(6) The rule proposed in article 22 is in a certain relationship with article 41 of the Vienna Convention on Diplomatic Relations,³⁰² article 55 of the Vienna Convention on Consular Relations,³⁰³ article 47 of the Convention on Special Missions³⁰⁴ and article 77 of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.³⁰⁵ In the first two conventions, paragraph 1 of the relevant articles reads as follows:

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

Paragraph 1 of the relevant article of the Convention on Special Missions and of the Convention on the Representation of States in Their Relations with International Organizations of a Universal Character reproduces the foregoing text, with some drafting changes. The roots of the rule contained in article 22, however, can be traced further, and ultimately to the principle of sovereignty and equality of States. Obviously, beyond the limits of the privileges granted by the State, its laws and regulations must be generally observed on its territory.

(7) The purpose of a most-favoured-nation clause, namely, to create a situation of non-discrimination between the beneficiary State and the granting State, can be defeated by a discriminatory application of the laws of the granting State. Therefore the Commission has found that the rule embodied in article 22 which states the obligation of compliance with the relevant laws of the granting State should also contain a proviso as to the application of those laws. Consequently, article 22 states that the laws and regulations of the granting State shall

³⁰¹ United Nations, *Treaty Series*, vol. 472, p. 74.

³⁰² *Ibid.*, vol. 500, p. 120.

³⁰³ *Ibid.*, vol. 596, pp. 308-310.

³⁰⁴ General Assembly resolution 2530 (XXIV), annex.

³⁰⁵ *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations*, vol. II, *Documents of The Conference* (United Nations publication, Sales No. E.75.V.12), p. 221.

not be applied in such a manner that the treatment of the beneficiary State, or of persons or things in a determined relationship with that State, is less favourable than that of the third State or of persons or things in the same relationship with that third State.

Article 23. The most-favoured-nation clause in relation to treatment under a generalized system of preferences

A beneficiary State is not entitled, under a most-favoured-nation clause, to treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a scheme of generalized preferences, established by that granting State, which conforms with a generalized system of preferences recognized by the international community of States as a whole or, for the States members of a competent international organization, adopted in accordance with its relevant rules and procedures.

Commentary

(1) As stated in the introduction to this chapter of the Commission's report,³⁰⁶ the Commission from the early stages of its work has taken cognizance of the problem which the application of the most-favoured-nation clause creates in the sphere of economic relations when the world consists of States whose economic development is strikingly unequal. Part of General Principle Eight of annex A.I.1 of the recommendations adopted by UNCTAD at its first session was also quoted.³⁰⁷ This principle was adopted in 1964 by a roll-call vote of 78 to 11, with 23 abstentions.

(2) The secretariat of UNCTAD had explained the meaning of General Principle Eight as follows:

From General Principle Eight it is clear that the basic philosophy of UNCTAD starts from the assumption that the trade needs of a developing economy are substantially different from those of a developed one. As a consequence, the two types of economies should not be subject to the same rules in their international trade relations. To apply the most-favoured-nation clause to all countries regardless of their level of development would satisfy the conditions of formal equality, but would in fact involve implicit discrimination against the weaker members of the international community. This is not to reject on a permanent basis the most-favoured-nation clause. The opening sentence of General Principle Eight lays down that "international trade should be conducted to mutual advantage on the basis of the most-favoured-nation treatment...". The recognition of the trade and development needs of developing countries requires that, for a certain period of time, the most-favoured-nation clause will not apply to certain types of international trade relations.**

** In the words of a report entitled "The developing countries in GATT", submitted to the first session of the Conference:

"There is no dispute about the need for a rule of law in world trade. The question is: What should be the character of that law? Should it be a law based on the presumption that the world is essentially homogeneous, being composed of countries of equal strength and comparable levels of economic development, a law founded, therefore, on the principles of reciprocity and non-discrimination? Or should it be a law that recognizes diversity of levels of economic development and differences in economic and social systems?"³⁰⁸

³⁰⁶ See paras. 51-55 above.

³⁰⁷ See para. 52 above.

³⁰⁸ See *Yearbook ... 1970*, vol. II, p. 231, doc. A/CN.4/228 and Add.1, para. 188.

(3) Of primary interest to developing countries are the preferences granted to them by developed countries. The main aim of UNCTAD from the very beginning has been to achieve a system of generalized non-reciprocal and non-discriminatory preferences for the benefit of developing countries. The main ideas of UNCTAD in this area are explained as follows in an UNCTAD research memorandum:

In the relationship between developed and developing countries the most-favoured-nation clause is subject to important qualifications. These qualifications follow from the principle of a generalized, non-reciprocal and non-discriminatory system of preferences. Developed market-economy countries are to accord preferential treatment in their markets to exports of manufactures and semi-manufactures from developing countries. This preferential treatment should be enjoyed only by the developing suppliers of these products. At the same time developing countries will not be required to grant developed countries reciprocal concessions.

The need for a preferential system in favour of all developing countries is referred to in a number of recommendations adopted by the first session of the United Nations Conference on Trade and Development. General Principle Eight states that "developed countries should grant concessions to all developing countries ... and should not, in granting these or other concessions, require any concessions in return from developing countries".^[309] In its recommendation A.III.5, the Conference recommended

"that the Secretary-General of the United Nations make appropriate arrangements for the establishment as soon as possible of a committee of governmental representatives ... with a view to working out the best method of implementing such preferences on the basis of non-reciprocity from the developing countries".^[310]

At the second session of the Conference, the principle of preferential treatment of exports of manufactures and semi-manufactures from developing countries was unanimously accepted. According to resolution 21 (II), the Conference:

"1. *Agrees* that the objectives of the generalized non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least advanced among the developing countries, should be:

- "(a) To increase their export earnings;
- "(b) To promote their industrialization;
- "(c) To accelerate their rates of economic growth;

"2. *Establishes*, to this end, a Special Committee on Preferences, as a subsidiary organ of the Trade and Development Board, to enable all the countries concerned to participate in the necessary consultations...

"...

"4. *Requests* that ... the aim should be to settle the details of the arrangements in the course of 1969 with a view to seeking legislative authority and the required waiver in the General Agreement on Tariffs and Trade as soon as possible thereafter;

"5. *Notes* the hope expressed by many countries that the arrangements should enter into effect in early 1970".^[311]

³⁰⁹ 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.

³¹⁰ *Ibid.*, p. 39.

³¹¹ *Ibid.*, *Second Session*, vol. 1, *Report and Annexes* (United Nations publication, Sales No. E.68.II.D.14), p. 38.

This is not the occasion to go at length into the reasons and considerations underlying the position of UNCTAD on the issue of preferences. Given the sluggish expansion of exports of primary products, and the limitations of inward-looking industrialization, the economic growth of developing countries depends in no small measure upon the development of export-oriented industries. It is clear, however, that to gain a foothold in the highly competitive markets of the developed countries, the developing countries need to enjoy, for a certain period, preferential conditions of access. The case for such a preferential treatment is not unlike that of the infant industry argument. It has long been accepted that, in the early stages of industrialization, domestic producers should enjoy a sheltered home market vis-à-vis foreign competitors. Such a shelter is achieved through the protection of the nascent industries in the home market. By the same token it could be argued that the promotion of export-oriented industries requires a sheltered export market. This is achieved through the establishment of preferential conditions of access in favour of developing suppliers. Preferential treatment for exports of manufactures and semi-manufactures is supposed to last until developing suppliers are adjudged to have become competitive in the world market. Upon reaching this stage, conditions of access to the markets of developed countries are to be governed again by the most-favoured-nation clause.

While UNCTAD is in favour of a general non-reciprocal system of preferences from which *all* developing countries would benefit, it does not favour the so-called special or vertical preferences. Those refer to the preferential arrangements actually in force between *some* developing countries and *some* developed countries. A typical example of vertical preferences is that between the European Economic Community (EEC) and eighteen African countries, most of which are former French colonies. The same is true of the preferential arrangement between the United Kingdom and developing Commonwealth countries. Such preferential arrangements differ from the general system of preferences in two important respects:

- (a) they involve discrimination in favour of some developing countries against all other developing countries. Accordingly third party developing countries stand to be adversely affected;
- (b) they are reciprocal. Thus, the associated African countries enjoy preferential conditions of access in the Common Market. In return the Common Market countries enjoy preferential access to the markets of the associated countries. Although there are some exceptions, reciprocity is also characteristic of the relationship between the United Kingdom and the Commonwealth countries.

As has been mentioned before, these special preferential arrangements were countenanced by Article I of GATT as a derogation from the most-favoured-nation clause. According to UNCTAD recommendations, these preferential arrangements are to be gradually phased out against the provision of equivalent advantages to the beneficiary developing countries. General Principle Eight states that:

“Special preferences at present enjoyed by certain developing countries in certain developed countries should be regarded as transitional and subject to progressive reduction. They should be eliminated as and when effective international measures guaranteeing at least equivalent advantages to the countries concerned come into operation.” [312]

The question is taken up again in recommendation A.II.1.:

“Preferential arrangements between developed countries and developing countries which involve discrimination against

other developing countries, and which are essential for the maintenance and growth of the export earnings and for the economic advancement of the less developed countries at present benefiting therefrom, should be abolished *pari passu* with the effective application of international measures providing at least equivalent advantages for the said countries. These international measures should be introduced gradually in such a way that they become operative before the end of the United Nations Development Decade.” [313]

The position of UNCTAD on the issue of special preferences is motivated by various considerations. It is believed that the existence of such preferential arrangements may act as a hindrance to the eventual establishment of a fully integrated world economy. The privileged position of some developing countries in the markets of some developed countries is likely to create pressure on third party developing countries to seek similar exclusive privileges in the same or in other developed countries. The experience of the last decade goes a long way to vindicate this belief. The Yaoundé Convention of 1963, providing for preferential arrangements between EEC and the eighteen African countries, has induced many other African countries (e.g. Nigeria, Kenya, Uganda, Tanzania) to seek similar association with EEC. Moreover, in Latin America there appears to be a growing feeling that, to counteract discrimination against them in the Common Market, it may be necessary to secure preferential treatment in the United States market from which the associated African countries would be excluded. Such a proliferation of special preferential arrangements between groups of countries may eventually lead to the division of the world economy into competing economic blocks.

Apart from the danger of proliferation, special preferences involve, as mentioned before, reciprocal treatment. Accordingly, some developed countries enjoy preferential access to the markets of some developing countries. Here again, the existence of the so-called reverse preferences may provide an additional inducement for proliferation of vertical trading arrangements.

For these considerations UNCTAD has recommended the gradual phasing-out of special preferences. It is recognized, however, that, in the case of certain countries, the enjoyment of preferential access is essential for the maintenance and growth of their export earnings. For this reason the phasing-out of special preferences was made conditional upon the application of international measures providing at least equivalent advantages for developing countries benefiting therefrom.³¹⁴

(4) In the sphere of preferences, a compromise agreement was reached unanimously at the second session of UNCTAD, in 1968, and embodied in resolution 21 (II). That resolution favoured the introduction of a generalized non-reciprocal, non-discriminatory system of preferences and envisaged the necessity of a gradual phasing-out of the special preferences.

(5) The Special Committee on Preferences, established by resolution 21 (II) as a subsidiary organ of the Trade and Development Board, succeeded in reaching “agreed conclusions” on a generalized system of preferences which were annexed to decision 75 (S-IV) adopted by the Trade and Development Board at its fourth special session held at Geneva on 12 and 13 October 1970.³¹⁵

³¹² *Ibid.*, p. 30.

³¹³ UNCTAD, Research memorandum No. 33/Rev.1, paras. 19-27.

³¹⁴ UNCTAD, *Official Records of the Trade and Development Board, Fourth Special Session, Supplement No. 1 (TD/B/322)*, p. 1.

³¹² *Ibid.*, [First Session], vol. I, *Final Act and Report* (United Nations publication, Sales No. 64.II.B.11), p. 20.

Excerpts from that very important document are reproduced below.

I.

The Special Committee on Preferences

1. *Recalls* that in its resolution 21 (II) of 26 March 1968 the United Nations Conference on Trade and Development recognized the unanimous agreement in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal, non-discriminatory preferences which would be beneficial to the developing countries;

2. *Further recalls* the agreement that the objectives of the generalized, non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least developed among the developing countries, should be: (a) to increase their export earnings; (b) to promote their industrialization; and (c) to accelerate their rates of economic growth;

...

9. *Recognizes* that these preferential arrangements are mutually acceptable and represent a co-operative effort which has resulted from the detailed and extensive consultations between the developed and developing countries which have taken place in UNCTAD. This co-operation will continue to be reflected in the consultations which will take place in the future in connexion with the periodic reviews of the system and its operation;

10. *Notes* the determination of the prospective preference-giving countries to seek as rapidly as possible the necessary legislative or other sanction with the aim of implementing the preferential arrangements as early as possible in 1971;

...

II. REVERSE PREFERENCES AND SPECIAL PREFERENCES

1. The special Committee notes that, consistent with Conference resolution 21 (II), there is agreement with the objective that in principle all developing countries should participate as beneficiaries from the outset and that the attainment of this objective, in relation to the question of reverse preferences, which remains to be resolved, will require further consultations between the parties directly concerned. These consultations should be pursued as a matter of urgency with a view to finding solutions before the implementation of the schemes. The Secretary-General of UNCTAD will assist in these consultations with the agreement of the Governments concerned.

...

III. SAFEGUARD MECHANISMS

1. All proposed individual schemes of preferences provide for certain safeguard mechanisms (for example, *a priori* limitation or escape-clause type measures) so as to retain some degree of control by preference-giving countries over the trade which might be generated by the new tariff advantages. The preference-giving countries reserve the right to make changes in the detailed application as in the scope of their measures, and in particular, if deemed necessary, to limit or withdraw entirely or partly some of the tariff advantages granted. The preference-giving countries, however, declare that such measures would remain exceptional and would be decided on only after taking due account, in so far as their legal provisions permit, of the aims of the generalized system of preferences and the general interests of the developing countries, and in particular the interests of the least developed among the developing countries.

...

IV. BENEFICIARIES

1. The Special Committee noted the individual submissions of the preference-giving countries on this subject and the joint position of the countries members of the Organization for Economic Co-operation and Development as contained in paragraph 13 of the introduction to the substantive documentation containing the preliminary submissions of the developed countries; ... namely:

"As for beneficiaries, donor countries would in general base themselves on the principle of self-election. With regard to this principle, reference should be made to the relevant paragraphs in document TD/56, ... i.e. Section A in Part I."

...

V. SPECIAL MEASURES IN FAVOUR OF THE LEAST DEVELOPED AMONG THE DEVELOPING COUNTRIES

1. In implementing Conference resolution 21 (II), and as provided therein, the special need for improving the economic situation of the least developed among the developing countries is recognized. It is important that these countries should benefit to the fullest extent possible from the generalized system of preferences. In this context, the provisions of Conference resolution 24 (II) of 26 March 1968 should be borne in mind.

2. The preference-giving countries will consider, as far as possible, on a case-by-case basis, the inclusion in the generalized system of preferences of products of export interest mainly to the least developed among the developing countries, and as appropriate, greater tariff reductions on such products.

...

VI. DURATION

The initial duration of the generalized system of preferences will be ten years. A comprehensive review will be held some time before the end of the ten-year period to determine, in the light of the objectives of Conference resolution 21 (II), whether the preferential system should be continued beyond that period.

VII. RULES OF ORIGIN

...

VIII. INSTITUTIONAL ARRANGEMENTS

1. The Special Committee on Preferences agrees that there should be appropriate machinery within UNCTAD to deal with the questions relating to the implementation of Conference resolution 21 (II) bearing in mind Conference resolution 24 (II). The [appropriate UNCTAD body] should have the following terms of reference:

(a) It will review:

- (i) The effects of the generalized system of preferences on exports and export earnings, industrialization and the rates of economic growth of the beneficiary countries, including the least developed among the developing countries, and in so doing will consider, *inter alia*, questions related to product coverage, exception lists, depths of cut, working of safeguard mechanisms (including ceilings and escape clauses) and rules of origin;

...

IX. LEGAL STATUS

1. The Special Committee recognizes that no country intends to invoke its rights to most-favoured-nation treatment with a view to obtaining, in whole or in part, the preferential treatment granted to developing countries in accordance with Conference resolution 21 (II), and that the Contracting Parties to the General Agreement on Tariffs and Trade intend to seek the required waiver or waivers as soon as possible.

2. The Special Committee takes note of the statement made by the preference-giving countries that the legal status of the tariff preferences to be accorded to the beneficiary countries by each preference-giving country individually will be governed by the following considerations:

- (a) The tariff preferences are 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 accommodations;
- (c) Their grant is conditional upon the necessary waiver or waivers in respect of existing international obligations, in particular in the General Agreement on Tariffs and Trade.

(6) The General Assembly took note of the unanimous agreement reached in the Special Committee on Preferences by including the following passage in the International Development Strategy for the Second United Nations Development Decade adopted in its resolution 2626 (XXV) of 24 October 1970:

(32) Arrangements concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential treatment to exports of developing countries in the markets of developed countries have been drawn up in the United Nations Conference on Trade and Development and considered mutually acceptable to developed and developing countries. Preference-giving countries are determined to seek as rapidly as possible the necessary legislative or other sanction with the aim of implementing the preferential arrangements as early as possible in 1971. Efforts for further improvements of these preferential arrangements will be pursued in a dynamic context in the light of the objectives of resolution 21 (II) of 26 March 1968, adopted by the Conference at its second session.

Developments in GATT

(7) Part IV of the General Agreement was added to the original text in 1966 with the intention of satisfying the trade needs of developing countries.³¹⁶ It did not take too long to detect that the provisions of part IV were insufficient. On the basis of the agreement reached at the second session of UNCTAD and in the Special Committee on Preferences, the Governments members of GATT voted to authorize the introduction by developed member countries of generalized, non-discriminatory preferential tariff treatment for products originating in developing countries. The authorization takes the form of a waiver under the terms of article XXV of the General Agreement. The full text of the waiver reads as follows:

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

Recognizing that a principal aim of the CONTRACTING PARTIES is promotion of the trade and export earnings of developing countries for the furtherance of their economic development;

Recognizing further that individual and joint action is essential to further the development of the economies of developing countries;

Recalling that at the Second UNCTAD, unanimous agreement was reached in favour of the early establishment of a mutually acceptable system of generalized, non-discriminatory preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries;

Considering that mutually acceptable arrangements have been drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries;

Noting the statement of developed contracting parties that the grant of tariff preferences does not constitute a binding commitment and that they are temporary in nature;

Recognizing fully that the proposed preferential arrangements do not constitute an impediment to the reduction of tariffs on a most-favoured-nation basis,

Decide:

(a) That without prejudice to any other Article of the General Agreement, the provisions of Article I shall be waived for a period of ten years to the extent necessary to permit developed contracting parties, subject to the procedures set out hereunder, to accord preferential tariff treatment to products originating in developing countries and territories with a view to extending to such countries and territories generally the preferential tariff treatment referred to in the Preamble to this Decision, without according such treatment to like products of other contracting parties

Provided that any such preferential tariff arrangements shall be designed to facilitate trade from developing countries and territories and not to raise barriers to the trade of other contracting parties;

(b) That they will, without duplicating the work of other international organizations, keep under review the operation of this Decision and decide, before its expiry and in the light of the considerations outlined in the Preamble, whether the Decision would be renewed and if so, what its terms should be;

(c) That any contracting party which introduces a preferential tariff arrangement under the terms of the present Decision or later modifies such arrangement, shall notify the CONTRACTING PARTIES and furnish them with all useful information relating to the actions taken pursuant to the present Decision;

(d) That such 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 preferential arrangement;

(e) That any contracting party which considers that the arrangement or its later extension is not consistent with the present Decision or that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the arrangement or its subsequent extension 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.³¹⁷

Functioning of the generalized system of preferences

(8) The Soviet Union was the first country to introduce, as early as 1965, a unilateral system of duty-free imports from developing countries. Such duty-free treatment

³¹⁶ See *Yearbook ... 1970*, vol. II, p. 232, doc. A/CN.4/228 and Add.1, para. 192.

³¹⁷ Decision of 25 June 1971. GATT, *Basic Instruments and Selected Documents, Eighteenth Supplement* (Sales No.: GATT/1972-1), pp. 24-26.

applies to all products. No conditions in respect of duration or the reimposition of duties are attached. As the Soviet representative in the Special Committee on Preferences explained, the USSR, in addition to according tariff preferences, would continue with a number of other measures designed to increase its imports from developing countries on the lines outlined in the Joint Declaration of the socialist countries of Eastern Europe.³¹⁸

(9) Australia followed suit in 1966 with a more restricted unilateral system, and Hungary announced its own system in 1968. Some detailed description of the latter may serve to illustrate the operation of a scheme of generalized preferences established by a State. As amplified and approved in 1971 and 1974, the Hungarian preferential list to products covers a wide range of products, both agricultural and industrial. It is based on requests of developing countries and includes items of special export interest for the least developed among the developing countries; the extent of tariff reductions is set forth by government decree. The preferential tariff rates are 50 to 90 per cent below the most-favoured-nation tariff rates and more than 100 products are accorded full duty exemption. Beneficiary countries are those developing countries in Asia, Africa and Latin America whose *per capita* national income is less than Hungary's, which do not apply discrimination against Hungary, and which maintain normal trade relations with Hungary and can give reliable evidence of the origin of products eligible for preferential tariff treatment. A product shall be deemed to originate in a beneficiary country if it has been produced in that country or 50 per cent of its value has been added to it in that country. A safeguard mechanism consists in the possibility that the Ministers of Foreign Trade and of Finance, in collaboration with the President of the National Board for Materials and Prices, can increase, reduce or suspend the application of the tariff rates established in columns I, II and III (columns I and II of the customs tariff indicate "preferential" and "most-favoured-nation" tariff rates, respectively; the tariff rates in column III are applied to goods originating from those countries to which neither preferential nor most-favoured-nation treatment is applied). This detailed regulation entered into force on 1 January 1971. In 1974, the number of beneficiary countries was enlarged, the product coverage of the system was also broadened and some tariff rates were reduced.³¹⁹ The Hungarian system allows preferences only provisionally for those countries which on 1 January 1972 extended special (reverse) preferences to certain developed countries.

(10) EEC also announced a scheme of generalized preferences in 1971, allowing the duty-free entry of manufactured and semi-manufactured products from a number of developing States. Firm limits are set for the quantities that may be imported in this way and certain sensitive

items such as textiles and shoes are given less generous treatment. The generalized system of preferences of the United States of America is contained in title V of its Trade Act of 1974.³²⁰ Its section 501 authorizes the President to extend preferences. Section 502 defines the notion of a "beneficiary developing country", excluding from that notion certain countries. Section 503 determines the articles eligible for preferential treatment, excluding some import-sensitive articles. Section 504 contains limitations on preferential treatment. Section 505 sets a 10-year time-limit for duty-free treatment under the title and provides for a comprehensive review of the operation of the whole preferential system after five years.

(11) It is perhaps too early to assess the results—the success or failure—of the GSP. Some voices of complaint have already been heard. According to the report of the Trade and Development Board on its fifth special session (April-May 1973):

The representatives of developing countries stated that, while some progress might have been achieved in the implementation of the generalized system of preferences, the system itself was far from adequate in terms of its objectives and its performance thus far was disappointing... They observed that the actual benefits of the scheme were still meagre because of the limited coverage of the schemes in operation, ... the limitations imposed on preferential imports by ceilings and the application of non-tariff barriers on products covered by the system.

The representatives of several developing countries including the least developed among them felt that the generalized system of preferences was of little or no benefit, since their countries did not produce manufactures or semi-manufactures, but only supplied primary materials and semi-processed agricultural commodities which were not covered by the generalized system of preferences. In addition, they pointed out that the safeguard clauses presently embodied in the schemes allowed much leeway for limiting the scope of preferences and made such preferences disparate, while creating considerable uncertainty.³²¹

(12) The Charter of Economic Rights and Duties of (XXIX) of 12 December 1974 also contains provisions pertinent to the problems under consideration. Thus, with regard to the GSP, articles 18 and 19 read as follows:

Article 18

Developed countries should extend, improve and enlarge the system of generalized non-reciprocal and non-discriminatory tariff preferences to the developing countries consistent with the relevant agreed conclusions and relevant decisions as adopted on this subject, in the framework of the competent international organizations. Developed countries should also give serious consideration to the adoption of other differential measures, in areas where this is feasible and appropriate and in ways which will provide special and more favourable treatment, in order to meet the trade and development needs of the developing countries. In the conduct of international economic relations the developed countries should endeavour to avoid measures having a negative effect on the development of the national economies of the developing countries, as promoted by generalized tariff pref-

³¹⁸ *Official Records of the Trade and Development Board, Tenth Session, Supplement No. 6A* (TD/B/329/Rev.1), part two, para. 192. See R. Krishnamurti, "The agreement on preferences, a generalized system in favour of developing countries", *Journal of World Trade Law*, Twickenham, vol. 5, No. 3 (January-February 1971), pp. 56 and 57.

³¹⁹ See GATT documents L/3301 and L/4106.

³²⁰ Public Law 93-618; came into force on 3 January 1975. For text, see *U.S. Code Congressional and Administrative News*, Washington, D. C., No. 13 (30 January 1975), p. 6956.

³²¹ *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 15* (A/9015/Rev.1), part one, chap. I, paras. 89 and 90.

ferences and other generally agreed differential measures in their favour.

Article 26

All States have the duty to co-exist in tolerance and live together in peace, irrespective of differences in political, economic, social and cultural systems, and to facilitate trade between States having different economic and social systems. International trade should be conducted without prejudice to generalized non-discriminatory and non-reciprocal preferences in favour of developing countries, on the basis of mutual advantage, equitable benefits and the exchange of most-favoured-nation treatment.

(13) At its last (fourth) session, held at Nairobi in May 1976, the United Nations Conference on Trade and Development adopted resolution 96 (IV), of 31 May 1976, entitled "A set of interrelated and mutually supporting measures for expansion and diversification of exports of manufactures and semi-manufactures of developing countries". Section I of that resolution ("Improving access to markets in developed countries for manufactures and semi-manufactures of developing countries") includes the following:

Access to markets of developed countries for manufactures and semi-manufactures should be improved, in particular in the following areas:

A. Generalized system of preferences

(a) The generalized system of non-reciprocal, non-discriminatory preferences should be improved in favour of the developing countries, taking into account the relevant interests of those developing countries enjoying special advantages as well as the need to find ways and means of protecting their interests. Preference-giving countries should achieve this in their respective schemes through the adoption, *inter alia*, of the following measures:

- (i) Extension of the coverage of the system to as many products of export interest to developing countries as possible, taking into account the export needs of developing countries and their desire to have all such products included in the schemes;
- (ii) As far as possible, application of duty-free entry for manufactured and semi-manufactured products and, where applicable, the substantial increase of ceilings and tariff quotas for these products;
- (iii) As flexible and liberal an application as possible of the rules for the operation of the schemes;
- (iv) Simplification, harmonization and improvement of the rules of origin of the generalized system of preferences in order to facilitate the maximum utilization of the schemes and exports thereunder. Preference-giving countries which have not yet done so should give serious consideration to adopting appropriate forms of "cumulative origin" treatment in their respective schemes;
- (v) Adaptation of the generalized system of preferences to respond better to the evolving needs of the developing countries, taking account in particular of the interests of the least developed countries.

(b) Preference-giving countries should implement the provisions of Conference resolution 21 (II) regarding the generalized, non-reciprocal and non-discriminatory system of preferences.

(c) The generalized system of preferences should continue beyond the initial period of ten years originally envisaged, bearing in mind, in particular, the need for long-term export planning in the developing countries. The relevant provisions of section III

of the agreed conclusions adopted by the Special Committee on Preferences at the second part of its fourth session [322] should be taken into account.

(d) The generalized system of preferences has been instituted to help meet the development needs of the developing countries and should only be used as such and not as an instrument of political or economic coercion or of retaliation against developing countries, including those that have adopted or may adopt, singly or jointly, policies aimed at safeguarding their national resources.

Additional measures to increase the utilization of preferences

(e) Efforts should be made by all preference-giving countries and beneficiary countries to increase, as much as possible, the degree of utilization of the different schemes of generalized preferences by all appropriate means. In this connexion, developed countries should make efforts to give technical assistance to countries benefiting from generalized preferences, particularly to the least advanced countries, to enable them to draw maximum advantage from preferences. Among other measures, this assistance could focus on better information to beneficiary countries concerning the advantages granted and on technical training for the personnel of developing countries dealing with the generalized system of preferences. Moreover, it is recommended that UNCTAD, with the assistance of other appropriate international institutions, pursue work in the field of dissemination of information, trade promotion and industrial promotion for products covered by the generalized system of preferences.

(f) Application of the above provisions by the socialist countries of Eastern Europe in their schemes of preferences, taking into account the joint declaration made by socialist countries of Eastern Europe at the second part of the fourth session of the Special Committee on Preferences, [323] and with due observance of the relevant provisions of the Charter of Economic Rights and Duties of States,³²⁴

(14) By its resolution 31/159 of 21 December 1976 the General Assembly decided, *inter alia*, as follows:

The General Assembly,

...

6. Endorses further resolution 96 (IV) of 31 May 1976 of the United Nations Conference on Trade and Development relating to a set of interrelated and mutually supporting measures for expansion and diversification of exports of manufactures and semi-manufactures of developing countries, in particular the decisions on the extension of the coverage of the generalized system of preferences to as many products of export interest to developing countries as possible and on the continuation of the system beyond the initial period of ten years as originally envisaged, and requests developed countries to consider, as appropriate, making it a continuing feature of their trade policies.

(15) There appears to be general agreement in principle, expressed within United Nations organs, that States should adopt a generalized system of preferences the characteristics of which are outlined above. There seems to be general agreement also that States will refrain from

³²² Trade and Development Board decision 75 (S-IV) of 13 October 1970, annex. See also para. (5) above.

³²³ *Official Records of the Trade and Development Board, Tenth Session, Supplement No. 6A* (TD/B/329/Rev.1), part two, para. 192.

³²⁴ *Proceedings of the United Nations Conference on Trade and Development, Fourth Session*, vol. I and Corr. 1, *Report and Annexes* (United Nations publication, Sales No.: E.76.II.D.10), p. 10.

invoking their rights to most-favoured-nation treatment with a view to obtaining in whole or in part the preferential treatment granted to developing countries by developed countries.³²⁵ Accordingly, contracting parties to GATT have, under the conditions described above,³²⁶ waived their rights to most-favoured-nation treatment under article I of the General Agreement.

(16) The Commission is aware that the usefulness of article 23 depends upon the permanence and the development of the GSP. It noted, however, that the General Assembly, in its resolutions 3362 (S-VII) of 16 September 1975, and 31/159 of 21 December 1976, expressed the wish that the GSP should not terminate at the end of the period of 10 years originally envisaged.

(17) It also took account of the fact that the countries establishing their own preferential scheme were free to withdraw their grants in whole or in part and that those grants were conditional upon the necessary waiver or waivers in cases where, as in the framework of the General Agreement on Tariffs and Trade, it was so prescribed.

(18) It is also evident that the advantages which the GSP may yield to developing countries may be diminished by a reduction of tariffs following international arrangements or unilateral action. In this respect, it is not yet possible to foresee to what extent the results of the current round of multilateral trade negotiations (the "Tokyo round") may affect the generalized system of preferences

(19) The system is based upon the principle of self-selection, i.e. that the donor countries have the right to select the beneficiaries of their system and withhold preferences from certain developing countries. As may be seen from the examples given above,³²⁷ selections can be based on various considerations. It could be argued that the individual, national schemes of generalized preferences were in fact discriminatory and that the original idea of non-discriminatory preferences had not been reached. The principle of self-selection is, however, part of the system, from which it cannot be severed; but there is also the expectation that the right of self-selection will be exercised with reasonable restraint.

(20) The above-mentioned features are part and parcel of the GSP, which was adopted as a matter of compromise between developed and developing States.

(21) The Commission also took cognizance of the fact that there was currently no general agreement among States concerning the concepts of developed and developing States. The rule contained in article 23 applies to any State beneficiary of a most-favoured-nation clause irrespective of whether it belongs to the developed or to 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-selection—could be circumvented.

(22) On the basis of the foregoing considerations, the Commission adopted article 23, whose first phrase states

that a beneficiary State is not entitled, under a most-favoured-nation clause, to treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a scheme of generalized preferences established by that granting State which conforms with a generalized system of preferences. The last phrase of the article, "recognized by the international community of States as a whole or, for the States members of a competent international organization, adopted in accordance with its relevant rules and procedures", is intended to make the article more accurately reflect the current situation as regards the general acceptability and implementation of the GSP, having due regard to the actual participation of States in international organizations or arrangements concerned with this question.

Article 24. The most-favoured-nation clause in relation to arrangements between developing States

A developed beneficiary State is not entitled under a most-favoured-nation clause to any preferential treatment in the field of trade extended by a developing granting State to a developing third State in conformity with the relevant rules and procedures of a competent international organization of which the States concerned are members.

Commentary

(1) Trade expansion, economic co-operation and economic integration among developing countries—whether within organized economic groupings or otherwise—have been accepted as important elements of an "international development strategy" and as essential factors in the economic development of those countries in a number of important international instruments adopted with the participation of both developed and developing countries. 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 developed countries to promote this tendency, *inter alia* by granting exceptions from their most-favoured-nation rights.

(2) General Principle Eight of recommendation A.I.1. adopted at the first session of the United Nations Conference on Trade and Development (Geneva, 1964), states, *inter alia*:

Developing countries need not extend to developed countries preferential treatment in operation amongst them.³²⁸

General Principle Ten states, *inter alia*:

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...³²⁹

³²⁵ See para. (5) above, excerpts from the agreed conclusions of the Special Committee on Preferences, sect. IX: "Legal status".

³²⁶ See para. (7) above.

³²⁷ See paras. (9) and (10) above.

³²⁸ For full text, see *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report (op. cit.)*, p. 20. (The text cited above is reproduced in *Yearbook ... 1970*, vol. II, p. 231, doc. A/CN.4/228 and Add.1, para. 188.)

³²⁹ *Ibid.*

Recommendation A.III.8 states, *inter alia*:

... rules governing world trade should ... permit developing countries to grant each other concessions not extended to developed countries...³³⁰

(3) At its second session, (New Delhi 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)), containing "declarations of support" by the developed market-economy countries and by the socialist countries of Eastern Europe. According to the first of these declarations:

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.³³¹

According to the second:

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.³³²

(4) At its last (fourth) session (Nairobi 1976), UNCTAD adopted without dissent, on 30 May 1976, resolution 92 (IV), entitled "Measures of support by developed countries and international organizations for the programme of economic co-operation among developing countries", the operative part of which reads, *inter alia*, as follows:

The United Nations Conference on Trade and Development,

...

Urges the developed countries and the United Nations system to provide, as and when requested, support and assistance to developing countries in strengthening and enlarging their mutual co-operation. To this end:

(a) The developed countries, both the developed market-economy countries and the socialist countries of Eastern Europe, commit themselves to abstain as appropriate from adopting any kind of measures or action which could adversely affect the decisions of developing countries in favour of the strengthening of their economic co-operation and the diversification of their production structures;

...

(c) The developed market-economy countries should, in particular:

(i) Support preferential trade arrangements among developing countries, including those of limited scope, through tech-

nical assistance and through appropriate policy measures in international trade organizations.³³³

(5) A Protocol relating to trade negotiations among developing countries was established at Geneva on 8 December 1971 under the auspices of GATT.³³⁴ 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 by all developing countries. The Protocol entered into effect on 11 February 1973 for eight participating countries and, subsequently, for additional participating countries. The contracting parties to GATT, desirous of encouraging trade negotiations among developing countries through their participation in the Protocol, adopted a decision³³⁵ authorizing the waiver of the provisions of paragraph 1 of article I 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 same treatment to like goods when imported from other contracting parties. That decision was taken without prejudice to the reduction of tariffs on a most-favoured-nation basis.

(6) Economic co-operation among developing countries, based on the concept of individual and collective self-reliance, has been identified by them, in a number of declarations, as a major strategy to promote their development and as an important means of consolidating their unity and solidarity. Through such decisions, economic co-operation among developing countries has assumed increasing importance as a major area where this concept could materialize into policy action. Those declarations include, in particular, the Programme of Action adopted by the Third Ministerial Meeting of the Group of 77, held at Manila from 26 January to 7 February 1976,³³⁶ the Action Programme for Economic Co-operation adopted by the Fifth Conference of Heads of State or Government of Non-Aligned Countries, held at Colombo from 16 to 19 August 1976,³³⁷ and the report of the Conference on Economic Co-operation among Developing Countries, held at Mexico City from 13 to 22 September 1976.³³⁸

³³⁰ *Ibid.*, p. 42. For a fuller treatment of the problems involved, see *Yearbook ... 1970*, vol. II, pp. 238 and 239, doc. A/CN.4/228 and Add.1, annex I, where the views of the UNCTAD secretariat on "Trade among developing countries" are set out.

³³¹ *Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. I, *Report and Annexes (op. cit.)*, p. 53.

³³² *Ibid.*

³³³ *Proceedings of the United Nations Conference on Trade and Development, Fourth Session*, vol. I, *Report and Annexes (op. cit.)*, pp. 32 and 33.

³³⁴ See GATT, *Basic Instruments and Selected Documents, Eighteenth Supplement (op. cit.)*, p. 11.

³³⁵ *Ibid.*, p. 26.

³³⁶ See *Proceedings of the United Nations Conference on Trade and Development, Fourth Session*, vol. I, *Report and Annexes (op. cit.)*, p. 118.

³³⁷ See A/31/197, annex III.

³³⁸ See A/C.2/31/7 and Add.1.

(7) As has been explained in a report by the Secretary-General of the United Nations on economic co-operation among developing countries,

... The three conferences held at Manila, Colombo and Mexico City were precisely directed towards the identification of a comprehensive set of objectives and related policy measures which could constitute a basic framework within which action by developing countries could be strengthened, initiated or further investigated. These three conferences should therefore be considered successive stages of the same process aimed at the elaboration of an action programme which would enable developing countries to exploit fully the potential complementarity of their economies while strengthening their collective countervailing power in their negotiations on economic relations with the developed countries.

The Third Ministerial Meeting of the Group of 77 at Manila drew up broad guidelines in the area of economic co-operation among developing countries and decided to convene the Conference on Economic Co-operation among Developing Countries at Mexico City further to elaborate on them. In the mean time, the non-aligned countries, all of which are members of the Group of 77, at the Fifth Conference of Heads of State or Government of Non-Aligned Countries at Colombo, adopted a programme in the same area. At Mexico City an effort was made by the Group of 77 to absorb within one single document all the major elements elaborated at the two previous conferences. As a result, the report of the conference at Mexico City may be considered to be the consolidated position of the Group of 77 on the subject of economic co-operation among developing countries.³³⁹

(8) Among the "Measures for economic co-operation among developing countries" adopted by the Mexico City Conference is the following:

II. TRADE AND RELATED MEASURES

A. Establishment of a global system of trade preferences among developing countries

3. A global system of trade preferences exclusively among developing countries should be established, with the objective of promoting the development of national production and mutual trade.³⁴⁰

(9) The General Assembly, in resolutions 3177 (XXVIII) of 17 December 1973, 3241 (XXIX) of 29 November 1974, 3442 (XXX) of 9 December 1975, 31/119 of 16 December 1976 and 32/180 of 19 December 1977, urged developed countries and international organizations to support measures of economic co-operation among developing countries.

(10) Reference must be made, in particular, to articles 21 and 23 of the Charter of Economic Rights and Duties of States,³⁴¹ which read as follows:

Article 21

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.

³³⁹ A/32/312, paras. 5 and 6.

³⁴⁰ A/C.2/31/7, p. 15.

³⁴¹ General Assembly resolution 3281 (XXIX).

Article 23

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.

(11) Preferences granted by developing countries among themselves have been excluded from the operation of the most-favoured-nation clause in multilateral treaties concluded between developed and developing States or between developing States among themselves. Recent examples of these are, respectively, the Lomé-Convention between, the African, Caribbean and Pacific States (ACP) and EEC,³⁴² and the First Agreement on Trade Negotiations among Developing Member Countries of the Economic and Social Commission for Asia and the Pacific (Bangkok Agreement), signed at Bangkok on 31 July 1975.³⁴³

(12) The relevant provisions of those two treaties read as follows:

(a) ACP-EEC Convention of Lomé:

TITLE I

TRADE CO-OPERATION

...

Chapter 1

TRADE ARRANGEMENTS

...

Article 7

1. In view of their present development needs, the ACP States shall not be required, for the duration of this Convention, to assume, in respect of imports of products originating in the Community, obligations corresponding to the commitments entered into by the Community in respect of imports of the products originating in the ACP States, under this Chapter.

2. (a) In their trade with the Community, the ACP States shall not discriminate among the Member States, 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.

(b) Bangkok Agreement:

Article 10

In matters of trade, any advantage, benefit, franchise, immunity or privilege applied by a Participating State in respect of a product originating in, or intended for consignment to, any other Participating State or any other country shall be immediately and unconditionally extended to the like product originating in, or intended for consignment to, the territories of the other Participating States.

Article 11

The provisions of article 10 shall not apply in relation to preferences granted by Participating States:

...

³⁴² See *Official Journal of the European Communities*, Luxembourg, 30 January 1976, vol. 19, No. L25, p. 2.

³⁴³ See TD/B/609/Add.1 (vol. V), p. 177.

(b) Exclusively to other developing countries prior to the entry into force of this Agreement;

...

(d) To any other Participating State(s) and/or other ESCAP developing countries with which the Participating State engages in the formation of an economic integration grouping;

(e) To any other Participating State(s) and/or other developing countries with which the Participating State enters into an industrial co-operation agreement or joint venture in other productive sectors, within the purview of article 12.

...

Article 12

The Participating States agree to consider extending special tariff and non-tariff preferences in favour of products included in industrial co-operation agreements and joint ventures in other productive sectors reached among some or all of them, and/or with the participation of other developing countries that are members of the ESCAP Trade Negotiations Group, which will apply exclusively in favour of the countries participating in the said agreements or ventures...

(13) In the light of the developments indicated in the preceding paragraphs of this commentary, the Commission decided to include in its draft article 24, on the most-favoured-nation clause in relation to arrangements between developing States. In conformity with current trends, as exemplified in the international instruments referred to above, the article excepts from the operation of the most-favoured-nation clause as regards a developed beneficiary State any preferential treatment extended by a developing granting State to a developing third State. The rule is qualified, however, in two important respects. First, it is restricted to preferential treatment between developing countries in the sphere of trade. Secondly, it refers to preferential treatment by a developing granting State of a developing third State, extended "in conformity with the relevant rules and procedures of a competent international organization of which the States concerned are members". The last phrase is intended to make the provision of article 24 conform with the relevant provisions of the Charter of Economic Rights and Duties of States.

(14) The Commission reiterates, in the context of the present article, the fact that, at present, there is no general agreement among States concerning the concepts of developed and developing States.³⁴⁴

³⁴⁴ At its thirty-second session, the General Assembly had before it the 1977 report of the Committee on Contributions, in which "the absence of a single and universally accepted definition of countries to be designated as developing" was noted (*Official Records of the General Assembly, Thirty-second Session Supplement No. 11 (A/32/11)* para. 44). The Committee on Contributions also included in its report passages from a paper entitled "Developing countries and levels of development" prepared by the Secretariat for the Committee for Development Planning at its twelfth session, in 1976, in which it is stated, *inter alia* :

"While it has become an established practice to refer to countries as either developed or developing, or, in different circumstances, as developed market economies, developing market economies or centrally planned economies, the designations used do not in all cases apply to exactly the same groups of countries... (E/AC.54/L.81, p. 3)." (*Ibid.*, para. 43.)

(15) Some members of the Commission believed that the absence of such agreed concepts, in particular for purposes of international trade, might give rise to enormous difficulties in the application of the provisions of article 24.

Article 25. *The most-favoured-nation clause in relation to treatment extended to facilitate frontier traffic*

1. A beneficiary State other than a contiguous State is not entitled under a most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State in order to facilitate frontier traffic.

2. A contiguous beneficiary State is entitled under a most-favoured-nation clause to treatment not less favourable than the treatment extended by the granting State to a contiguous third State in order to facilitate frontier traffic only if the subject-matter of the clause is the facilitation of frontier traffic.

Commentary

(1) One of the exceptions that is often included in commercial treaties containing a most-favoured-nation clause relates to frontier traffic. Thus the General Agreement on Tariffs and Trade contains a cursory statement (article XXIV, para. 3) 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...³⁴⁵

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 thereafter be granted by either contracting country to an adjacent third State to facilitate the frontier traffic...³⁴⁶

(2) 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.³⁴⁷

(3) 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 neigh-

³⁴⁵ GATT, *Basic Instruments and Selected Documents*, vol. IV (*op. cit.*), p. 41.

³⁴⁶ *Yearbook ... 1969*, vol. II, p. 181, doc. A/CN.4/213, annex II.

³⁴⁷ *Ibid.*, pp. 178 and 179, annex I.

bouring countries in order to facilitate frontier traffic.³⁴⁸ 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.

(4) According to an authoritative source, 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.³⁴⁹ The same source quotes from a 1923 treaty between France and Czechoslovakia which exempts concessions granted within a 15-kilometre frontier zone, "such regime 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".³⁵⁰

(5) The expression "frontier traffic" is not quite unequivocal. It may mean the movement of goods or of persons or of both. It relates usually to persons residing in a certain frontier zone and to their movements to, and labour relations in, the opposite frontier zone, and also to the movement of goods between the two neighbouring zones, sometimes restricted to goods produced in those zones. The national regulations of frontier traffic are quite diverse, not only as to the width of the zone in question but also as to the conditions of the traffic between the two zones lying on both sides of the common frontier.

(6) The frontier traffic exception is frequently found in conventional stipulations. It seems that the rule is in conformity with the constant practice of States, which has not, to the best of the Commission's knowledge, produced any instance where a dispute has arisen over the essence of the rule. The rule seems to be founded on the basic philosophy of the most-favoured-nation clause and notably on the *ejusdem generis* rule, reflected in articles 9 and 10. It seems evident that a beneficiary State which has no common frontier with the granting State is not in a position to claim the same treatment for its nationals as that which the granting State extends in respect of those nationals of the contiguous third State who are residents of the frontier zone. It is equally evident that a non-contiguous beneficiary State cannot, on the basis of a general most-favoured-nation clause embodied in a commercial treaty, expect the same treatment for the movement of its goods as that extended by the granting State to a contiguous third State in respect of the movement of goods restricted to those produced in the frontier zone or to those serving the needs of the population of that zone.

(7) Although it may be said that the exception would apply on the basis of articles 9 and 10, the Commission was of the view that the spelling out of this undisputed rule, which is based on the fundamental limitations of the

³⁴⁸ Basdevant, "Clause de la nation la plus favorisée" (*loc. cit.*), p. 476.

³⁴⁹ Snyder (*op. cit.*), p. 157, 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.

³⁵⁰ Article 13 (League of Nations, *Treaty Series*, vol. XLIV, p. 21).

clause, could be useful, and accordingly *paragraph 1* of article 25 states that a beneficiary State which is not contiguous to the granting State is not entitled, under the most-favoured-nation clause, to the treatment extended by the granting State to a contiguous third State for the purpose of facilitating frontier traffic.

(8) The situation is different if the beneficiary of a most-favoured-nation clause is a State which is itself also contiguous to the granting State. In such a case it is quite possible that the most-favoured-nation clause in favour of that State covers the benefits extended by the granting State to another (third) contiguous State. Accordingly, *paragraph 2* of article 25 states that a contiguous beneficiary State is entitled under a most-favoured-nation clause to treatment not less favourable than the treatment extended by the granting State to a contiguous third State, but again, in such a case, the most-favoured-nation clause attracts the relevant benefits only if the treatment conforms to the requirements of articles 9 and 10, i.e. if it is *ejusdem generis*. The Commission considered, however, that that requirement should be stated restrictively, and accordingly *paragraph 2* of article 25 explicitly states that the subject-matter of the clause must be the facilitation of frontier traffic. In the view of the Commission, the expression "contiguous beneficiary State", in *paragraph 2*, should not be understood to mean only a State having a common land frontier with the granting State but also a State separated from the granting State by a stretch of water, if the States concerned have agreed to consider traffic through it as "frontier" traffic.

Article 26. The most-favoured-nation clause in relation to rights and facilities extended to a land-locked third State

1. A beneficiary State other than a land-locked State is not entitled under a most-favoured-nation clause to rights and facilities extended by the granting State to a land-locked third State in order to facilitate its access to and from the sea.

2. A land-locked beneficiary State is entitled under a most-favoured-nation clause to the rights and facilities extended by the granting State to a land-locked third State in order to facilitate its access to and from the sea only if the subject-matter of the clause is the facilitation of access to and from the sea.

Commentary

(1) The case of the land-locked States, that is, the exception which the special position of those States requires in regard to the operation of the most-favoured-nation clause,³⁵¹ was stated in a proposal 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,

³⁵¹ See *Yearbook ... 1975*, vol. II, p. 137, doc. A/10010/Rev.1, chap. IV, sect. B, article 14, paras. (9) and (10) of the commentary.

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.³⁵²

That proposal did not lead to the adoption of any rule on the matter by the 1958 United Nations Conference on the Law of the Sea.

(2) In 1964, the United Nations Conference on Trade and Development adopted a series of principles relating to transit trade of land-locked countries, principle VII of which reads:

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.³⁵³

(3) The preamble of the Convention on Transit Trade of Land-Locked States of 8 July 1965 reaffirms principle VII adopted by UNCTAD in 1964, and article 10 of the same Convention contains the following provision:

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

2. If a Contracting State grants to a land-locked State facilities or special rights greater than those provided for in this Convention, such facilities or special rights may be limited to that land-locked State, except in so far as the withholding of such greater facilities or special rights from any other land-locked State contravenes the most-favoured-nation provision of a treaty between such other land-locked State and the Contracting State granting such facilities or special rights.³⁵⁴

(4) The Third United Nations Conference on the Law of the Sea, in progress, has considered the matter in question, and has included in its "informal composite negotiating text" article 126, reading as follows:

Exclusion of application of the most-favoured-nation clause

Provisions of the present Convention, as well as special agreements relating to 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.³⁵⁵

³⁵² *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, doc. A/CONF.13/C.5/L.1, annex VI, commentary to article 8. See also report of the Working Party to the Fifth Committee (*ibid.*, p. 84, doc. A/CONF.13/C.5/L.16, para. 13).

³⁵³ *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report (op. cit.)*, p. 25.

³⁵⁴ United Nations, *Treaty Series*, vol. 597, p. 42.

³⁵⁵ *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. VIII (United Nations publication, Sales No. E.78.V.4), p. 22, doc. A/CONF.62/WP.10.

(5) On the basis of the foregoing, the Commission found it advisable to adopt a provision on most-favoured-nation clauses in relation to treatment granted to land-locked States. The Commission did not propose to enter into the study of the rights and facilities that were needed by land-locked States³⁵⁶ or that were due to them under general international law. It took into account that currently sovereign States constituting approximately one fifth of the members of the international community were land-locked, and that most of those were developing States, some of which belonged to the least-developed countries.

(6) The Commission is of the view that the rights and facilities extended to a land-locked State by a coastal State for the purpose of facilitating the access of the former to and from the sea cannot be attracted by a most-favoured-nation clause in favour of another coastal State. This seems to be now generally recognized, as seen from the developments enumerated above. Such an exception serves the legitimate interests of land-locked States, which are in a disadvantageous position in respect of their access to the sea. The adoption of the rule will facilitate the extension of free access rights to those countries and relieve the coastal States in question from their obligations under most-favoured-nation clauses granted to other coastal States.

(7) The Commission found, however, that the exception thus constituted should not necessarily operate in respect of a clause the beneficiary of which is itself a land-locked State. If such State has a most-favoured-nation right *vis-à-vis* the coastal State, then it can avail itself of that right provided that the treatment is *ejusdem generis*, i.e. that it conforms to the requirements of articles 9 and 10 of the draft.

(8) Accordingly, *paragraph 1* of article 26 states that a beneficiary State other than a land-locked State is not entitled under a most-favoured-nation clause to rights and facilities extended by the granting State to a land-locked third State in order to facilitate its access to and from the sea. *Paragraph 2*, on the other hand, states that a land-locked beneficiary State is entitled to such favours under a most-favoured nation clause. That paragraph however, restricting somewhat the rules embodied in articles 9 and 10 of the present articles, allows for entitlement to such favours only if the subject-matter of the most-favoured-nation clause is the facilitation of access to and from the sea. Having made that restriction, the Commission did not find it necessary to provide expressly in paragraph 2 that the land-locked beneficiary State must be in the same region or subregion as the granting State.

(9) The Commission noted that the Convention on the High Seas (Geneva, 29 April 1958)³⁵⁷ did not use, in English, the expression "land-locked States", but spoke of "non-coastal States" in article 2 and of "States having no sea-coast" in article 3. It believed, however, that the

³⁵⁶ On this point, see L. C. Cafišch, "The access of land-locked States to the sea" in *Iranian Review of International Relations*, Teheran, Nos. 5-6 (winter 1975-76), p. 53.

³⁵⁷ United Nations, *Treaty Series*, vol. 450, p. 82.

use of the term "land-locked States" had become quite common since 1958, as shown by the Convention on Transit Trade of Land-Locked States of 8 July 1965, mentioned above.³⁵⁸ The expression is also used in the documents of the Third United Nations Conference on the Law of the Sea, and is defined in article 124, paragraph 1 (a), of the informal composite negotiating text of that Conference, as a "State which has no seacoast".³⁵⁹ The Commission therefore believes that it can safely use this term without any risk of misunderstanding.

Article 27. 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) Article 27 reproduces, in substance, the text of article 73 of the Vienna Convention. It is intended to express the idea that cases of State succession, State responsibility, and outbreak of hostilities are not covered by the present articles. It may be questioned whether an article of this type is really necessary among the articles on the most-favoured-nation clause. Owing to the fact that the present articles were conceived as an autonomous set and that the States bound by these articles will not necessarily be parties to the Vienna Convention, the Commission concluded that the inclusion of an article based on article 73 of the Convention was warranted.

(2) Questions may also be raised concerning the use of the verb "prejudge" in relation to the international responsibility of a State. In the context of the Commission's work on State responsibility,³⁶⁰ the rules on the most-favoured-nation clause contained in the present articles would constitute the "primary rules" to be observed by States. These primary rules would entail certain consequences, namely, the application of the "secondary rules" of international responsibility; therefore the violation of the rules could be said, in a certain sense, to prejudice the consequences. These possible objections ultimately relate to the language of the Vienna Convention, and the Commission found that a divergence from the language of that Convention would not be desirable. Similar language was used by the Commission in respect of State responsibility in article 38 of the draft which it prepared in 1974 on succession of States in respect of treaties.³⁶¹

³⁵⁸ See para. (3) above.

³⁵⁹ *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. VIII (*op. cit.*), p. 22, doc. A/CONF.62/WP.10.

³⁶⁰ See chapter III below.

³⁶¹ See *Yearbook ... 1974*, vol. II (Part One), p. 268, doc. A/9610/Rev.1, chap. II, sect. D.

(3) As to the case of State succession, the Commission assumes that, in respect of a treaty embodying a most-favoured-nation clause, the general rules of State succession would apply. These rules apply obviously to any treaty that exists between the granting State and the beneficiary State. They apply also to treaties between the granting State and a third State serving as a basis for the beneficiary State's most-favoured-nation rights. If the rules of State succession result in the extinction of this latter type of treaty, this may of course lead to the termination of the right of the beneficiary State to the relevant treatment under article 21 of the present articles. An obvious example of such a case is the uniting of the granting State and the third State.

(4) As to State responsibility, any violation of an obligation under a most-favoured-nation clause, whether such violation has been committed directly or indirectly, by circumvention of the obligations concerned,³⁶² will entail the international responsibility of the granting State—the rules of such responsibility not being covered by the present articles. Similarly, the articles do not deal with the question of when and under what circumstances the granting State may suspend the application of most-favoured-nation treatment as a retaliation or sanction for international wrongs committed against it.

(5) The articles, lastly, do not contain any provisions concerning the effect on the operation of the clause of an outbreak of hostilities between any of the States involved. It was thought that, because consideration of such situations was specifically omitted by the Commission in its study of the general law of treaties, it would be out of place to deal with them in the restricted sphere of the most-favoured-nation clause. A similar stand was adopted by the Commission in the context of its work on succession of States in respect of treaties (article 38).³⁶³

Article 28. Non-retroactivity of the present articles

1. 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 these articles, they apply only to a most-favoured-nation clause in a treaty which is concluded by States after the entry into force of the present articles with regard to such States.

2. Without prejudice to the application of any rule set forth in the present articles to which clauses on most-favoured-nation treatment would be subject under international law independently of these articles, they apply to the relations of States as between themselves only under a clause on most-favoured-nation treatment contained in an international agreement which is concluded by States and other subjects of international law after the entry into force of the present articles with regard to such States.

³⁶² See *Yearbook ... 1969*, vol. II, pp. 171 and 172, doc. A/CN.4/213, paras. 85-89.

³⁶³ See foot-note 361 above.

Commentary

(1) This article is based on article 4 of the Vienna Convention. Its purpose is the same as that of the said provision of the Convention, which is essentially to simplify and facilitate the acceptance of the articles by governments.

(2) Although the necessity for article 28 may be questioned in view of the general rule of international law—codified in article 28 of the Vienna Convention—concerning the non-retroactivity of treaties, the Commission concluded that the inclusion of article 28 in the draft had the merit of placing the articles—as concerns their applicability—on the same footing as the Vienna Convention. It was agreed in that respect that the provision of article 28 operated *ex abundanti cautela*.

(3) The question may also be raised whether the articles contain anything which, under the introductory words of article 28 of the Vienna Convention (“Unless a different intention appears from the treaty or is otherwise established”), would counteract the principle of the non-retroactivity of treaties contained in that article. Because the view prevailed that the answer to that question was in the negative, the Commission decided to include article 28 in the draft.

(4) In view of the provisions of article 6, the present article is cast in two parallel paragraphs which relate, respectively, to most-favoured-nation clauses contained in treaties concluded by States and to clauses on most-favoured-nation treatment contained in international agreements concluded by States and other subjects of international law.

Article 29. Provisions otherwise agreed

The present articles are without prejudice to any provision on which the granting State and the beneficiary State may otherwise agree.

Commentary

(1) The purpose of this article is to express the residual character of the provisions contained in the present draft. The draft articles are in general without prejudice to the provisions to which the parties may agree in the treaty containing the clause or otherwise. The Commission was unanimous in the view that the granting and beneficiary States might agree on most-favoured-nation treatment in all matters that lent themselves to such treatment: they might specify the sphere of relations in which they undertook most-favoured-nation obligations and they might restrict *ratione materiae* their respective promises. The Commission also agreed that States might, in the clause itself or in the treaty containing the clause or otherwise, reserve their right to grant preferences, i.e. to except from the application of the most-favoured-nation clause favours that they granted to one or more States. It is understood, however, in this connexion, that the present article should not be used as a pretext for discrimination.

(2) It might be argued that a reservation as to preferential treatment of one or more States, while always

possible by agreement between States, changes the very nature of the clause as defined in articles 4 and 5, and in article 2, paragraph 1 (*d*). Were that to be the case, clauses of this type would not properly fall under the present articles; the provisions of the present articles would apply only *mutatis mutandis* to such “restricted most-favoured-nation clauses”. The Commission considered, however, that the practice of reserving the right to grant preferences, which was quite general, did not affect the nature of the most-favoured-nation clause.

Article 30. New rules of international law in favour of developing countries

The present articles are without prejudice to the establishment of new rules of international law in favour of developing countries.

Commentary

(1) The Commission considered whether further rules in favour of developing countries than those embodied in articles 23 and 24 should be developed for inclusion in the present draft. The Commission is conscious that the promotion of the trade of developing countries with a view to their economic development is being pursued at present in areas other than those to which articles 23 and 24 refer, namely, the generalized system of preferences and preferences granted by developing countries among themselves.

(2) One example of such other areas is that concerning multilateral trade negotiations. The relationship between multilateral trade negotiations and preferences granted to developing countries under the GSP is evident; to the extent that most-favoured-nation tariffs may be cut for export products from developing countries covered by the GSP, the margin of preference will be reduced even to zero depending upon the depth of cut, thus negating the privileged position which the developing countries concerned would be expected to enjoy under the GSP.

(3) This, among other reasons, has led to the formulation, in the context of multilateral trade negotiations, of the concept of “differential measures” as distinct from that of “preferences”. The reference to “differential measures” appears in the Tokyo Declaration. A declaration of intent to undertake a new round of multilateral trade negotiations in GATT was made in 1972 by EEC, the United States and Japan. The negotiations were declared officially open by a declaration of ministers of the contracting parties to GATT adopted at Tokyo in 14 September 1973 (the Tokyo Declaration).³⁶⁴ Prior to that Declaration, at the third session (1972) of UNCTAD, and subsequently at the fourth session (1976) and in the General Assembly and other organs of the United Nations, as well as in intergovernmental meetings held outside the United Nations, declarations, resolutions and other decisions have addressed themselves to the question of “differential treatment” in the context of multilateral trade negotiations.

³⁶⁴ See GATT, *Basic Instruments and Selected Documents, Twentieth Supplement* (Sales No. GATT/1974-1), pp. 19 *et seq.*

(4) For the purposes of the commentary to the present article, it suffices to refer to the relevant provisions of the Tokyo Declaration and of recent resolutions adopted by UNCTAD and the General Assembly. The Tokyo Declaration provides, *inter alia*:

2. The negotiations shall aim to:

- achieve the expansion and ever greater liberalization of world trade ... through ... the improvement of the international framework for the conduct of world trade.

...

5. The negotiations shall be conducted on the basis of the principles of mutual advantage, mutual commitment and overall reciprocity, while observing the most-favoured-nation clause... The developed countries do not expect reciprocity for commitments made by them in the negotiations to reduce or remove tariff and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of the trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. The Ministers recognize the need for special measures to be taken in the negotiations to assist the developing countries in their efforts to increase their export earnings and promote their economic development and, where appropriate, for priority attention to be given to products or areas of interest to developing countries. They also recognize the importance of maintaining and improving the Generalized System of Preferences. They further recognize the importance of the application of differential measures to developing countries in ways which will provide special and more favourable treatment for them in areas of the negotiation where this is feasible and appropriate.

...

9. ... Consideration shall be given to improvements in the international framework for the conduct of world trade which might be desirable in the light of progress in the negotiations...³⁶⁵

(5) At its fourth session (Nairobi 1976), UNCTAD adopted without dissent resolution 91 (IV) of 30 May 1976, which provides *inter alia* as follows:

The United Nations Conference on Trade and Development.

...

Reaffirming the need to secure additional benefits for the international trade of developing countries, as one of the major objectives of the multilateral trade negotiations, so as to improve the possibilities for these countries to participate in the expansion of world trade,

...

14. *Recalls* the provisions of the Tokyo Declaration ... according to which consideration shall be given to improvements in the international framework for the conduct of world trade which might be desirable in the light of progress in the negotiations and in this connexion draws attention to the proposal for establishing a group with the following mandate: "to improve the international framework for the conduct of world trade, particularly with respect to trade between developed and developing countries and

differentiated and more favourable measures to be adopted in such trade"³⁶⁶

(6) The Charter of Economic Rights and Duties of States³⁶⁷ provides, *inter alia*, in article 18, as follows:

... Developed countries should also give serious consideration to the adoption of other differential measures, in areas where this is feasible and appropriate and in ways which will provide special and more favourable treatment, in order to meet the trade and development needs of the developing countries. In the conduct of international economic relations the developed countries should endeavour to avoid measures having a negative effect on the development of the national economies of the developing countries, as promoted by generalized tariff preferences and other generally agreed differential measures in their favour.

(7) While all these developments may show that there might be a tendency among States to promote the trade of developing countries through "differential treatment", the conclusion of the Commission is that this tendency has not yet crystallized sufficiently to permit it to be embodied in a clear legal rule that could find its place among the general rules on the functioning and application of the most-favoured-nation clause. All the texts partially quoted above are substantially expressions of intent rather than obligatory rules. Moreover, the multilateral trade negotiations are conducted within the framework of GATT, and the GATT system is subject to a procedure of consultations and the ultimate judgement of the contracting parties; it is not a universal system but is restricted to the membership of GATT, however broad that may be.

(8) What has been said of "differential treatment" can also be said of other concepts evolving with the aim of promoting the trade of developing countries. Under these circumstances it seemed to the Commission that, at least at the current stage of development, there was no agreement discernible that would warrant the inclusion in the draft articles of rules in favour of developing countries other than those contained in articles 23 and 24. Nor did UNCTAD, at its fourth session (Nairobi, May 1976), provide the Commission with a definitive text upon which it could have based the adoption of a new rule. However, with a view to the possibility of the development of such new rules, the Commission decided to include in the draft articles a general reservation concerning the possible establishment of new rules of international law in favour of developing countries. Article 30 leaves the matter open for future development within the international community and accordingly states that the present articles are without prejudice to the establishment of new rules of international law in favour of developing countries.

³⁶⁶ *Proceedings of the United Nations Conference on Trade and Development, Fourth Session, vol. I, Report and Annexes (op. cit.)*, pp. 14 and 15.

³⁶⁷ General Assembly resolution 3281 (XXIX) of 12 December 1974.

³⁶⁵ *Ibid.*, pp. 20-22.

Chapter III

STATE RESPONSIBILITY

A. Introduction

1. HISTORICAL REVIEW OF THE WORK

75. The object of the current work of the International Law Commission on State responsibility is to codify the rules governing State responsibility as a general and independent topic. The work is proceeding on the basis of two decisions of the Commission: (a) not to limit its study of the topic to a particular area, such as responsibility for injuries to the person or property of aliens, or indeed any other area; (b) in codifying the rules governing international responsibility, not to engage in the definition and codification of the "primary" rules whose breach entails responsibility for an internationally wrongful act.

76. The historical aspects of the circumstances in which the Commission came to resume the study of the topic of "State responsibility" from this new standpoint have been described in previous reports of the Commission.³⁶⁸ Following the work of the Sub-Committee on State Responsibility, the members of the Commission expressed agreement, in 1963, on the following general conclusions: (a) that, for the purposes of codification of the topic, priority should be given to the definition of the general rules governing international responsibility of the State; (b) that there could nevertheless be no question of neglecting the experience and material gathered in certain particular sectors, especially that of responsibility for injuries to the person or property of aliens; and (c) that careful attention should be paid to the possible repercussions that recent developments in international law might have had on State responsibility.

77. These conclusions having been approved by the Sixth Committee, the Commission gave fresh impetus to the work of codifying the topic, in accordance with the recommendations of the General Assembly. In 1967, having before it a note on State responsibility submitted by Mr. Ago, Special Rapporteur,³⁶⁹ the Commission, as newly constituted, confirmed the instructions given him in 1963.³⁷⁰ In 1969 and 1970, the Commission discussed the Special Rapporteur's first³⁷¹ and second³⁷² reports in detail. That general examination enabled the Commission

to establish a plan for the study of the topic, the successive stages for the execution of the plan and the criteria to be adopted for the different parts of the draft. At the same time, the Commission reached a series of conclusions as to the method, substance and terminology essential for the continuation of its work on State responsibility.³⁷³

78. It is on the basis of these directives, which were generally approved by the members of the Sixth Committee and adopted by the General Assembly, that the Commission is now preparing the draft articles under consideration. In its resolutions 3315 (XXIX) of 14 December 1974, 3495 (XXX) of 15 December 1975, and 31/97 of 15 December 1976, the General Assembly recommended that the Commission should continue its work on State responsibility on a high priority basis, with a view to completing the preparation of a first set of draft articles on the responsibility of States for internationally wrongful acts. General Assembly resolution 32/151, adopted on 19 December 1977, recommends that the Commission should continue its work on State responsibility on a high priority basis, taking into account the resolutions of the General Assembly adopted at previous sessions, with a view to completing, within the current term of office of the members of the Commission, at least the first reading of the set of articles constituting part I of the draft on responsibility of States for internationally wrongful acts.

2. SCOPE OF THE DRAFT

79. The draft articles under study—which are cast in a form that will permit them to be used as a basis for the conclusion of a convention if so decided—³⁷⁴ thus relate solely to the *responsibility of States for internationally wrongful acts*. The Commission fully recognizes the importance not only of questions of responsibility for internationally wrongful acts, but also of questions concerning the obligation to make good any injurious consequences arising out of certain activities not prohibited by inter-

³⁶⁸ See in particular *Yearbook ... 1969*, vol. II, pp. 229 *et seq.*, doc. A/7610/Rev.1, chap. IV.

³⁶⁹ *Yearbook ... 1967*, vol. II, p. 325, doc. A/CN.4/196.

³⁷⁰ *Ibid.*, p. 368, doc. A/6709/Rev.1, para. 42.

³⁷¹ *Yearbook ... 1969*, vol. II, p. 125, doc. A/CN.4/217 and Add.1. In 1971, the Special Rapporteur submitted a second addendum (A/CN.4/217/Add.2) to his first report (*Yearbook ... 1971*, vol. II (Part One), p. 193).

³⁷² *Yearbook ... 1970*, vol. II, p. 177, doc. A/CN.4/233.

³⁷³ See *Yearbook ... 1969*, vol. II, p. 233, doc. A/7610/Rev.1, paras. 80-84, and *Yearbook ... 1970*, vol. II, pp. 307-309, doc. A/8010/Rev.1, paras. 70-83.

³⁷⁴ The question of the final form to be given to the codification of State responsibility will obviously have to be settled later, when the Commission has completed the draft. The Commission will then formulate, in accordance with its Statute, the recommendation it considers appropriate.

³⁷⁵ The Commission does not underestimate the importance of studying questions relating to the responsibility of subjects of international law other than States, but the overriding need for clarity in the examination of the topic, and the organic nature of the draft, clearly make it necessary to defer consideration of these other questions.

national law, especially those which, because of their nature, present certain risks. The Commission takes the view, however, that the latter category of questions cannot be treated jointly with the former. A joint examination of the two subjects could only make both of them more difficult to grasp. To be obliged to bear any injurious consequences of an activity that is in itself lawful, and to be obliged to face the consequences (not necessarily limited to compensation) of the breach of a legal obligation, are not comparable situations. It is only because of the relative poverty of legal language that the same term is sometimes used to designate both.

80. The limitation imposed on the present draft articles does not of course mean that the Commission will not also embark on a study of the topic of international liability for injurious consequences arising out of certain acts not prohibited by international law, as recommended by the General Assembly. In 1974, the Commission in fact placed the subject of "International liability for injurious consequences arising out of acts not prohibited by international law" on its general programme of work as a separate topic,³⁷⁶ as recommended in paragraph 3 (c) of General Assembly resolution 3071 (XXVIII) of 30 November 1973. Furthermore, bearing in mind the pertinent recommendations in General Assembly resolutions 3315 (XXIX) of 14 December 1974, 3495 (XXX) of 15 December 1975, and 31/97 of 15 December 1976, the Commission considered in 1977 that the topic in question should be placed on its active programme at the earliest possible time.³⁷⁷ That suggestion by the Commission having been approved by delegations in the Sixth Committee, the General Assembly, in paragraph 7 of its resolution 32/151 of 19 December 1977, invited the Commission, at an appropriate time and in the light of progress made on the draft articles on State responsibility for internationally wrongful acts and on other topics in its current programme of work, to commence work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. Following that recommendation by the General Assembly, the Commission took a series of steps at its current session, including the appointment of a special rapporteur, with a view to beginning the consideration of preliminary issues raised by the study of the topic of international liability for injurious consequences arising out of acts not prohibited by international law.³⁷⁸

81. The fact that the topic of liability for injurious consequences arising out of acts not prohibited by international law is being studied separately from that of responsibility for internationally wrongful acts means that two matters which, despite certain appearances, are quite distinct, will not have to be dealt with in one and the same draft. The Commission has nevertheless deemed it appropriate, in defining the principle stated in article 1 of the present draft articles on responsibility of States for internationally wrongful acts, to adopt a formulation which,

while indicating that the internationally wrongful act is a source of international responsibility, cannot be interpreted as automatically ruling out the existence of another possible source of "responsibility". At the same time, while reserving the question of the final title of the draft articles for later consideration, the Commission wishes to emphasize that the expression "State responsibility", which appears in the title of the draft, is to be understood as meaning only "responsibility of States for internationally wrongful acts".

82. It should also be pointed out once again that the purpose of the draft articles is not to define the rules imposing on States, in one sector or another of inter-State relations, obligations whose breach may be a source of responsibility and which, in a certain sense, may be described as "primary". On the contrary, in preparing the present draft, the Commission is undertaking to define other rules which, unlike the first, may be described as "secondary", inasmuch as they are aimed at determining the legal consequences of failure to fulfil obligations established by the "primary" rules. Only these "secondary" rules fall within the actual sphere of responsibility for internationally wrongful acts. A strict distinction in this respect is essential if the topic of international responsibility for internationally wrongful acts is to be placed in its proper perspective and viewed as a whole.

83. This does not mean, of course, that the content, nature and scope of the obligations imposed on the State by the "primary" rules of international law are of no significance in determining the rules governing responsibility for internationally wrongful acts. As the Commission has had occasion to note, especially during recent sessions, it is certainly necessary to establish a distinction on these bases between different categories of international obligations when studying the objective element of the internationally wrongful act. To be able to assess the gravity of the internationally wrongful act and to determine the consequences attributable to that act, it is unquestionably necessary to take into consideration the fact that the importance attached by the international community to the fulfilment of some obligations—for example, those concerning the maintenance of peace and security—will be of quite a different order from the importance it attaches to the fulfilment of other obligations, precisely because of the content of the former. Some obligations must also be distinguished from others according to their nature if it is to be possible to determine in each case whether or not an international obligation has actually been breached and, if so, the moment when the breach occurred (and when the resulting international responsibility can therefore be invoked), and the duration of the commission of the breach. The present draft must therefore bring out these different aspects of international obligations whenever that proves necessary for the purpose of codifying the rules governing international responsibility for internationally wrongful acts. The essential fact nevertheless remains that it is one thing to state a rule and the content of the obligation it imposes, and another to determine whether that obligation has been breached and what the consequences of the breach must be. Only this second aspect comes within the actual sphere of the international responsibility that is the subject-matter of

³⁷⁶ See *Yearbook ... 1974*, vol. II (Part One), p. 305, doc. A/9610/Rev.1, para. 163.

³⁷⁷ See *Yearbook ... 1977*, vol. II (Part Two), p. 129, doc. A/32/10, para. 108.

³⁷⁸ See paras. 170-178 below.

the present draft. To foster any confusion on this point would be to erect an obstacle that might once again frustrate the hope of successfully codifying the topic.

84. The draft articles are thus concerned only with determination of the rules governing the international responsibility of the State for internationally wrongful acts, that is to say, the rules that govern all the new legal relationships to which an internationally wrongful act on the part of a State may give rise in different cases. They codify the rules governing the responsibility of States for internationally wrongful acts "in general", and not only in certain particular sectors. The international responsibility of the State is made up of a set of legal situations that result from the breach of any international obligation, whether imposed by the rules governing one particular matter or by those governing another.

85. The Commission wishes to emphasize that international responsibility is one of the topics in which development of law can play a particularly important part, especially as regards the distinction between different categories of international offences and the content and degrees of responsibility. The roles to be assigned to progressive development and to codification of already accepted principles respectively cannot, however, be planned in advance. They will depend on the specific solutions adopted for the various problems.

3. GENERAL STRUCTURE OF THE DRAFT

86. The general structure of the present draft was described at length in the Commission's report on the work of its twenty-seventh session.³⁷⁹ Under the general plan adopted by the Commission, *the origin of international responsibility* forms the subject of *part I* of the draft, which is concerned with determining on what grounds and in what circumstances a State may be held to have committed an internationally wrongful act which, as such, is a source of international responsibility. *Part 2* will deal with the *content, forms and degrees of international responsibility*, that is to say, with determination of the consequences that an internationally wrongful act of a State may have under international law in different cases (reparative and punitive consequences of an internationally wrongful act, relationship between these two types of consequences, material forms that reparation and sanction may take). Once these two essential tasks are completed, the Commission may perhaps decide to add to the draft a *part 3* concerning the "implementation" ("mise en œuvre") of *international responsibility* and the *settlement of disputes*. The Commission also considered that it would be better to postpone a decision on the question whether the draft articles on State responsibility for internationally wrongful acts should begin with an article giving definitions or an article enumerating the matters excluded from the scope of the draft. When solutions to the various problems have reached a more advanced stage, it will be easier to see whether or not such preliminary clauses are needed in the general structure

³⁷⁹ See *Yearbook ... 1975*, vol. II, pp. 55-59, doc. A/10010/Rev.1, paras. 38-51.

of the draft. It is always advisable to avoid definitions or initial formulations that may prejudice solutions to be adopted later.

87. Subject to subsequent decisions of the Commission, *part I* of the draft (*The origin of international responsibility*) is in principle divided into five chapters. *Chapter I (General principles)* is devoted to the definition of a set of fundamental principles, including the principle attaching responsibility to every internationally wrongful act and the principle of the two elements, subjective and objective, of an internationally wrongful act. *Chapter II (The "act of the State" under international law)* is concerned with the subjective element of the internationally wrongful act, that is to say, with determination of the conditions under which particular conduct must be considered as an "act of the State" under international law. *Chapter III (Breach of an international obligation)* deals with the various aspects of the objective element of the internationally wrongful act constituted by the breach of an international obligation. *Chapter IV (Implication of a State in the internationally wrongful act of another State)* covers the cases in which a State participates in the commission by another State of an international offence (complicity), and the cases in which responsibility arising out of an internationally wrongful act is placed on a State other than the State to which the act itself is attributed (responsibility for the act of another, or indirect responsibility). Lastly, *chapter V (Circumstances precluding wrongfulness and attenuating or aggravating circumstances)* defines the circumstances that may have the effect either of precluding wrongfulness (*force majeure* and fortuitous event, state of emergency, self-defence, legitimate application of a sanction, consent of the injured State, etc.) or, as the case may be, of mitigating or aggravating the wrongfulness of the State's conduct.

4. PROGRESS OF THE WORK

88. In 1973, at its twenty-fifth session, the Commission began the preparation of the draft articles on first reading. At that session, on the basis of proposals made by the Special Rapporteur in the relevant sections of his third report,³⁸⁰ it adopted articles 1 to 4 of *chapter I* (General principles) and the first two articles (articles 5 and 6 of *chapter II* (The "act of the State" under international law) of *part I* of the draft.³⁸¹ In 1974, at its twenty-sixth session, the Commission continued its examination of the provisions of *chapter II* and, on the basis of proposals contained in other sections of the Special Rapporteur's third report,³⁸²

³⁸⁰ *Yearbook ... 1971*, vol. II (Part One), p. 199, doc. A/CN.4/246 and Add.1-3. The sections of chapter I and sections 1 to 3 of chapter II of the Special Rapporteur's third report were considered by the Commission at its 1202nd-1213th and 1215th meetings (*Yearbook ... 1973*, vol. I, pp. 5-59 and 65 and 66).

³⁸¹ *Yearbook ... 1973*, vol. II, pp. 173 *et seq.*, doc. A/9010/Rev.1, chap. II, sect. B. The Commission adopted the texts proposed by the Drafting Committee for those articles at its 1225th and 1226th meetings (*ibid.*, vol. I, pp. 117-121).

³⁸² Sections 4 to 6 of chapter II of the Special Rapporteur's third report (see foot-note 380 above). Those sections were considered by the Commission at its 1251st-1253rd and 1255th-1263rd meetings (*Yearbooks ... 1974*, vol. I, pp. 5-16 and 16-61).

adopted articles 7 to 9 of that chapter.³⁸³ At its twenty-seventh session, in 1975, the Commission completed its examination of *chapter II*, i.e. of the provisions relating to the conditions for attribution to the State, as a subject of international law, of an act capable of constituting a source of international responsibility, by adopting, on the basis of the proposals made by the Special Rapporteur in this fourth report,³⁸⁴ articles 10 to 15.³⁸⁵ In 1976, at its twenty-eighth session, the Commission began consideration of the various issues involved in *chapter III* (Breach of an international obligation) and, on the basis of the proposals contained in the Special Rapporteur's fifth report,³⁸⁶ it adopted articles 16 to 19, concerning respectively the general requirement for the existence of a breach of an international obligation, the irrelevance for that purpose of the origin of the international obligation breached, the requirement that the international obligation be in force for the State for a breach of the obligation to occur, and the distinction to be made between international crimes and international delicts on the basis of the importance for the international community as a whole of the subject-matter of the international obligation breached.³⁸⁷ At its twenty-ninth session, in 1977, the Commission continued its examination of the provisions of *chapter III* and, on the basis of proposals contained in the Special Rapporteur's sixth report,³⁸⁸ adopted articles 20 to 22 of that chapter, dealing with the effects of the nature of an international obligation on the conditions for its breach and, more particularly, with the breach of an international obligation requiring the adoption of a particular course of conduct, the breach of an international obligation requiring the achievement of a specified result, and the force of the "exhaustion of local remedies" requirement in regard to the commission of a breach of an international obligation of result whose specific purpose is to guarantee a particular treatment to aliens.³⁸⁹ The texts of those articles and

the commentaries thereto were reproduced in the reports of the Commission on the work of the sessions mentioned.

89. At the current session, the Commission had before it the seventh report of the Special Rapporteur (A/CN.4/307 and Add.1 and 2 and Add.2/Corr.1).³⁹⁰ That report took into consideration, first, the outstanding questions pertaining to *chapter III*: those concerning determination of the conditions in which there was a breach of an international obligation requiring the State to prevent the occurrence of a given event, and those relating to determination of the moment and duration of an international obligation (*tempus commissi delicti*) in the cases, respectively, where the act of the State committing the breach was instantaneous or extended in time, and in the particular case in which there was a breach of an obligation to prevent an event. The report then took up the subject-matter of *chapter IV*, dealing with the cases where a State was implicated in the internationally wrongful act of another State (participation in the internationally wrongful act of another State and responsibility of a State for the act of another State).

90. The Commission was able at the current session, at its 1476th to 1482nd meetings, to take up the questions dealt with in the Special Rapporteur's seventh report (which completed *chapter III* of the draft, and to refer the articles pertaining thereto to the Drafting Committee. At its 1513th meeting, it considered the texts of articles 23 to 26 proposed by the Drafting Committee, and adopted them on first reading. It then considered, at its 1516th to 1519th meetings, the first of the questions dealt with in *chapter IV* (Implication of a State in the internationally wrongful act of another State), and referred the article pertaining thereto to the Drafting Committee. At its 1524th meeting, it considered the text of article 27 proposed by the Drafting Committee and adopted the text of that article on first reading.

91. The Commission intends to continue its study of the topic at the point where it broke off at the current session. It therefore proposes to examine the outstanding questions relating to *chapter IV* and the questions pertaining to *chapter V*, dealing with circumstances precluding wrongfulness, which will be discussed in a further report by the Special Rapporteur. The Commission will thus have completed the first reading of the part of the draft concerning the origin of international responsibility for internationally wrongful acts, and will then be able to begin its study of part 2, concerning the content, forms and degrees of international responsibility, and decide whether or not the draft should be extended to include a part 3 concerning the "implementation" ("mise en œuvre") of international responsibility and settlement of disputes.

92. In the Commission's opinion, because of the complexity of the topic of State responsibility for internationally wrongful acts, governments must have as much time as possible to prepare the observations and comments

³⁸³ See *Yearbook ... 1974*, vol. II (Part One), p. 277, doc. A/9610/Rev.1, chap. III, sect. B, 2. The Commission adopted the texts proposed by the Drafting Committee for those articles at its 1278th meeting (*ibid.*, vol. I, pp. 151-154).

³⁸⁴ *Yearbook ... 1972*, vol. II, p. 71, doc. A/CN.4/264 and Add.1. The Commission considered the sections contained in the Special Rapporteur's report at its 1303rd-1317th meetings (*Yearbook ... 1973*, vol. I, pp. 3-72).

³⁸⁵ *Yearbook ... 1975*, vol. II, pp. 61 *et seq.*, doc. A/10010/Rev.1, chap. II, sect. B, 2. The Commission adopted the texts proposed by the Drafting Committee for those articles at its 1345th meeting (*ibid.*, vol. I, pp. 214-218).

³⁸⁶ Sections 1-4 of chapter III of the fifth report (*Yearbook ... 1976*, vol. II (Part One), pp. 3 *et seq.*, doc. A/CN.4/291 and Add.1 and 2). The Commission considered those sections at its 1361st-1367th meetings (*ibid.*, vol. I, pp. 6-91).

³⁸⁷ *Yearbook ... 1976*, vol. II (Part Two), pp. 75 *et seq.*, doc. A/31/10, chap. III, sect. B, 2. The Commission adopted the texts proposed by the Drafting Committee for those articles at its 1401st-1403rd meetings (*ibid.*, vol. I, pp. 235-253).

³⁸⁸ Sections 5-7 of chapter III of the sixth report (*Yearbook ... 1977*, vol. II (Part One), pp. 3 *et seq.*, doc. A/CN.4/302 and Add.1-3). The Commission considered those sections at its 1454th-1457th, 1460th, 1461st, 1463rd and 1465th-1468th meetings (*ibid.*, vol. I, pp. 215-233, 240-248, 250-255, and 259-277).

³⁸⁹ *Yearbook ... 1977*, vol. II (Part Two), pp. 11 *et seq.*, doc. A/32/10, chap. II, sect. B, 2. The Commission adopted the text proposed by the Drafting Committee for those articles at its 1462nd and 1469th meetings (*ibid.*, vol. I, pp. 249 and 250, and 278-282).

³⁹⁰ Reproduced in *Yearbook ... 1978*, vol. II (Part One).

in the light of which the Commission, at the appropriate time, will have to undertake the second reading of the draft articles under consideration. The Commission accordingly reached the conclusion that the articles of the draft should be submitted to governments for observations and comments without waiting for the draft as a whole to be adopted on first reading. Such a procedure, which the Commission had previously adopted in connexion with other drafts (e.g. the draft articles on the law of treaties), would also make it possible for the Commission to proceed to the second reading without too much delay.

In the context of that general conclusion, the Commission decided at its current session, in conformity with articles 16 and 21 of its Statute, to communicate to governments, through the Secretary-General, chapters I, II and III of part 1 of its draft articles on State responsibility for internationally wrongful acts, and to request them to transmit their observations and comments on the provisions of those chapters. Governments were requested to submit their observations and comments on the provisions in question by 31 December 1979.

93. At the end of its twenty-ninth session, the Commission received a Secretariat document containing a comprehensive review of State practice, international jurisprudence and doctrine relating to "*force majeure*" and "fortuitous event" as circumstances precluding wrongfulness. That document had been prepared by the Codification Division of the United Nations Office of Legal Affairs as part of the research on the subject undertaken at the request of the Commission and the Special Rapporteur.³⁹¹

B. Draft articles on State responsibility³⁹²

94. The texts of articles 1 to 27 adopted by the Commission at its twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth and current sessions, together with the texts of articles 23 to 27 and the commentaries thereto, as adopted by the Commission at its current session, are reproduced below for the information of the General Assembly.

1. TEXT OF ALL THE DRAFT ARTICLES ADOPTED SO FAR BY THE COMMISSION

CHAPTER I GENERAL PRINCIPLES

Article 1. Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

³⁹¹ The Commission decided that that document, the provisional version of which was circulated under the symbol ST/LEG/13, should be reproduced in the *Yearbook* containing the documents of the Commission's current session (see para. 202 below).

³⁹² As stated above (para. 79), the draft articles relate only to the responsibility of States for internationally wrongful acts. The question of the final title of the draft will be considered by the Commission at a later date.

Article 2. Possibility that every State may be held to have committed an internationally wrongful act

Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility.

Article 3. Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when:

- (a) conduct consisting of an action or omission is attributable to the State under international law; and
- (b) that conduct constitutes a breach of an international obligation of the State.

Article 4. Characterization of an act of a State as internationally wrongful

An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law.

CHAPTER II

THE "ACT OF THE STATE" UNDER INTERNATIONAL LAW

Article 5. Attribution to the State of the conduct of its organs

For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

Article 6. Irrelevance of the position of the organ in the organization of the State

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the organization of the State.

Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

Article 8. Attribution to the State of the conduct of persons acting in fact on behalf of the State

The conduct of a person or group of persons shall also be considered as an act of the State under international law if

- (a) it is established that such person or group of persons was in fact acting on behalf of that State; or

(b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

Article 9. Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization

The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

Article 10. Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.

Article 11. Conduct of persons not acting on behalf of the State

1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.

Article 12. Conduct of organs of another State

1. The conduct of an organ of a State acting in that capacity, which takes place in the territory of another State or in any other territory under its jurisdiction, shall not be considered as an act of the latter State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

Article 13. Conduct of organs of an international organization

The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

Article 14. Conduct of organs of an insurrectional movement

1. The conduct of an organ of an insurrectional movement, which is established in the territory of a State or in any other territory under its administration, shall not be considered as an act of that State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.

3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

Article 15. Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State

1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.

2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Article 16. Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation.

Article 17. Irrelevance of the origin of the international obligation breached

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation.

2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.

Article 18. Requirement that the international obligation be in force for the State

1. An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State.

2. However, an act of the State which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law.

3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State.

4. If an act of the State which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State.

5. If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period.

Article 19. International crimes and international delicts

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.

Article 20. Breach of an international obligation requiring the adoption of a particular course of conduct

There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.

Article 21. Breach of an international obligation requiring the achievement of a specified result

1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result, if, by the conduct adopted, the State does not achieve the result required of it by that obligation.

2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation.

Article 22. Exhaustion of local remedies

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.

Article 23. Breach of an international obligation to prevent a given event

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.

Article 24. Moment and duration of the breach of an international obligation by an act of the State not extending in time

The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, even if the effects of the act of the State continue subsequently.

Article 25. Moment and duration of the breach of an international obligation by an act of the State extending in time

1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.

2. The breach of an international obligation by an act of the State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.

3. The breach of an international obligation by a complex act of the State, consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.

Article 26. Moment and duration of the breach of an international obligation to prevent a given event

The breach of an international obligation requiring a State to prevent a given event occurs when the event begins. Nevertheless, the time of commission of the breach extends over the entire period during which the event continues.

CHAPTER IV

IMPLICATION OF A STATE
IN THE INTERNATIONALLY WRONGFUL ACT
OF ANOTHER STATE*Article 27. Aid or assistance by a State to another State for the commission of an internationally wrongful act*

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.

2. TEXT OF ARTICLES 23 TO 27, WITH COMMENTARIES THERETO,
ADOPTED BY THE COMMISSION AT ITS THIRTIETH SESSION

*Article 23. Breach of an international obligation
to prevent a given event*

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.

Commentary

(1) In the rule laid down at the beginning of chapter III (article 16), the Commission set out the general requirement for recognition of the existence of a breach of an international obligation. The Commission then examined successively, in the same chapter, the distinctions to be drawn between the various types of international obligation and any effect of those distinctions of the requirements for the existence of a breach and on its characterization. It held that the determination of the existence of a breach was not affected by any distinction between international obligations as to their origin (article 17). On the basis of the distinction that must be made by virtue of the more or less essential character, for the international community, of the subject-matter of international obligations, it differentiated between breaches of such obligations as breaches constituting, respectively, international crimes and international delicts (article 19). With regard to the delicate distinctions, of considerable consequence in that context, pertaining to the nature of the international obligation, the Commission first examined the basic distinction between obligations requiring the State to adopt a particular course of conduct (so-called obligations "of conduct" or "of means"), and those requiring the State to ensure a specified result but leaving it free to choose the means of achieving that result and allowing it, where necessary, to remedy by subsequent conduct a situation created by its initial conduct and that was inconsistent with the result aimed at (so-called obligations "of result"). It thus defined separately, for each of those two basic categories of obligation, the respective requirements for the occurrence of a breach (articles 20 and 21). It then set out, in article 22, the additional condition that must be fulfilled for there to be a breach of an obligation of result whose object was to protect aliens and which, for the achievement of the required result, provided for co-operation by the individuals concerned in the form of the use by them of the remedies available under the internal legal order. In article 23, the Commission rounded off its work on that point by defining the specific condition to be fulfilled for the existence of another special type of obligations of result to be established, namely, those where the result specifically required of the State was to ensure the non-occurrence of a given event.

(2) Some explanation is necessary, however, to make clear the type of obligations to which the Commission was referring in that article. Among the different kinds of obligations that general international law or treaties impose on States, there are many whose direct or indirect

purpose is to prevent the occurrence of certain events injurious to foreign States, their environment, their representatives or their nationals. However, these obligations cannot all be classified among those that are the subject of article 23. When States formulate the obligations they are preparing to assume, they are free to structure them as they deem preferable in the light of the particular objective pursued. They therefore sometimes subscribe to commitments which are typically obligations "of conduct" and which, as such, require of the State not that it ensure a result, but that it perform particular acts of commission or omission. There is no dearth of examples: the customary law obligation to prohibit the formation or existence in the territory of a State of movements whose aim is subversion in a neighbouring State; the obligation which, with a view to preventing collisions, requires States to prescribe specific navigation corridors to be used by ships or aircraft; the obligation which, with a view to preventing pollution of waters and beaches, requires the State to prohibit tankers from spilling hydrocarbonic wastes in certain sea areas, or to impose on them the observance of certain safety measures; the obligation requiring the State to prohibit the siting near a frontier of a factory producing toxic emanations; the obligation requiring the posting of a guard at, or the provision of special protection for, a foreign building; the obligation to carry out certain improvement or maintenance work affecting the course or flow of rivers; and the obligation, such as that in article 11 of the Agreement of 29 December 1949 concerning the régime of the Norwegian-Soviet frontier and procedure for the settlement of frontier disputes and incidents³⁹³ which, with a view to preventing fires, requires the parties specifically to prohibit workmen engaged in floating timber from remaining on work sites during the night, lighting fires, etc. Obligations of this kind naturally come under the provisions of article 20 of the draft, and determination of any breach of the obligation presents no problem. There is a breach whenever the State that has assumed the obligation adopts a course of conduct not in conformity with the conduct specifically required of it.

(3) However, there are also many obligations whose objectives are similar but which are based on different principles and structured in a different way — obligations that may therefore be described as obligations of result. These require the State specifically to ensure the result of preventing the occurrence of a feared event, but without in any way prescribing a particular course of conduct to that end. Here again, examples may be found in many different areas of international relations. Examples that come readily to mind are the customary obligation requiring the State to ensure that, within its territory, nationals of another State are not massacred or lynched by xenophobic mobs; the obligation on the State to prevent, within its territory, the infliction of injuries on representatives of a foreign State by individuals or organs of a third State; the obligation laid down in article 22 of the 1961 Vienna Convention on Diplomatic Relations³⁹⁴ requiring the State to ensure that the premises of a mission

³⁹³ United Nations, *Treaty Series*, vol. 83, p. 291.

³⁹⁴ *Ibid.*, vol. 500, p. 95.

are not subject to any intrusion or damage and that there is no disturbance of the peace of the mission or impairment of its dignity, not only by State organs but also by third parties, and the obligation in article 29 of the same Convention requiring the State to take all appropriate steps to prevent any attack on the person, freedom or dignity of a foreign diplomatic agent; obligations such as that laid down in article 14 of the aforementioned agreement between Norway and the USSR,³⁹⁵ which requires the parties to "ensure that the frontier waters are kept clean and are not artificially polluted or fouled in any way" and "to prevent damage to the banks of frontier rivers and lakes"; treaty obligations which commit the contracting parties to ensure that the use of waterways for navigation, irrigation, production of hydroelectric energy, etc., is not hampered by any acts of man or natural phenomena; and obligations such as that contained in article X of the Convention of 17 September 1955 between Italy and Switzerland concerning the regulation of Lake Lugano,³⁹⁶ which requires the parties, in the event of the construction or alteration of any civil engineering works, to ensure the prevention of "any obstruction of or interference with the regulation of the lake or any damage to the bank belonging to the other State", etc.

(4) It is quite clear that the obligations of which examples have been given all fall within the category referred to in article 21, because they are obligations whose fulfilment, like that of others of the same category, takes place only if the result that they require can be seen to have been ensured, and whose breach similarly takes place only if that result can be seen not to have been ensured. However, it would be wrong to believe that the general provision formulated in article 21 in order to define the conditions for the existence of a breach of an obligation of result suffices, by itself, to resolve the questions arising in cases where the result aimed at by the obligation is the prevention by the State of an event caused by factors in which it plays no part. The conditions for the breach of an obligation requiring a result of this kind need a different kind of definition from those that apply to an obligation requiring a result in whose achievement or non-achievement only action by the State is involved. To ensure the result of preventing individuals or third parties from committing certain acts, or of preventing disasters, whether naturally or artificially caused (such as flooding or pollution), from taking place, is something quite different from ensuring, for example, the result that nationals of a given foreign country be allowed to practise, within the State, an occupation or other activity on an equal footing with nationals. The characteristic feature of the case taken into consideration by the Commission here is precisely the notion of an event, i.e. an act of man or of nature which, as such, involves no action by the State. Consequently, if the result which the obligation requires the State to ensure is that one or another event should not take place, the key indication of breach of the obligation is the occurrence of the event, just as the non-occurrence of the event is the key indication of fulfilment of the obligation. The State bound

by an obligation of this kind cannot assert that it has achieved the required result by claiming that it has set up a perfect system of prevention³⁹⁷ if in practice that system proves ineffective and permits the event to occur. Conversely, the State having an interest in the fulfilment of the obligation cannot claim that the obligation has been breached solely because it regards the system of prevention set up by the obligated State as clearly insufficient or ineffective, as long as the occurrence the system was intended to prevent has not taken place. In other words, the non-occurrence of the event is the result that the State is required to ensure, and it is the occurrence of the event that determines that the result has not been achieved.

(5) The "event" whose occurrence the State is required to prevent must not be understood as being "damage" in the sense in which this term is used in the theory of State responsibility. It is true that the events whose occurrence international obligations are intended to prevent are generally injurious events, but damage is not necessarily caused in every specific case where an event occurs which the State was under an obligation to prevent. For example, an attack on a person, even when perpetrated, may sometimes have no injurious consequences, as the person attacked may have succeeded, by his reaction, in ensuring that no injury is in fact caused to him. However, this does not alter the fact that the attack has taken place, and that the responsibility of the State is therefore entailed. The requirement that the event must have occurred for there to be a breach of an obligation requiring the State to prevent its occurrence is therefore in no way a sort of exception to the general position taken by the Commission during the formulation of article 3 and of the commentary thereto.³⁹⁸ Even in the specific case of an obligation to prevent an event, the presence of damage is not an additional condition for the existence of an internationally wrongful act, quite apart, of course, from the fact that obligations to prevent events are only a particular kind of international obligation and certainly do not account for all international obligations.

(6) However, the occurrence of the event is not the only condition specifically stipulated for the existence of a breach of an international obligation requiring the State to achieve the result of preventing the occurrence of that event. In assuming obligations of this kind, States are not underwriting some kind of insurance to cover co-contracting States against the occurrence, whatever the conditions, of events of the kind contemplated, i.e. against the occurrence of the event even regardless of any material possibility of the State's preventing it from occurring in a given case. The State can obviously be required only to act in such a way that the possibility of the event is obstructed, i.e. to frustrate the occurrence of the event as far as lies within its power. Only when the event has

³⁹⁷ Obligations requiring the prevention of given events are therefore not the same as those that are commonly referred to by the blanket term "obligations of due diligence". The commission of a breach of the latter obligations often consists of an action or omission by the State and is not necessarily affected by the fact that an external event does or does not take place.

³⁹⁸ See *Yearbook ... 1973*, vol. II, pp. 179-184, doc. A/9010/Rev.1, chap. II, sect. B.

³⁹⁵ See foot-note 393^a above.

³⁹⁶ United Nations, *Treaty Series*, vol. 291, p. 213.

occurred because the State has failed to prevent it by its conduct, and when the State is shown to have been capable of preventing it by different conduct, can the result required by the obligation be said not to have been achieved. Consequently, for there to be a breach of the obligation, a certain causal link—indirect, of course, not direct—must exist between the occurrence of the event and the conduct adopted in the matter by the organs of the State. It is hardly necessary to add that the objective of each obligation and the more or less essential character of the prevention of this or that type of event³⁹⁹ must also be taken into account, once the event to be prevented has occurred, in comparing the conduct actually adopted by the State and the conduct that it might reasonably have been expected to adopt to prevent the event from occurring.

(7) The Commission believes that the foregoing considerations show why a separate rule is needed in the present draft for the particular case of the breach of an international obligation requiring the State to achieve the specific result of preventing the occurrence of an event. It also believes it has emphasized the two conditions—occurrence of the event and existence of an indirect causal link between the occurrence and the conduct adopted in the matter by the State—that such a rule must specifically stipulate for a breach of an obligation of the kind in question to be established.⁴⁰⁰ Having so far justified its conclusions on the basis of abstract legal logic, the Commission considers that it should now support them by an analysis of State practice and the opinions of writers.

(8) The quite special structure of so-called international obligations “of event” and its consequences for determining the conditions for the existence of a breach of such obligations did not escape the attention of the Preparatory Committee for the Conference for the Codification of International Law (The Hague, 1930). Thus, in drafting point VII of the request for information addressed to States, the Committee took it for granted that the event represented by an act committed by private individuals to the detriment of foreigners must actually have occurred in order for the responsibility of the State for lack of prevention on the part of its organs to be entailed.⁴⁰¹ In

using the wording that it did, the Committee demonstrated its conviction that any lack of prevention on the part of the State organs entrusted with that task could not be taken into consideration as a source of international responsibility except *in connexion with* acts committed by a private individual to the detriment of a foreigner. The existence of a breach by the State of its international obligation therefore depended on the presence of two conditions: lack of prevention on the part of the State organs and occurrence, in that context, of the event constituted by the injurious act of the private individual. The replies of governments to point VII of the questionnaire confirmed implicitly the view that lack of prevention on the part of State organs might be taken into consideration as a source of international responsibility only in connexion with an act committed by a private individual to the detriment of a foreigner.⁴⁰² The same is true of the replies to point IX of the request for information, which extended the question put in point VII to the case of damage caused to foreigners by “persons engaged in insurrections or riots, or through mob violence”.⁴⁰³

(9) In its reply to point V, No. 1(c), of the questionnaire,⁴⁰⁴ the Austrian Government pointed out, in regard to persons enjoying protection, that lack of protection was not enough to engage the responsibility of the State: damage must actually have been caused for the conduct of the State to constitute a breach of the international obligation.⁴⁰⁵ The replies of other governments on that point, while not as specific as the Austrian reply, were interpreted by the Drafting Committee in the same way, for in drafting basis No. 10 it stated:

A State is responsible for *damage suffered** by a foreigner as the result of failure on the part of the executive power to show such diligence in the protection of foreigners as, having regard to the circumstances and to the status of the persons concerned, could be expected from a civilised State...⁴⁰⁶

In other words, the existence of the event represented by the damage actually caused to a foreigner who has some public character is expressly indicated, along with lack of diligence in prevention, as one of the two conditions

³⁹⁹ An event such as the murder of a foreign Head of State is certainly far more serious for relations between States than the pollution of a boundary river or the destruction of an asset.

⁴⁰⁰ Where the victims of an event that the State should have prevented are aliens, the conditions specifically required for establishing the existence of a breach of an international obligation to prevent the event may be additional to the condition already stipulated in article 22 for the existence of a breach of an international obligation concerning the treatment to be accorded to aliens.

⁴⁰¹ Point VII (a) of the request for information was worded as follows:

“Circumstances in which the acts of private persons causing damage to the person or property of a foreigner in the territory of a State may be the occasion of liability on the part of the State, and grounds on which such liability arises, if it does arise: Failure on the part of the State authorities to do what is in their power to preserve order and prevent crime, or to confer reasonable protection on the person or property of a foreigner.” (League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (C.75.M.69.1929.V), p. 93.)

⁴⁰² *Ibid.* and *Supplement to vol. III* (C.75(a).M.69(a).1929.V), pp. 3 and 18).

⁴⁰³ *Ibid.*, pp. 108 *et seq.* and p. 20 respectively.

⁴⁰⁴ Point V, No. 1(c), was worded as follows:

“Does the State become responsible in the following circumstances and, if so, on what grounds does liability rest:

Failure to exercise due diligence to protect individuals, more particularly those in respect of whom a special obligation of protection is recognised — for example: persons invested with a public character recognised by the State?” (*Ibid.*, vol. III, p. 62.)

⁴⁰⁵ The reply of the Austrian Government to point V, No. 1(c), of the questionnaire was as follows:

“It is obvious that mere failure to exercise due diligence in protecting the person of foreigners does not in itself involve the responsibility of the State: such responsibility would arise only if a foreigner suffered injury through the act of a private person” (*ibid.*, p. 63).

This position of the Austrian Government is particularly interesting in that the wording by the Preparatory Committee of point V, No. 1(c), did not expressly mention “acts of a private person” as constituting the occasion for international responsibility arising in the event of lack of prevention on the part of State organs.

⁴⁰⁶ *Ibid.*, p. 67.

for establishing the State's breach of its obligation and for engaging its responsibility.

(10) At the Hague Conference, basis No. 10 as formulated by the Drafting Committee was incorporated in a new basis No. 10, providing that a State was responsible "for damage caused" by a private person to the person or property of a foreigner" in general.⁴⁰⁷ The Conference did not have occasion to take a decision on the point now under discussion. It seems, however, that the view generally shared by all the governments represented was that a breach of an obligation to prevent an event such as an injurious act by a private individual against a foreigner could not be imputed to a State as long as that event had not occurred.

(11) In international jurisprudence, there have been very many cases where the subject of the dispute has been the breach of an international obligation requiring a State to ensure that certain events do not occur.⁴⁰⁸ A study of these cases confirms the view held by the governments participating in the 1930 Conference. Where a government has complained in an international judicial or arbitral

⁴⁰⁷ League of Nations, *Acts of the Conference for the Codification of International Law* (The Hague, 13 March-12 April 1930), vol. IV, *Minutes of the Third Committee* (C.351(c).M.145(c).1930.V), p. 143. For the discussion, see *ibid.*, pp. 143 *et seq.*, 175 and 176 and 185 *et seq.*

⁴⁰⁸ For cases of breach of the obligation to prevent the occurrence, in the territory of a neighbouring State, of injury resulting from an activity carried on in the territory of the State, see, for example, the Trail Smelter Case between the United States of America and Canada, referred to the Arbitral Tribunal constituted under the Convention of 15 April 1935 (United Nations, *Reports of International Arbitral Awards*, vol. III (United Nations publication, Sales No. 1949.V.2), pp. 1905 *et seq.*).

For cases of breach of the obligation to prevent the occurrence of attacks against specially protected persons, see the Borchgrave Case between Belgium and Spain, referred to the Permanent Court of International Justice, especially the memorandum of the Belgian Government of 15 May 1937 (*P.C.I.J.*, Series C, No. 83, pp. 28 *et seq.*), and the Spanish memorandum of 29 June 1937 (*ibid.*, pp. 55 *et seq.*).

Innumerable disputes concerning breaches of the obligation to prevent attacks against the safety of foreigners and their property by private individuals or groups of individuals or by insurgents have been referred to an international tribunal. It will suffice to mention the disputes referred to the Venezuelan Commissions of 1903, in particular the Sambiaggio case with Italy (United Nations, *Reports of International Arbitral Awards*, vol. X (United Nations publication, Sales No. 60.V.4), pp. 499 *et seq.*, especially p. 513); the Kummerow etc. cases with Germany (*ibid.*, pp. 369 *et seq.*, especially pp. 397 and 398); the Aroa Mines Ltd. case with Great Britain (*ibid.*, vol. IX (Sales No. 59.V.5), pp. 402 *et seq.*, especially pp. 438 *et seq.*) and the Jenny L. Underhill case with the United States of America (*ibid.*, p. 159); the Home Frontier and Foreign Missionary Society of the United Brethren in Christ case between the United States of America and Great Britain, referred to the Arbitral Tribunal set up under the Special Agreement of 18 August 1910 (*ibid.*, vol. VI (Sales No. 1955.V.3), pp. 42 *et seq.*, especially p. 44); the British Property in Spanish Morocco case between Great Britain and Spain, referred to Mr. Max Huber, the arbitrator appointed under the agreement of 29 May 1923 (*ibid.*, vol. II (Sales No. 1949.V.1), pp. 615 *et seq.*, especially p. 642); the cases submitted to the Mexico-United States of America General Claims Commission set up under the Convention of 8 September 1923, in particular The Home Insurance Company case (*ibid.*, vol. IV (Sales No. 1951.V.1), pp. 48 *et seq.*, especially p. 52); and the Walter A. Noyes case between the United States of America and Panama, referred to the United States-Panama General Claims Commission set up under the Convention of 28 July 1926 (*ibid.*, vol. VI (Sales No. 1955.V.3), pp. 308 *et seq.*, especially p. 311).

body of the breach of an obligation of this specific kind, it has cited an event that has actually occurred. No such body has ever been asked to recognize as a breach of an international obligation of this kind the mere fact that the State failed to adopt measures to prevent a theoretically possible event that did not actually occur. It is in connexion with events that have actually occurred, and in particular with injurious conduct emanating from private individuals, insurrectional movements, etc., that international tribunals have been asked to rule that a State has breached its obligation to prevent such an event. Moreover, the decisions of those tribunals with regard to disputes relating to possible breaches of international obligations of "event" do not assert, even indirectly or incidentally,⁴⁰⁹ that failure to adopt measures to prevent the occurrence of an event would suffice in itself—i.e. without the actual occurrence of the event—to constitute a breach by the State of the international obligation in question.

(12) The positions taken by States in disputes settled through diplomatic channels correspond fully to those that have been observed in disputes referred to international adjudication or arbitration. In diplomatic practice, it is only after the occurrence of an event that States have invoked the breach of the international obligation to prevent the event. That has been the case, for example, with a whole series of disputes involving a State's obligation to prevent certain attacks by private individuals, insurgents, organs of foreign States and so on. Both at the diplomatic and at the international judicial or arbitral levels, therefore, the State claiming injury has not normally complained of an internationally wrongful act until after the event, represented by the attack emanating from private individuals or other sources, has actually occurred.⁴¹⁰ It should not be deduced from this that a State may not send a communication to the obligated

⁴⁰⁹ They could do so, for example, in determining the moment and duration of the internationally wrongful act.

⁴¹⁰ With regard to the duty of a State to protect the person of a diplomatic agent or of an agent of other organs of a foreign State, see, for example, the cases of the murder of the Italian members of the Tellini mission (1923), the murder of Worowsky, the Soviet envoy to the Lausanne Peace Conference (1923), the murder of de Borchgrave, a member of the Belgian diplomatic mission in Spain (1936), etc. (*Yearbook ... 1972*, vol. II, pp. 114 *et seq.*, doc. A/CN.4/264 and Add.1, paras. 115 *et seq.*). Note also the attitude adopted by the State claiming injury in certain cases relating to the obligation to protect the premises of diplomatic missions of a foreign State; for example, those of the Romanian Legation in Bern (1955), of the Hungarian Legation in Bern (1958), of the United States Embassy in Moscow (1964 and 1965) and of the USSR Embassy in Peking (1966) (*ibid.*, pp. 118 *et seq.*, paras. 130-133). See also the cases of the United States Embassy in T'ai-pei (1957) (M. Whiteman, *Digest of International Law*, Washington D., C., U.S. Government Printing Office, 1967, vol. VIII, pp. 747 *et seq.*); the Belgian Embassy in Cairo (1961) (*Revue générale de droit international public*, Paris, 3rd series, vol. XXXII, No. 3 (July-Sept. 1961), pp. 579 *et seq.*, and *Revue belge de droit international*, Brussels, 1966, vol. II, No. 2, pp. 505 *et seq.*); the Yugoslav Trade Mission at Bad Godesberg (1962) (*Revue générale de droit international public*, Paris, 3rd series, vol. XXXIV, No. 2 (April-June 1963), pp. 361 *et seq.*, and *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Stuttgart, vol. 24, No. 4 (October 1964), pp. 681 *et seq.*); and of the USSR Embassy in Washington (1968), (*Revue générale de droit international public*, Paris, 3rd series, vol. XXXIX, No. 4 (Oct.-Dec. 1968), pp. 1082 *et seq.*).

State before the event occurs in order to draw its attention to the fact that, in its opinion, the measures adopted are insufficient to prevent the occurrence of the event whose prevention is the subject-matter of the international obligation in question. However, such communications or representations, which are very frequent in relations between States, must not be confused with international claims invoking the responsibility of States for breach of an international obligation incumbent upon them.

(13) International jurists wishing to give a typical example of an international obligation requiring the State to adopt conduct capable of preventing the occurrence of certain events have generally cited the obligation to prevent injurious conduct by private individuals. In so doing, the writers concerned have usually taken as a starting point the premise of the existence, as a *fait accompli*, of injury caused by private individuals to a foreign State, its representatives or its nationals. It is in relation to injury actually caused that these authors pose the question of the cases in which the State could be held responsible. As has been seen,⁴¹¹ the reply of the overwhelming majority of modern writers is that the State cannot be held internationally responsible except in cases where it has omitted to adopt measures normally likely to prevent private individuals from committing the injurious acts in question and where such acts have been committed precisely because of lack of prevention by the State. For most of these writers, such lack of prevention is not a theoretical concept but a reality given substance by the actual occurrence of the event which the State had the duty to prevent and which has taken place because of the State's failure to prevent it.⁴¹² Furthermore, the authors of learned works who have closely studied the question of determination of conditions for breaches of international obligations "of event" all agree that it would be out of the question to hold that there has been a breach of an international obligation requiring a State to prevent by its conduct the occurrence of certain events as long as the latter have not taken place.⁴¹³

⁴¹¹ *Yearbook ... 1975*, vol. II, pp. 80 and 81, doc. A/10010/Rev.1, chap. II, sect. B, 2, article 11, para. 33 of the commentary.

⁴¹² The writers who have given the matter particular attention have pointed out that the act of the private individual is the "occasion" or even the "condition" for the State to be held to have committed a breach of its obligation to take preventive action and to have incurred the resulting international responsibility. See, for example, Ch. de Visscher, "La responsabilité des États", *Bibliotheca Visseriana*, Leiden, Brill, 1924, vol. II, p. 103; A. Decencière-Ferrandière, *La responsabilité internationale des États à raison des dommages subis par des étrangers*, Paris, Rousseau, 1925, p. 63; L. Delbez, "La responsabilité internationale pour crimes commis sur le territoire d'un État et dirigés contre la sûreté d'un État étranger", *Revue générale de droit international public*, Paris, 3rd series, vol. IV, 1930, p. 470; J. Spiropoulos, *Traité théorique et pratique du droit international public*, Paris, Librairie générale de droit et de jurisprudence, 1933, p. 275.

⁴¹³ See, for example, R. Ago, "Le délit international", *Recueil des cours de l'Académie de droit international de La Haye, 1939-II*, Paris, Sirey, 1947, vol. 68, pp. 447 et seq.; G. Morelli, *Nozioni di diritto internazionale*, 7th ed., Padua, CEDAM, 1967, pp. 348 et seq.; P. A. Zannas, *La responsabilité internationale des États pour les actes de négligence*, Montreux, Ganguin et Laubscher, 1952, pp. 32 et seq.; M. Giuliano, *Diritto internazionale*, Milan, Giuffrè, 1974, vol. I, pp. 591 and 592; B. Gräfrath, E. Oeser and P. A. Steiniger, *Völkerrechtliche Verantwortlichkeit der Staaten*, Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1977, pp. 57 and 58.

(14) With regard to the conditions required as proof of a breach, the conclusion that derives from the nature of international obligations "of event" is thus fully confirmed in the practice of States, international jurisprudence and doctrine. Where general international law or a treaty places upon a State an obligation whose direct object is the prevention of a certain event, the breach of the obligation can be asserted to exist, and the responsibility of the State to be incurred, only if the event to be prevented actually occurs and also if lack of prevention on the part of the obligated State is proved. As has been seen, a further requirement is that, between the conduct of the State in the instance in question and the event that has occurred, there should be a causal link such that the said conduct may be regarded as a *sine qua non* of the event. These conditions are of so specific a nature that their definition, in the Commission's opinion, cannot be omitted from the present draft articles. The special attention given hitherto to the establishment, with regard to each kind of international obligation, of the conditions under which its breach occurs would also preclude such an omission. It should be stressed, however, that the purpose of article 23 of the draft is not to introduce or identify international obligations "of event", but merely to make it clear that, if an international obligation is an obligation "of event", its breach occurs in a certain way.

(15) In the light of the foregoing considerations, the Commission has provided in article 23 that, "when the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result". The first part of the sentence defines the case to which the provision refers, placing particular emphasis on the fact, illustrated above,⁴¹⁴ that the international obligations taken into account in this article are a special type of the general category of obligations "of result". The "type" of obligation to which article 23 refers is thus one that requires the State to achieve a specific result but leaves it free to choose the means of achieving that result.

(16) In the category of "obligations of result", the particular "type" of obligation to which article 23 is intended to refer is defined by the statement that, in the case of these obligations, the result to be achieved is "the prevention... of the occurrence of a given event". This statement governs the reading of the operative part of the rule, which provides that, when the obligation is of this type, "there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result". "That result" obviously means the specific result of preventing *the occurrence of a given event*. The article thus defines clearly the first of the two conditions that must be met if it is to be established, in the case envisaged, that there is a breach of the obligation, namely, the condition described in paragraph (4) above. According to the rule thus defined, a breach of the obligation cannot be said to occur as long as the event that the State was required to prevent has not occurred—in other words, as long as it has not been established that the State that could

⁴¹⁴ See paras. (3) and (4).

have been expected to achieve the result of preventing "the occurrence of a given event" has failed to achieve *that result*. At the same time, the second condition for the breach, namely, the existence of an indirect causal link between the occurrence of the event and the conduct in fact adopted by the State, is clearly indicated by the words "by the conduct adopted". These words concisely express the requirement referred to above,⁴¹⁵ namely, that the occurrence of the event must have been made possible by the conduct that the State chose to adopt in the case in question, whereas by a different conduct it would have been able to achieve the required result.

Article 24. Moment and duration of the breach of an international obligation by an act of the State not extending in time

The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, even if the effects of the act of the State continue subsequently.

Commentary

(1) The preceding articles of chapter III of the present draft, a chapter that considers the objective element of an internationally wrongful act, were devoted mainly to determination of the conditions for the existence of a breach of an international obligation; to that specific end, the different categories and types of international obligations were dealt with separately. To complete the exposition of the rules relating to the subject-matter of this chapter, account remains to be taken of another aspect, namely, the temporal aspect, which in both international and internal law is characterized as the determination of the *tempus commissi delicti*. This term covers both the determination of the moment when the existence of the breach of an international obligation is established and the determination of the duration, or the continuance in time, of that breach.

(2) The Commission touched earlier on certain aspects of the temporal element, as for example in article 18, in which it formulated the rule stating the requirement that an international obligation must be in force for a State contemporaneously with the adoption by that State of conduct not in conformity with that required by the obligation for such conduct to be considered as internationally wrongful. The Commission also dealt with the temporal element when it set forth the rules in article 21, paragraph 2, and article 22, concerning determination of the conditions for the occurrence of a breach of certain obligations of result, as well as the rule in article 23, concerning determination of the conditions for the occurrence of a breach of an obligation requiring the prevention of an event. The solutions adopted in those articles will obviously have a bearing on the solution of the problem of determination of the *tempus commissi delicti*, as will appear more specifically from the commentaries to articles 25 and 26. The need to ensure full con-

sistency between the solutions adopted in the various rules formulated in the present draft has thus been emphasized; however, it would be erroneous to think that the solution to the problems now in hand is to be found ready-made in the answers given earlier in the draft to questions that are—and continue to be—different. It is one thing to determine the existence of a breach of an international obligation, and another to determine the moment and duration of a breach whose existence has been established.

(3) The purpose of articles 24 to 26 of the draft is thus to provide answers, in connexion with the various situations that may arise, to the two questions raised at the end of paragraph (1) of the present commentary. The first of these questions is to determine the moment when—all the constituent elements of the breach of an international obligation being present—it may be concluded that the breach exists. The second is to determine the entire period during which the breach continues, i.e. from when and until when its commission extends, both before and after the moment when its existence is established.

(4) It is not very easy to answer these questions. The Commission has already described some of the delicate and at times complicated aspects involved, particularly in certain situations, in determining the conditions for the existence of a breach of an international obligation. The difficulty of these aspects necessarily affects the determination of the moment when the breach, in all its constituent elements, must be considered to have occurred, and accordingly the moment when its existence is established. Nor should it be thought that determining the time of commission of a breach of an international obligation is a matter of ascertaining facts rather than of applying legal criteria. Such determination is not in fact easy except where a breach consists in an act of the State not extending in time, in other words, where the time of commission of the breach coincides with the moment when the breach occurs. The task becomes more complicated and necessarily requires the application of legal rules in cases where an act of the State not in conformity with the international obligation is an act extending over a period of time, whether because of the continuing character of that act, or because the act is composed of a number of separate individual acts, or because it is a complex act consisting of a succession of different actions or omissions by the State. Equally dependent on the application of legal criteria is the determination of the moment and duration of the breach of an obligation to prevent the occurrence of an event. The Commission will deal more specifically with these problems in articles 25 and 26 and the commentaries thereto.

(5) The practical importance of the solution to the above mentioned problems needs no stressing. The determination of the moment when it may be concluded that a breach of an international obligation has occurred is obviously essential in determining the moment when the international responsibility of the State committing the breach is entailed and, consequently, the moment when the State against which the breach was directed is able to take action at the diplomatic level, or even at the arbitral or judicial levels, to invoke that responsibility. The moment of the occurrence of a breach of an international obligation and the duration of the commission of the breach, moreover,

⁴¹⁵ See para. (6).

are two elements that may be decisive in resolving a whole series of problems in which a temporal element is involved. That is the case, for example, with regard to the determination of the extent of the injury caused by a given internationally wrongful act and, consequently, of the amount of reparation owed by the State that has committed the act in question. It is also the case with regard to the determination of the existence or non-existence of the competence of an international tribunal to deal with a dispute arising out of the breach by a State of an international obligation where the agreement concluded by the parties to the dispute includes a clause limiting the jurisdiction of the tribunal established under or mentioned in the agreement to disputes concerning "acts" or "situations" subsequent to a specific date,⁴¹⁶ provided that the parties in question have not expressly laid down

⁴¹⁶ A clause of this kind appears in several bilateral treaties providing for the judicial or arbitral settlement of disputes between the parties; for example, the treaty between Spain and Belgium of 1927 on which the jurisdiction of the International Court of Justice was based in the case concerning the Barcelona Traction, Light and Power Company, Limited (*I.C.J. Reports 1964*, pp. 39 and 40). Article 39 of the General Act for the Pacific Settlement of International Disputes, of 26 September 1928, permitted the parties, in acceding to the Act, to exclude from the procedure described in that instrument "Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute" (League of Nations, *Treaty Series*, vol. XCIII, p. 361). A reservation having the same effects was also included in numerous unilateral declarations of acceptance of the compulsory jurisdiction of the Permanent Court of International Justice; for example, in the declaration made by Belgium on 10 March 1926, limiting that acceptance to "any disputes arising after ratification of the present declaration with regard to *situations or facts subsequent to this ratification*"; in that made by France on 25 April 1931, limiting such acceptance to "any disputes arising after ratification of the present declaration with regard to *situations or facts subsequent to this ratification*"; and in that made by India on 28 February 1940, limiting the Court's jurisdiction to "all disputes arising after 5 February 1930, with regard to *situations or facts subsequent to the same date*". These reservations played an important role in the Electricity Company of Sofia and Bulgaria case, the Phosphates in Morocco case and the Right of Passage over Indian Territory case respectively (see, respectively, *P.C.I.J.*, series A/B, No. 77, p. 81; *ibid.*, No. 74, p. 22; *I.C.J. Reports 1957*, p. 140). At present, a limitation expressed in these or more or less similar terms appears in the declarations of acceptance of the compulsory jurisdiction of the International Court of Justice by Belgium (17 June 1958), Canada (7 April 1970), El Salvador (26 November 1973), India (18 September 1974), Israel (17 October 1956), Japan (15 September 1958), Kenya (19 April 1965), Luxembourg (15 September 1930), Malawi (12 December 1966), Mexico (28 October 1947), the Sudan (2 January 1958) and the United Kingdom (1 January 1969) (see *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions: List of Signatures, Ratifications, Accessions, etc. as at 31 December 1977* (United Nations publication, Sales No. E.78.V.6), pp. 11-24). It is interesting to note that limitations along the same lines are to be found in certain declarations of acceptance of the jurisdiction of the European Commission of Human Rights with regard to applications submitted by individuals. In its declaration of 14 January 1966, the Government of the United Kingdom recognized such jurisdiction "in relation to any act or decision occurring or any facts or events arising subsequently to the 13th of January, 1966" (*Yearbook of the European Convention on Human Rights, 1966*, vol. 9, The Hague, 1968, p. 8). Similarly, the Italian Government, in its declaration of 20 June 1973, accepted such jurisdiction in relation to "any act or decision occurring or any facts or events arising subsequently to this date" [31 July 1973] (*Yearbook of the European Convention on Human Rights, 1973*, The Hague, vol. 16, 1975, p. 10).

special criteria for the interpretation of that clause. The determination of the moment and duration of the breach of an international obligation may also have a bearing on decisions concerning the existence or non-existence of what is known as the "national character of the claim" which, according to the opinion exemplified by practice, must exist, if a State is to be entitled to intervene for the purpose of the diplomatic protection of an individual, from the moment of the commission of the internationally wrongful act injurious to that individual until the moment when the claim is submitted.⁴¹⁷ The determination of the moment and duration of the breach of an international obligation will always affect the determination of the moment from which the period of prescription will begin to run, assuming that international law recognizes that the right of a State to invoke responsibility for an internationally wrongful act committed against it by another State may lapse by prescription. The determination of the duration of the commission of an internationally wrongful act may also be important at times in assessing the seriousness of that act and in determining whether, on that basis, the act in question may be defined as an "international crime" under article 19 of the draft. The list of examples given is in no way intended to be exhaustive.

(6) In the general context referred to in paragraph (3) above, the question dealt with in article 24 is the determination of the moment and duration of the breach of an international obligation in a case where the act of the State committing the breach in *an act that does not extend in time*, i.e. an act that ends as soon as it is committed.⁴¹⁸ Examples of such acts may readily be found: anti-aircraft defence units of one State shooting down an aircraft lawfully flying over that country's territory; the torpedo boat of a belligerent State sinking a neutral ship on the high seas; the police of one State killing or wounding the representative of another State or kidnapping an individual in foreign territory; organs of a State confiscating the building in which a foreign diplomatic mission has its headquarters, etc.⁴¹⁹ The only object of determining the moment when a breach of an international

⁴¹⁷ And, in some cases, until the moment when application is made to an international tribunal. It is obvious that, in a case where the occurrence of a breach of an international obligation extends in time, the "national character of the claim", i.e. the link of nationality between the individual who is the direct victim of the breach and the State that intends to provide him with diplomatic protection, must have existed without interruption since the beginning of the time of commission of the breach. It thus becomes essential to determine exactly when the time of commission began.

⁴¹⁸ Under the general theory of internal law, an act falling into this category is generally known as an "instantaneous act". Frequently cited examples of such acts are murder, infliction of bodily injury on a person and the burning of another's property.

⁴¹⁹ In the "Observations and submissions" submitted by the Italian Government to the Permanent Court of International Justice on 15 July 1937 in connexion with the Phosphates in Morocco case, the internationally unlawful act that does not extend in time is described in the following terms:

"On the one hand there are breaches of international law, for example an insult to the flag of a friendly nation, the torpedoing of a neutral ship and so on, which are immediate in character. When such a breach is accomplished, that is, when it has been perfected, it is then exhausted and no longer exists as such." (*P.C.I.J.*, Series C, No. 84, p. 494.)

obligation occurs in a case where the act of the State that committed it does not extend in time is to verify whether the conditions for the existence of a breach in the particular instance have been fulfilled.⁴²⁰ It is moreover obvious that, in such a case, the moment when the said conditions have been fulfilled is at once the moment when the breach occurs and the moment when, the breach having occurred, it also automatically ceases to exist. The breach, as such, has no duration outside that moment.⁴²¹ In the case of a breach caused by an act of this kind, therefore, to establish the moment when the breach was committed is also to determine the time of its commission.

(7) It is scarcely necessary to point out, still referring to the case considered in article 24, that both what preceded and what followed the commission of the breach have no bearing on the determination of its duration. Conceiving the idea of a breach, and even providing for the conditions that could facilitate its execution, and so on, constitute steps towards the breach, but not its commission or even only the beginning of its commission. The duration of any preparatory activities thus has no bearing on the determination of the *tempus commissi delicti*. Neither do the effects, i.e. the possible consequences, of the act of the State committing the breach affect such determination. Blows and injuries inflicted on an alien by members of the police or the army may have lasting effects on his health, ability to work and ability to perform his duties; the plundering of a foreign citizen may deprive him of possession of his property for a certain time (or even permanently, if no remedial action is taken); the destruction of the aircraft or ships of a neutral State will in future deprive that State of those means of transport or defence and may even affect the potential of its air force or navy for a long period. The durable character of these effects may be taken into consideration for the purpose of determining the injury for which reparation is to be made, but will have no bearing on the duration of the State act that caused them—an act that will in any event remain an act that does not extend in time.

⁴²⁰ In this connexion, it is necessary first of all to establish that the obligation was in force at the time when the act in question took place (article 18, para. 1), and also that the case is not one of those exceptional ones where an act that was considered wrongful at the time of its commission subsequently become compulsory by virtue of a peremptory norm of general international law (article 18, para. 2). Secondly, if the obligation whose breach is alleged is one of those that require the State to adopt a particular course of conduct, it is necessary only to ensure that the course of conduct actually adopted by the State was not in conformity with what was required of it. If, on the other hand, the obligation is of the category of those that require the State to achieve a result, but that leave the State free to choose the means of achieving it, the requirements for the existence of a breach may be considered fulfilled only if the State, by its freely chosen course of conduct, has immediately and definitively made unachievable the result intended by the obligation (article 21, para. 1).

⁴²¹ This assertion must obviously not be interpreted as meaning more than it says. Any act that occurs has some duration, however infinitesimal. The performance of an internationally wrongful act clearly falling in the category of acts defined as “instantaneous” may actually require a certain amount of time: to sink a ship, for example, a lengthy shelling may be necessary. The point it is desired to bring out here is that, in the case of the acts dealt with in article 24, the time of commission of the breach extends neither before nor after the moment when the breach occurred.

(8) Thus any lasting consequences of an act that does not, as such, extend in time must not cause any “continuing character” to be attributed to the act, nor result in its being confused with one of the acts that will be dealt with in article 25, paragraph 1. The distinction between a “continuing violation” and an “act producing lasting effects” has been emphasized, in particular, by the European Commission of Human Rights.⁴²² The International Law Commission, for its part, has already applied this distinction in its commentary to article 18 of the draft, in connexion with the requirement that the “force” of the international obligation shall be contemporaneous with the performance of the act deemed to be a breach of the obligation.⁴²³ This distinction necessarily applies also in the determination of the *tempus commissi delicti*.

(9) The fact that the *tempus commissi* of an internationally wrongful act of which only the effects can continue in time does not extend beyond the moment when the act in question occurred is of practical importance from several standpoints to which reference was made earlier.⁴²⁴ It is relevant, for example, in determining the *dies a quo* of the period of extinctive prescription⁴²⁵ and, particularly, in determining the competence *ratione temporis* of an international tribunal to hear a dispute caused by one of the acts here referred to. It would seem logical that it should be impossible for an internationally wrongful act to be regarded as *subsequent* to the crucial date fixed by agreement, or by a unilateral declaration of acceptance of the competence of an international tribunal, if the act ceased to exist before that date and if all that transpired subsequently was no more than a simple consequence of the effects of the act concerned.

(10) The analysis of certain aspects of the *Phosphates in Morocco Case* is particularly instructive in this connexion. The Commission examined this case earlier, in its commentary to article 22.⁴²⁶ As pointed out above,⁴²⁷

⁴²² An act, such as a judicial decision or an arbitral award, that has exclusively lasting effects is nevertheless, according to the European Commission of Human Rights, an “instantaneous act”, and its consequences are merely “simple effects”, and not a prolongation of the performance of the act. See the cases cited in the Commission’s report on the work of its twenty-eighth session (*Yearbook ... 1976*, vol. II (Part Two), p. 93, doc. A/31/10, foot-note 437).

⁴²³ *Ibid.*, article 18, para. (21) of the commentary.

⁴²⁴ See para. (5) above.

⁴²⁵ If, as assumed above, international law recognizes that the right of the injured State to invoke the responsibility of a State culpable of committing an internationally wrongful act against it (or at least of a wrongful act that is not of an especially serious category) may lapse by prescription, the determination of the final moment of the commission of that wrongful act may be decisive, for that is the moment from which the period of prescription will run as regards the right in question. Such prescription will obviously occur earlier if, as held by the Commission and recent jurisprudence, it is necessary to exclude from the duration of the commission of the wrongful act the period during which the effects of that act, which will itself have ceased to exist, continue to occur or to subsist.

⁴²⁶ *Yearbook ... 1977*, vol. II (Part Two), pp. 38-40, doc. A/32/10, chap. II, sect. B, 2, article 22, paras. (25)-(28) of the commentary.

⁴²⁷ See foot-note 416.

the competence of the Permanent Court of International Justice was limited, by reason of the reservation in the French declaration of acceptance, to "any disputes which may arise after the ratification of the present declaration with regard to situations or facts subsequent to such ratification", i.e. subsequent to 25 April 1931. In describing the terms of the dispute, the Court noted that the Italian Government had asserted, although only as a *subsidiary* complaint, that the decision of the Department of Mines of 8 January 1925 had deprived the Italian citizen, Mr. Tassara, of his vested rights, in breach of the international obligation of France. With a view to proving that the case was subject to the jurisdiction of the Court, the applicant Government contended not only that the decision of the Department of Mines had been carried out, and completed as an internationally wrongful act, by a denial of justice consummated after the crucial date,⁴²⁸ but also, in the words of the Court, that

The dispossession of M. Tassara and his successors constituted a permanent illegal situation which, although brought about by the decision of the Department of Mines, was maintained in existence at a period subsequent to the crucial date...⁴²⁹

However, the reasoning on this point in the judgement of 14 June 1938 reveals that, according to the Court, the breach of international law, in so far as there really was a breach, consisted of the decision of the Department of Mines of 8 January 1925. According to the Court, it was that decision that had deprived the Italian citizen of the rights he claimed, and that decision could not be subject to the jurisdiction of the Court, even if its harmful consequences had remained in existence up to and beyond the crucial date. Without using precisely those words, the Court thus considered—correctly, it would seem—that the 1925 decision was an "instantaneous act producing continuing effects" rather than a "continuing act" of a lasting nature. The same belief emerges clearly from the separate opinion of Judge Cheng Tien-Hsi, which states:

So far as the decision of the Mines Department is concerned, it is right in holding that the dispute has arisen in regard to a fact anterior to the crucial date, because the decision was given in 1925. If it was wrongful, it was a wrong done in 1925. If it subsists, it subsists simply as an injury unredressed; but it does no new mischief, infringes no new right, and therefore gives rise to no new fact or situation.⁴³⁰

⁴²⁸ The analysis of the case by the Commission in its report on its twenty-ninth session concerned that aspect of the case in particular.

⁴²⁹ *P.C.I.J.*, Series A/B, No. 74, p. 28.

⁴³⁰ *Ibid.*, p. 36. Whatever the differences of opinion between the Italian Government, on the one hand, and the French Government and the Court on the other, with regard to the existence in the case in point of an "instantaneous" wrongful act, even if it was one producing lasting effects, or of a "continuing" wrongful act, it is important to note that the Italian Government itself, in its "Observations and submissions", had asserted that "... in the case of instantaneous delicts, the moment of their commission coincides in time with the moment at which they cease to exist... Consequently, in the case of such delicts, the 'moment of the delict' will be the coincident moment of commission and completion..." (*P.C.I.J.*, Series C, No. 84, p. 494). By the expression "moment of the delict", the Italian Government clearly intended to refer both to the "moment" proper and to the "duration" of the internationally wrongful act.

(11) To conclude, the Commission was unanimous in considering that any duration exclusively of the effects of an act of the State not extending as such in time could not affect the determination of the *tempus* of commission of the breach of the obligation, that *tempus* being represented solely by the duration of the moment when the act in question was performed.

(12) With regard to the wording adopted for article 24, the Commission observes that the first proposition of the text ("The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed") states what might appear to be self-evident, since no problems arise in determining the moment when a breach occurs as a result of an act not extending in time: the breach cannot exist except at the moment when the act constituting the breach is performed. That first proposition acquires its true significance, however, in the light of the second, namely, that "the time of commission of the breach does not extend beyond that moment, even if the effects of the act of the State continue subsequently". This means that the truth expressed in the first proposition allows of no exception where the act by which the breach is committed has effects that themselves extend beyond the moment when the act is performed. Even in this case, the breach as such does not exist beyond the moment when it occurred; it no more continues after that moment than it began before it. In the title of the article, the words "moment and duration" were preferred to the condensed expression "time" because they illustrate more clearly the two distinct aspects of time contemplated in the article. The expression "act ... not extending in time" was preferred to the term "instantaneous act", although the latter is customary in internal law, in order to avoid too narrow an interpretation of the category of acts covered by article 24.

Article 25. Moment and duration of the breach of an international obligation by an act of the State extending in time

1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.

2. The breach of an international obligation, by an act of the State composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.

3. The breach of an international obligation, by a complex act of the State consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is

accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.

Commentary

(1) The specific purpose of this article is to determine the moment when the breach of an international obligation occurs and the time of commission of the breach in the various frequent yet different cases in which the act of the State committing the breach is not one whose duration coincides with the moment of commission of the breach, but extends in time after or before that particular moment. The three cases considered separately in article 25 are those of an act of the State taking place in time with a continuing character (a "continuing" act), an act of the State composed of a series of individual acts of the State committed in connexion with different matters (a "composite" act), and an act of the State made up of a succession of actions or omissions in connexion with one and the same matter (a "complex" act).

(2) The expression "continuing act" (or "act having a continuing character") describes conduct of a State—namely, an action or omission attributable to the State by virtue of the articles in chapter II of the draft—which proceeds unchanged over a given period of time: in other words, an act which, after its occurrence, continues to exist as such and not merely in its effects and consequences.⁴³¹ Maintenance in effect of provisions incompatible with those of a treaty, unlawful detention of a foreign official, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State, maintenance of armed forces in another State without its consent, unlawful blockade of foreign coasts or ports, etc., are examples of acts of this kind.⁴³²

⁴³¹ As is the case of an "instantaneous act producing continuing effects", considered in connexion with article 24. In the general theory of internal law, an act of the kind at present under consideration is usually called a "délit continu", "permanent wrong", "reato permanente", "Dauerdelikt", etc. Illegal restraint, unlawful possession of others' property, receiving of stolen goods, illegal possession of weapons, etc., are examples of such acts.

⁴³² In its "Observations and submissions" to the Permanent Court of International Justice in 1937, in the Phosphates in Morocco case, the Italian Government described the characteristics of an "instantaneous delict" not extending in time (see footnote 419 above), and went on to say:

"On the other hand, there are other breaches of international law which extend over a period of time, so that when they have become complete, in the sense that all their constituent elements are present, they do not thereby cease to exist but continue, remaining identical, with a permanent character."

Among other examples, the Italian Government mentioned the enactment of a statute contrary to international law, the arrest of a diplomat and the unlawful seizure of property belonging to an alien. It also quoted the passage from H. Triepel (*Völkerrecht und Landesrecht*, Leipzig, Hirschfeld, 1899, p. 289), in which the learned German writer stated:

"If at a given time States are internationally obliged to have rules of law with a given content, the State which already has such laws is breaching its obligation if it repeals them and fails to re-enact them, whereas the State which does not yet have such laws breaches its obligation merely by not introducing them; both States thus commit... a permanent international delict (*Völkerrechtliches Dauerdelikt*)" (*P.C.I.J.*, Series C, No. 84, p. 494).

(3) Where the act of the State consists in conduct extending in time while remaining the same during the given period of its existence, it will obviously, if not in conformity with what is required of the State by an international obligation, represent a breach of that obligation from the very moment when the conduct in question emerges.⁴³³ Consequently, a first point can be established, namely, that the breach of an international obligation by an act of a State having a continuing character occurs at the moment when that act begins.⁴³⁴ A second point can also be established, namely, that the time of commission of this breach is in no way limited to the moment at which the act begins, but extends over the whole period during which the act takes place and continues to be contrary to the requirements of the international obligation. Thus, contrary to the case of a breach committed by an act not extending in time, the beginning and end of the time of commission of a breach effected by an act having a continuing character do not coincide. The initial moment, too, is that at which the breach occurs; the final moment, on the other hand, is different, and corresponds to the moment when the act that effected the breach ceases to exist.⁴³⁵

(4) The positions adopted by States in connexion with disputes that have caused them to appear before international tribunals, and the jurisprudence of those tribunals, substantiate the validity of the conclusions already dictated by mere logical deduction from the inherent characteristics of the acts of the State now under consideration. The characterization of certain acts as "continuing" acts and their differentiation from "instantaneous acts having continuing effects" reveal most particularly, as has been pointed out above,⁴³⁶ their practical importance as regards the bearing they may have, *inter alia*, on the

⁴³³ In the case of an alleged breach of an international obligation by a continuing act of the State, just as in the case of an alleged breach of an international obligation by an act not extending in time (see foot-note 420 above), the conditions for the existence of the breach must therefore be present. It will first be necessary to establish that the obligation in question was in force for the State at the moment when the conduct allegedly not in conformity with what was required of it began (article 18, paras. 1 and 3); it will also be necessary to ascertain that the conduct of the State in the case in question is not of a kind which, although wrongful at the moment when it was adopted, later became compulsory by virtue of a peremptory norm of general international law (article 18, para. 2). Then, if the obligation whose breach is alleged is one of conduct, it will be necessary to establish that the conduct that the State has adopted is not in conformity with what was required of it (article 20); if the obligation in question is one of result, it will be necessary to establish that the conduct that the State has begun to adopt has, through its mere existence, rendered the result prescribed by the international obligation impossible to achieve at all (article 21, para. 1).

⁴³⁴ The breach will also occur, but at a later moment, if the obligation is placed on the State at that later moment, provided the conduct of the State has not changed in the meantime.

⁴³⁵ Once again, provided that the fact that the obligation breached is in force for the State and the continued existence of the State's conduct contrary to that obligation subsists simultaneously until the moment when that conduct ceases. If, at a given moment, the State ceases to be bound by the obligation, the time of commission of the breach ends at that same moment, independently of the fact that the conduct of the State continues unchanged beyond that date.

⁴³⁶ See article 24, para. (9) of the commentary.

determination either of the *dies a quo* of the period of extinctive prescription of the right to invoke the international responsibility of a State that is the author of an internationally wrongful act,⁴³⁷ or of the competence *rationa temporis* of an international tribunal to hear a particular dispute. It is precisely when opinions differ concerning the competence of an international tribunal to hear a dispute submitted to it that the parties to the dispute, and the judges seized of it, have been brought to take a position on the question of determining the time of commission of the breach of an international obligation, when that breach is committed by an act of the State of a continuing nature, and on the consequences to be drawn from such determination.

(5) In the "Observations and submissions" it submitted in 1937 to the Permanent Court of International Justice in the *Phosphates in Morocco Case*, the Italian Government contended that, in the case of a "permanent" wrongful act (i.e. an act of a continuing nature), the time of commission was necessarily "the whole of the period comprised between its beginning and its completion". It added:

Moreover, even if one considers the legal concept of the permanent delict in the internal legal order, one generally finds that the legislation, practice and doctrine of States accept the principle that the permanent or durable offence is considered as being committed throughout the duration of the offence itself, and that the *time of the delict* in the case of a *permanent delict* ... should be taken to be the entire period during which the delict occurred.⁴³⁸

The Court, in its aforementioned decision of 14 July 1938, in no way contested the general principle thus formulated by the Italian Government. Although the majority of the Court rejected the Italian claim, it did so because it considered the use of those concepts by the applicant in the case under consideration to be unfounded. What the judges forming the majority denied was, on the one hand, that the acts invoked by the Italian Government had the

character it attributed to them⁴³⁹ and, on the other hand, that, on the basis of the terms of the clause limiting *ratione temporis* the acceptance by France of compulsory jurisdiction, acts which, although extending over a period of time, had originated in measures taken prior to the crucial date, could be considered as subsequent to that date.⁴⁴⁰

(6) More recently, it has been mainly the European Commission of Human Rights that has had to distinguish between "instantaneous" wrongful acts with "continuing effects" and "continuing" wrongful acts in order to establish its competence in respect of certain disputes. The United Kingdom recognized the competence of the Commission with regard to individual applications alleging incompatibility with the United Kingdom's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms⁴⁴¹ of any act or decision or any fact or event occurring after 13 January 1966.⁴⁴² In intertemporal cases, the European Commission has clearly adopted different solutions according to the type of acts brought before it. In the case of a "continuing" wrongful act occurring partly before the crucial date and partly after, it has declared itself competent in respect of the second part of the "act". The Commission has thus recognized that the duration of a "continuing"

the dahirs of 1920 establishing the monopoly. If, by establishing the monopoly, Morocco and France violated the treaty régime of the General Act of Algeiras of 7 April 1906, and of the Franco-German Convention of 4 November 1911, that violation is the outcome of the dahirs of 1920. In those dahirs are to be sought the essential facts constituting the alleged monopolization and, consequently, the facts which really gave rise to the dispute regarding this monopolization. But these dahirs are "facts" which, by reason of their date, fall outside the Court's jurisdiction." (*P.C.I.J.*, Series A/B, No. 74, pp. 25 and 26.)

The Italian viewpoint was supported by Judge Cheng Tien-Hsi, who said in his separate opinion:

"For the monopoly, though instituted by the dahir of 1920, is still existing today. It is an existing fact or situation. If it is wrongful, it is wrongful not merely in its creation but in its continuance to the prejudice of those whose treaty rights are alleged to have been infringed, and this prejudice does not merely continue from an old existence but assumes a new existence every day, so long as the dahir that first created it remains in force. The case of the monopoly is not at all the same as the case where an injured party has not obtained satisfaction for an alleged injury, which would be a case like the decision of 1925; nor is it merely the consequences of an illicit act,* which would mean that the wrong was completed once for all at a given moment;... it is... not enough to say that it is a legal position resulting from the legislation of 1920 or that it cannot be considered separately from the legislation of which it is the result; for the essence of the dispute is a complaint against what the Applicant has repeatedly maintained to be the continuing and permanent state of things at variance with foreign rights, rather than the mere fact of its creation,*... For these reasons, I am of the opinion that the monopoly is not a situation or fact anterior to the crucial date and, in consequence, whatever may be the merits of the claim, the dispute concerning it is not outside the jurisdiction of the Court." (*Ibid.*, pp. 36 and 37.)

⁴⁴⁰ For the opinion of the majority of the Court, see *ibid.*, pp. 21 *et seq.*; for the contrary view, expressed in the dissenting opinion of Judge Van Eysinga, see *ibid.*, pp. 33 *et seq.*

⁴⁴¹ In force for the United Kingdom since 3 September 1953.

⁴⁴² See foot-note 416 above.

⁴³⁷ It has been pointed out above (see foot-note 425) that the determination of the final moment of the commission of an internationally wrongful act may be decisive for the determination of the moment from which the period of extinctive prescription begins to run. As in the case of an "instantaneous" wrongful act having continuing effects, the *dies a quo* of the period of prescription will be established before the possible date of the cessation of those effects, which have no bearing on it; in the case of a "continuing" wrongful act, however, this *dies* can be established only after the end of the time of commission of the wrongful act itself.

⁴³⁸ *P.C.I.J.*, Series C, No. 84, pp. 494 *et seq.*

⁴³⁹ The divergence between the point of view maintained by the Italian Government and that adopted by the Court related to the designation of the act of which Italy complained as a continuing act or an instantaneous act having continuing effects. The Italian Government had contended that the monopoly of Moroccan phosphates established by the dahirs of 27 January and 21 August 1920, i.e. before the crucial date, but also maintained after that date, was a "continuing act" which consequently fell within the jurisdiction of the Court (*ibid.*, pp. 497 and 498).

The majority of the Court, however, took the view that:

"The situation which the Italian Government denounces as unlawful is a legal position resulting from the legislation of 1920; and, from the point of view of the criticism directed against it, cannot be considered separately from the legislation of which it is the result. The alleged inconsistency of the monopoly régime with the international obligations of Morocco and of France is a reproach which applies first and foremost to

wrongful act extends beyond the initial time of its perpetration.⁴⁴³

(7) In writings on international law, Triepel was the first, in 1899, to formulate the concept of the continuing wrongful act, with the consequences deriving from it in regard to the time of occurrence of that type of act.⁴⁴⁴ That concept was subsequently taken up again in various general studies on State responsibility,⁴⁴⁵ as well as in works on the interpretation of the formula "situations or facts prior to a given date", used in some declarations of acceptance of the compulsory jurisdiction of the

⁴⁴³ In the partial decision of 16 December 1966 in the case of *Courcy v. the United Kingdom*, for example, the Commission, referring to the applicant's complaint that he had been kept in solitary confinement for a period of 10 months for 20 out of 24 hours, commented that:

"... even if the said period of ten months was in part subsequent to 13 January 1966, the conditions of the solitary confinement described do not constitute a violation of the rights and freedoms set forth in the Convention...; ... it follows that this part of the Application is manifestly ill-founded within the meaning of Article 27, paragraph (2) of the Convention" (*Yearbook of the European Convention on Human Rights*, 1967, vol. 10, The Hague, 1969, p. 382).

Setting aside the substance of the matter, what retains attention is that the European Commission implicitly admitted that the conduct of the State erroneously considered by the applicant as wrongful (solitary confinement), although beginning before the crucial date, had extended beyond that date, so that the Commission deemed itself competent in principle to rule on the possible incompatibility of that conduct, for the second part of its duration, with the obligations laid down by the Convention.

In the case of *Roy and Alice Fletcher v. the United Kingdom*, the applicants complained that, *inter alia*, contrary to the provisions of article 6 of the Convention, they had not been brought to trial within a reasonable time. In the decision handed down on 19 December 1967 in that case, the Commission rejected the application on the following grounds:

"Whereas, with regard to the Applicants' complaints that they were not tried within a reasonable time on the count of arson which was left on the file at the conclusion of their trial in 1961, it is to be observed that, insofar as the complaint relates to the period before 14 January 1966, under the terms of the United Kingdom's declaration of that date recognizing the Commission's competence to accept petitions under Article 25 of the Convention, the United Kingdom only recognizes the Commission's competence to accept petitions so far as they relate to acts or decisions, facts or events occurring or arising after 13 January 1966; whereas it follows that an examination of this part of the Application is outside the competence of the Commission *ratione temporis*;

Whereas, moreover, in regard to the period after 13 January 1966, an examination of this complaint as it has been submitted, including an examination made *ex officio*, does not disclose any appearance of a violation of the rights and freedoms set forth in the Convention and in particular in Article 6." (Council of Europe, European Commission of Human Rights, *Collection of Decisions*, Strasbourg, No. 25, May 1968, p. 86.)

Thus in that case, too, the Commission recognized its competence to rule on the possible incompatibility with the provisions of the Convention of the part of the "continuing" act (failure to bring the applicants to trial) that was subsequent to the crucial date. Other unpublished decisions tending in the same direction are cited by M. A. Eissen in "Les réserves *ratione temporis* à la reconnaissance du droit de recours individuel", *Les clauses facultatives de la Convention européenne des droits de l'homme*, Bari, Levante, 1974, p. 94, foot-note 38.

⁴⁴⁴ H. Triepel, *op. cit.*, p. 289.

⁴⁴⁵ See, for example, Decencière-Ferrandière, *op. cit.*, p. 93; Ago, *loc. cit.*, pp. 518 *et seq.*; Gräfrath, Oeser and Steiniger, *op. cit.*, pp. 60 and 61.

Permanent Court of International Justice,⁴⁴⁶ or on the interpretation of similar formulas contained in the British and Italian declarations of acceptance of the competence of the European Commission of Human Rights in respect of individual applications.⁴⁴⁷ All the writers concerned agree explicitly or implicitly in recognizing that the time of commission of a breach effected by a continuing act or situation extends beyond the initial moment of the occurrence of the breach and ends only when either the act of the State ceases or the obligation ceases to be in force for the State.

(8) To conclude on this point, the Commission considers it useful to draw attention once again, as it has already in a general way,⁴⁴⁸ to the need to ensure that the principles underlying the various rules formulated in the present draft are fully consistent with one another. In particular, it wishes to emphasize that the solution adopted in article 25, paragraph 1, is in harmony with that previously adopted in article 18, paragraph 3. By that provision, the Commission intended, in the specific case of an act of a continuing character, to meet the general requirement that, for a breach of an international obligation to occur, the obligation must be in force for the State concurrently with the commission by the State of an act not in conformity with that obligation. By not requiring such simultaneity from the time when the "continuing" act begins, but only that it exist at some time during the performance of the act,⁴⁴⁹ the Commission has implicitly taken a position on the question of the duration of a breach committed by an act of this kind. The two rules in article 18, paragraph 3, and article 25, paragraph 1, thus conform, with strict parallelism, to the idea that the time of the commission of a breach of an international obligation by a continuing act corresponds to the whole period during which the act takes place.

(9) The second of the cases contemplated in this article is that of a breach of an international obligation by one of the acts which the Commission, on other occasions, has already described as "composite acts of the State". This expression is intended to designate a type of act which, like the continuing act, is spread over a longer or shorter period of time. Unlike the continuing act, however, the composite act of the State does not consist of a single course of conduct extending over a period of time but remaining the same; it consists of a series of individual acts of the State succeeding each other in time, that is to say, a sequence of separate courses of conduct, actions or omissions, adopted in separate cases, but all contributing to the commission of the aggregate act in question.

⁴⁴⁶ See, for example, J. Fischer Williams, "The optional clause (the British signature and reservations)", *British Yearbook of International Law*, 1930, London, vol. II, pp. 74 and 75; R. Montagna, "La limitazione *ratione temporis* della giurisdizione internazionale obbligatoria", *Scritti giuridici in onore di Santi Romano*, Padua, CEDAM, 1940, vol. III, pp. 130 *et seq.*

⁴⁴⁷ See, for example, Eissen, *loc. cit.*, pp. 94 and 95.

⁴⁴⁸ See article 24 above, para. (2) of the commentary.

⁴⁴⁹ The Commission took this position, in particular, on the basis of the jurisprudence of the European Commission of Human Rights (de Becker case). See *Yearbook ... 1976*, vol. II (Part Two), p. 93, doc. A/31/10, article 18, para. (21) of the commentary.

The performance of these different individual acts is required to fulfil the conditions for the breach of an international obligation, which consists precisely in prohibiting the commission of the aggregate act that is the resultant of the sum of the individual acts. Taken separately, the individual acts that go to make up the "composite act" may be internationally lawful. It is also possible, and even common, for each of them to be itself an internationally wrongful act, but wrongful in relation to an international obligation other than that which determines the wrongfulness of the act as a whole. To conclude, the distinctive common characteristic of State acts of the type here considered is that they comprise a sequence of actions which, taken separately, may be lawful or unlawful, but which are interrelated by having the same intention, content and effects, although relating to different specific cases.

(10) It is easy to give examples of breaches of international obligations by composite acts. Supposing that State A has undertaken, by a treaty on establishment and economic co-operation, to permit, in general terms, participation by nationals of State B in the exploitation of certain of its own mineral, agricultural or marine resources and that, in execution of that obligation, a number of concessions have been granted to natural or juridical persons of State B. Supposing that, subsequently, one of these concessions is expropriated for specific reasons. Such expropriation may in itself be internationally irreproachable, having been carried out with due regard for the international rules relating to expropriation of foreign property. It may also be internationally wrongful, either on the basis of a conventional obligation whereby, for example, the two States are required not to expropriate assets belonging to their respective nationals, or on the basis of a customary obligation—for example, because of lack of adequate compensation. But the expropriation does not in itself constitute a breach by State A of its obligation to permit, in general, participation by nationals of State B in the exploitation of its own economic resources. If, on the other hand, the first expropriation is followed by a whole series of others, the total effect of which is actually to reduce such participation to nil, the aggregate of measures thus taken will clearly constitute a breach of the obligation that State A had assumed by concluding with State B the treaty on establishment and economic co-operation. In other words, State A thus achieves, by a plurality of separate acts which, as a whole, form a "composite" act, the same internationally wrongful object that it would have achieved by a single legislative or other act generally excluding the nationals of State B from the exercise of any economic activity in its territory. Another frequently cited example is the breach of an obligation prohibiting the State to which it applies from adopting a "discriminatory practice" in regard to the access of aliens from a particular country to the exercise of an activity or a profession. Where such a prohibition exists, the isolated rejection of an application submitted by one national of the country in question cannot in itself be considered a breach of the prohibition. But if the applications of nationals of that country are systematically rejected by the State authorities in a whole series of cases, such rejections, taken as a whole, definitely constitute the "discriminatory practice" that it had been

intended to prevent, and thus clearly conflict with what the obligation required of the State. In its commentary to article 18, paragraph 4, the Commission has already drawn attention to the fact that, in the practice of the Economic and Social Council of the United Nations, the consistent violation of human rights and fundamental freedoms has come to be established as an offence in itself, distinct from the offence that may be constituted by an isolated violation of such rights and freedoms.⁴⁵⁰ The concept of a composite internationally wrongful act is thus applicable in this context also.

(11) It follows logically from the characteristics of a "composite" act that the *moment of occurrence of the breach of an obligation* by an act of this kind certainly cannot be the moment when the first individual act of the series takes place, that is to say, the act that will only subsequently appear as having, as it were, "inaugurated" the series. Only after a whole series of acts of the same kind will the composite act be revealed; one of these acts, at a given moment, will be the release mechanism that reveals, not merely an accidental succession of isolated acts, but an aggregate act which, as such, requires a separate definition. Before that moment, it will not be possible to affirm the existence of the breach effected by the aggregate act; thus only at that moment, and not before, will the existence of the breach be established.⁴⁵¹

(12) It is also clear that, once the existence of the composite act is revealed, all the individual acts constituting it since its commencement are thereby affected. For example, as soon as it is apparent that, by a succession of individual expropriation measures, the State is effecting the general exclusion of aliens from the exercise of a specific activity, or that, by a series of specific cases of discrimination, the State is engaging in a real discriminatory "practice", such exclusion or such practice—and consequently the breach of the obligation—are deemed to have begun with the first measure, or the first case, in the series. Otherwise the absurd result would be achieved of recognizing, for example, the existence of a "practice" in a single action. Moreover, if similar actions were subsequently added to the already established series, the "composite" act would automatically be augmented by all those subsequent individual acts, and the breach of the obligation would be extended accordingly. In

⁴⁵⁰ *Ibid.*, p. 94, foot-note 438.

⁴⁵¹ Here again, to be able to conclude that a breach of an international obligation has taken place and, consequently, to be able to determine the moment when it took place, the other conditions for the existence of such a breach must have been fulfilled. The case here referred to requires, in particular, the fulfilment of the conditions stated in article 18, paragraph 4, which specifies, with respect to this case, the general requirement of contemporaneity of the "being in force" of the obligation and the possible occurrence of the breach of that obligation. According to this provision, there is a breach of the obligation if the composite act can be considered to be constituted by actions or omissions of the State occurring within the period during which the obligation is in force for that State. It follows that, if the international obligation was in force for the State when it committed the first individual acts of the series, but was not in force when it committed the subsequent individual act that made it possible to establish the existence of the composite act, it will not be possible either to establish the existence of a breach of the international obligation or, obviously, to determine the "moment" at which it took place.

conclusion, the duration, or *time of commission*, of the breach of an international obligation by a ["composite" act extends from the time when the first of the individual State acts composing it occurred up to the time of the last act added to it.⁴⁵² Thus the beginning of the time of commission will in no case coincide with the necessarily subsequent moment at which the breach is completed and established. The second moment might conceivably also be that which marks the end of the time of commission of the breach; usually, however, the time of commission will extend beyond that moment, for it is hardly likely that the series of individual acts constituting the composite act will end with the individual act establishing the existence of the breach.

(13) The determination of the time of commission of the breach of an international obligation by a "composite" act of the State may be of practical importance for several of the reasons given in the commentary to article 24.⁴⁵³ There is no doubt that this determination may have a considerable bearing on the establishment of the amount of reparation payable in consequence of the offence, since that amount will depend on the duration of the commission of the composite act. There is also no doubt that such determination may be decisive for recognition of the jurisdiction *ratione temporis* of an international tribunal in a dispute arising out of the commission of a composite internationally wrongful act. If the commission of the breach overlaps the crucial date, it seems obvious—subject always to a different conclusion following from the interpretation of the limiting clause—that the jurisdiction must be recognized, since the "composite" wrongful act has extended in time beyond that crucial date. With regard to the period of extinctive prescription, it seems quite normal that it should run only from the time when the last of the individual acts constituting the composite act took place. Finally, it is also possible that the determination of the time of commission of a breach by a "composite" act may have a bearing on the possible characterization of the composite act as an "international crime" under the terms of article 19 of the draft. For example, according to paragraph 3 (c) of that article, "an international crime may result, *inter alia*, from ... a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, *apartheid*". And, for a breach of an obligation of this description by an act of the State such as the adoption of a policy or "practice" of discrimination or slavery to be characterized as a "serious breach on a widespread scale", the determination of its duration may prove to be essential.

(14) The third situation contemplated in article 25 is that of a breach of an international obligation by an act belonging to a category of acts with which the Commis-

sion has had to deal on several occasions and which it has called "complex acts of the State". The Commission uses this term to designate a type of act whose commission also extends in time, but which differs not only from "continuing acts" but also from "composite acts", although it is similar to them. A "complex" act is not composed of a series of separate individual acts of the State committed in separate cases. Although it, too, consists of a succession of courses of conduct, of actions or omissions, by the State, such actions or omissions (either by the same organ or, more frequently, by different organs) all relate to a single specific case and, taken as a whole, represent the position taken by the State in that case.

(15) In article 21, paragraph 2, and in article 22, the Commission has set out rules for determining the existence of an internationally wrongful act constituted by a "complex" act of the State. These rules highlight the particular importance that this concept assumes in any explanation of the way in which the breach of certain obligations—commonly found in certain sectors of international law—occurs, namely, obligations requiring the State to achieve, by the means of its choice, a specified result, and which accord it, in addition to this initial choice, the right to redress, by the adoption of new means, any improper situation to which the means initially employed may have given rise in a particular case, so as to achieve at a later stage the internationally required result, or at least an equivalent result. The fundamental concept of a "complex" internationally wrongful act is therefore that of an offence which, having started or been set in train by the action or omission of a State organ through its failure at the outset to achieve, in a specific case, the result required by an international obligation, is then completed and brought to an end by further actions, sometimes, as has been said, by the same organ, but more often by other organs, relating to the same case at a subsequent time. In other words, the "complex" internationally wrongful act is the collective outcome of all the actions or omissions by State organs at successive stages in a given case, each of which actions or omissions could have ensured the internationally required result but failed to do so. The Commission has already given specific examples of such acts, and others could be added: acquittal at all the successive jurisdictional levels of the perpetrators of a crime against the representative of a foreign government; denial of justice to a foreign national as a result of a set of decisions handed down by the whole series of judicial authorities concerned; breach, in a given case, of a conventional obligation regarding the treatment to be accorded to the nationals of a particular country, or to nationals of a particular ethnic origin, resulting from the joint effect of successive acts by organs belonging to different branches of the State power; and so forth.

(16) The solution to be adopted for problems of *tempus commissi delicti* relating to an act of this nature is logically dictated by consideration of the particular characteristics of a "complex" act and by concern for consistency with the position taken by the Commission on the questions dealt with in article 21, paragraph 2, and article 22. As regards the determination of the *moment of commission*

⁴⁵² The reference, of course, is still to individual acts committed while the obligation was in force for the State. Acts committed before the entry into force of the obligation or after its extinction cannot be taken into consideration for purposes of determining the time of commission of the breach. Such time begins with the first act in the series committed after the entry into force of the obligation and ends with the last act performed before the possible extinction of that obligation.

⁴⁵³ See article 24 above, para. (5) of the commentary.

of the breach of an international obligation by a complex act, the Commission believes it can rule out the moment of the initial conduct of the State organ in the case in question, namely the conduct of the organ that first failed in its duty to ensure the result required by the obligation. That conduct simply opens the *iter* of the breach, but does not close it.⁴⁵⁴ The moment of occurrence of the breach in the situation considered can only be that of the State conduct that closes this *iter*, i.e. the conduct that makes it definitively impossible for the State to achieve the result required by the obligation. For it is only at that moment that, all the constituent elements of the complex act being present, the conditions are fulfilled for the existence of a breach by that act of the international obligation in question.⁴⁵⁵

(17) As to the *time of commission of the breach*, it appears equally evident that it cannot be limited by the moment of the final conduct that completes the breach. The non-conformity of the "complex" act of the State with what is required of the State by the international obligation is the product of a plurality of successive actions or omissions of the State, and not only of its final conduct. It would be inadmissible, therefore, in determining the duration of the breach, to take account only of this final conduct and to overlook all conduct that preceded it, beginning with the first, which at the outset defined the character of the breach and to a large extent determined its injurious consequences. The time of commission of the breach must therefore be reckoned from the moment of occurrence of the first State action that created a situation not in conformity with the result required by the obligation, until the moment of the conduct that made that result definitively unattainable. The time of commission of a breach effected by a complex act therefore begins at a moment prior to that at which the breach occurs and is completed, and ends at that precise moment; in other words, the moment at which the commission of the breach is concluded coincides with the moment at which the breach occurs.

(18) Although they are not numerous, the positions taken by States on this matter and the opinions expressed thereon by international tribunals confirm the validity of these conclusions, which are based mainly on considerations of legal logic. In the *Phosphates in Morocco Case*, already cited in connexion with other aspects of the

⁴⁵⁴ A case in which the initial conduct itself makes the result required of the State by the obligation definitively unattainable, so that the breach occurs at the moment of that initial conduct, is by definition outside the concept of a "complex" act of the State.

⁴⁵⁵ It goes without saying that, before affirming that the moment of a given State conduct is the moment of the breach of an international obligation, it is necessary first to make sure — as indicated in foot-note 420, 433 and 451 above — that all the other conditions for breach of the obligation have also been fulfilled. Thus it must have been established, as provided in article 18, paragraph 5, that the obligation was in force for the State when the first of the constituent elements of the complex act occurred. Further, if the obligation of result whose breach is alleged is an obligation concerning the treatment to be accorded to aliens, it will also be necessary to have established, as provided in article 22, that the aliens had not, or no longer had, any effective local remedies against the conduct of the State alleged to have rendered the required result definitively unattainable.

question, the Italian Government maintained (although, as pointed out earlier, as a subsidiary complaint) that the Italian company *Miniere e Fosfati* was being dispossessed of its vested rights⁴⁵⁶ — a dispossession, it claimed, resulting from the decision of the Department of Mines of 8 January 1925 and the denial of justice that had followed it, in breach of the obligation incumbent on France to respect those rights. According to the applicant government, that constituted an internationally wrongful act, doubtless initiated by the 1925 decision, but that did not become complete and final until the acts of 1931 and 1933, by which the French Government had refused to make available to the Italian nationals concerned effective means of redress against the disputed decision,⁴⁵⁷ and it was therefore a typical case of a "complex" internationally wrongful act. The applicant government had this to say concerning the intertemporal aspects of the breaches of obligations of result effected by the acts described above:

... It is only when there is, as a final result, a failure to fulfil these obligations that the breach of international law is complete and that, consequently, there is a wrongful act capable of giving rise to an international dispute. In this case, the international obligations incumbent on the protecting Power in regard to the treatment to be accorded to the company *Miniere e Fosfati* as an Italian national did not require that they should be fulfilled exclusively by certain organs. These obligations prescribed, in particular, that this company should share effectively in the profits yielded by the mining concessions; but there was as yet no decisive evidence that such a result had been set aside by the Department of Mines ... As long as a possibility of redressing the situation in accordance with these obligations existed—and, had there been a serious intention in this respect, no opportunity would have been more favourable than that of a revision of the decision of the Department of Mines by the highest authority of the Protectorate—there was no ground for stating that there had occurred a complete and final internationally wrongful act, giving rise to the international responsibility of the State, and creating international responsibility.⁴⁵⁸

And in its oral pleadings it added:

It was not until 28 January 1933 that the protecting State declared that it did not intend to take any measures to achieve the effect required by international law and that it wished to take advantage of the opportunity furnished by its own judicial law to make final the dispossession of the Italian nationals. It was at that precise moment, therefore, that the breach of conventional law was actually accomplished; it was at that precise moment that the final breach of the obligation to allow the Italian nationals to benefit from the concessions régime was actually accomplished.⁴⁵⁹

It is characteristic that, confronted by this argument, neither the respondent government nor the Court itself voiced objections to the fundamental thesis developed by

⁴⁵⁶ *P.C.I.J.*, Series A/B, No. 74, p. 27.

⁴⁵⁷ See the "Observations and submissions" of the Italian Government, 15 July 1937 (*ibid.*, Series C, No. 84, p. 493).

⁴⁵⁸ Further observations of the Italian Government, 21 February 1938 (*ibid.*, p. 850).

⁴⁵⁹ Statement by Counsel for the Italian Government, session of 12 May 1938 (*ibid.*, No. 85, pp. 1232 and 1233). The thesis thus developed enabled the Italian Government to maintain that the offence constituted by a succession of acts extending over the years 1925-1933 and becoming final in 1933 was to be considered as a whole as an act "subsequent" to the date on which France had accepted the compulsory jurisdiction of the Court.

the applicant government. What was contested both by the French Government⁴⁶⁰ and by the Court⁴⁶¹ was that, by applying that fundamental thesis, it might be possible, in the case in point, to override the objection regarding the Court's lack of competence *ratione temporis*. As for the solution adopted in article 25, paragraph 3, it must therefore be emphasized (a) that, in this important judicial case, the applicant openly affirmed, with regard to the definition of concepts, the existence of a class of internationally wrongful acts constituted by a succession of separate actions or omissions by the State relating to the same case, all of which, taken together, contributing to the commission of the breach, and that it deliberately and explicitly rejected the possibility that the time of commission of the breach of the obligation by an act of that type could be the moment when the initial action or omission of the series took place; and (b) that the respondent, far from raising theoretical objections to the principles affirmed by the applicant, was content to argue on the basis of cases in which the commission of the breach occurred "at more than one moment". The respondent would probably not have done so had it believed that the time of commission or of breach, in cases of that kind, must be taken to mean exclusively the moment of the initial conduct of the State.

(19) Indirect confirmation of the validity of the solutions proposed above⁴⁶² may be found in the decisions of the European Commission of Human Rights. As pointed out earlier, the United Kingdom recognized the Commission's jurisdiction in respect of applications submitted by individuals relating to any act or decision occurring or any facts or events arising subsequently to 13 January 1966 and Italy made a similar reservation.⁴⁶³ As the decisions of the European Commission have been published only in part, it is not always possible to know the Commission's attitude towards applications directed against an act or decision prior to the crucial date but in respect of which local remedies had not been exhausted until after that date. However, some of the published decisions provide indications on the attitude the Commission may have adopted on this question. In one such case, for example, the applicant complained about the procedure adopted by the State organs of the United Kingdom with regard to the expropriation of property belonging to him. The decision to expropriate had been taken prior to the crucial date, whereas the last decision taken in the matter had been subsequent thereto. The European Commission held that the application was inadmissible, but on grounds other than the existence of the United Kingdom's reservation *ratione temporis*.⁴⁶⁴ The possibility of denying the Commission's competence on the grounds that the decision to expropriate had been taken prior to the crucial date was not in fact mentioned either by the United

Kingdom or by the Commission. In another case, the applicant claimed that the last of the decisions by the United Kingdom authorities in the case—that which, in her opinion, should be considered final—had been subsequent to the crucial date. The discussion centred on whether the final decision in the case was actually the one alleged by the applicant or the one indicated by the United Kingdom Government, which had been prior to the crucial date. The European Commission endorsed the opinion of the United Kingdom Government on that point and, on that basis, declared that it had no competence *ratione temporis* with respect to the claim.⁴⁶⁵ It is nevertheless interesting that the Commission considered that the date to be taken into account in determining whether an act was prior or subsequent to the crucial date was not the date of the initial State conduct in the case (in that instance the act of expropriation), but the date of the decision embodying the final ruling on the applicant's appeal.⁴⁶⁶

(20) The conclusion of the European Commission of Human Rights on the point here considered is therefore as follows: (a) when a breach is effected by a "complex" act of the State, the *moment at which the breach occurs*, i.e. the moment at which its existence is established, is the moment at which the last of the actions or omissions making up the complex act is added to the preceding actions or omissions; (b) the *time of commission of the breach* extends over the entire period, from the moment of the first action or omission that initiated the breach by creating a situation not in conformity with the result required by the obligation to the moment of the final action or omission that completed the breach by making the result in question definitively unattainable.

(21) The practical importance of this conclusion is reflected in the consequences it produces in almost all the respects considered in the commentary to article 24.⁴⁶⁷ The determination of the *amount of reparation* payable by the State committing the breach will obviously be influenced by the fact that the time of commission of the breach is taken to be the entire period between the first and last of the actions or omissions constituting the complex act of the State, and not merely the moment of one of those actions or omissions. The condition termed *national character of the claim* will be reflected, in the light of the solutions adopted in paragraph 3 of article 25,

⁴⁶⁰ See especially the oral pleading of 5 May 1938 of the agent of the French Government (*ibid.*, pp. 1048 *et seq.*).

⁴⁶¹ *Ibid.*, Series A/B, No. 74, pp. 22 *et seq.*

⁴⁶² See paras. (16) and (17).

⁴⁶³ See foot-note 416 above.

⁴⁶⁴ Decision of 4 February 1970, application No. 3651/68 (*Yearbook of the European Convention on Human Rights*, 1970, The Hague, vol. 13, 1972, p. 476).

⁴⁶⁵ Decision of 14 December 1970, application No. 4430/70 (Council of Europe, European Commission of Human Rights, *Collection of Decisions*, Strasbourg, No. 37 (October 1971), pp. 112 *et seq.*).

⁴⁶⁶ On the value and scope of clauses limiting *ratione temporis* acceptance of the competence of the European Commission of Human Rights, see the study by G. Sacerdoti, "Épuisement préalable des recours internes et réserve *ratione temporis* dans la déclaration italienne d'acceptation du droit de requête individuelle", *Les clauses facultatives de la Convention européenne des droits de l'homme*, Bari, Levante 1974, pp. 133 *et seq.* On the general question of the determination of the *tempus commissi delicti* in cases of breach of an international obligation by a "complex" act, see Ago, *loc. cit.*, pp. 417 and 418; P. Reuter, "La responsabilité internationale", *Droit international public* (lectures), Paris, Les Nouvelles Institutes, 1955-1956), pp. 98 *et seq.*

⁴⁶⁷ See article 24 above, para. (5) of the commentary.

in the requirement that the individual on whose behalf the State intends to intervene must have possessed the nationality of the State in question from the time of the initial conduct of the State creating a situation not in conformity with the required result, and not simply, for example, from the time of the conduct completing the *iter* for the formation of the complex act. The possible limitation "*ratione temporis*" of the competence of an international tribunal to disputes relating to "situations" or "acts" subsequent to a specific date should not normally lead to the denial of such competence, in respect of disputes relating to a "complex" act, if the final moment of the time of commission of the act is subsequent to the crucial date—subject to the possibility of a different conclusion following from the interpretation of the text providing for such limitation. Lastly, as regards the right to invoke the responsibility of the State that committed the breach of the obligation, the *period of prescription* will logically begin to run from the moment when the last of the constituent elements of the complex act is added to the others, and not, for example, from the moment when the first of those elements came into being.

(22) In the wording of article 25, the Commission has taken care to establish the necessary parallelism with the wording of article 24 and to ensure perfect unity of terminology and full consistency of solutions with article 24 and other preceding articles, in particular article 18, which requires, as has frequently been noted, that an obligation shall be in force at the time when its breach is alleged to have occurred. The three paragraphs of article 25 establish in a uniform manner the criteria relating to the determination of the *tempus commissi delicti* in the three essential and distinct cases of breach effected by acts of the State having the common characteristic of extending in time. Each of these paragraphs first states the rule relating to the determination of the moment at which the breach of the international obligation occurs in each of the cases considered and then the rule relating to the determination of the time of commission of the breach, i.e. its *duration*.

Article 26. Moment and duration of the breach of an international obligation to prevent a given event

The breach of an international obligation requiring a State to prevent a given event occurs when the event begins. Nevertheless, the time of commission of the breach extends over the entire period during which the event continues.

Commentary

(1) The purpose of the present article is to determine the moment and duration of the breach of an international obligation where the obligation requires the State to prevent the occurrence of a given event. The need for a special rule for the determination of these two aspects of the *tempus commissi delicti* in the case of a breach of an obligation of this particular type arises essentially for the same reasons as those that led the Commission to formulate a special rule for the determination, in the same case, of the conditions for the existence of the breach. As

stated before,⁴⁶⁸ the particular type of obligation requiring the State to ensure, by means of its own choice, the non-occurrence of a given event, differs from other obligations in the general category of obligations of result in that the result it prescribes, in the case in point, is the non-occurrence of an external event, that is, of an act of man or nature which as such does not involve any action by the State. Since, as has also been pointed out, the key indication of a breach in this particular case is the "occurrence of the event" that the State should have prevented, that occurrence, as the *sine qua non* for the existence of the breach of the obligation, must also be the decisive factor for the determination of the moment and duration of the breach in that same case.

(2) However, as pointed out above,⁴⁶⁹ the occurrence of the event is not the only condition specifically required for the existence of a breach of an international obligation prescribing that the State achieve the result of preventing the occurrence of an event; for such a breach to be considered to exist, there must also be an indirect causal link between the occurrence of the event and the conduct adopted in the matter by the organs of the State. It has been emphasized that the event must have been able to occur because the State failed, by its conduct, to prevent it, whereas by different conduct the event could have been prevented. Only on the further condition that all this is clearly apparent can it be concluded that the result required by the obligation has not been achieved. Yet this further condition can have no bearing on the question of determining the moment of the breach of the international obligation. The breach cannot be considered to exist at a moment when lack of prevention by the State—conceivably making it possible for the event to occur—has perhaps already become manifest but has not yet resulted in the event actually taking place. Here logic therefore precludes the idea that the moment of the breach could be any moment preceding the occurrence of the event.

(3) The determination of the *moment of the breach* in the case in point is therefore very simple; the moment when the breach is committed will necessarily coincide with the moment when the event occurs. The latter moment will be the one at which the event in question, if instantaneous in character, begins and simultaneously ends; on the other hand, if the event has a continuing character, it will be only the moment at which the event begins.⁴⁷⁰ For it is evident that, when the event itself is characterized by the fact that it extends in time, only the inception of that event can determine the "moment" of the breach. The obligation requires the State to achieve the result of "preventing" the occurrence of a given event. Therefore, when the event becomes a reality, and does so because of lack of prevention by the State, that State has undoubtedly failed completely to achieve the result required of it by the obligation. The breach is therefore

⁴⁶⁸ See article 23 above, para. (4) of the commentary.

⁴⁶⁹ *Ibid.*, para. (6) of the commentary.

⁴⁷⁰ That is the case, for example, where an embassy is occupied by a group of rebels, where a river or lake is polluted or where the course of a river is altered.

committed at that moment, because at that moment the conditions for the breach are fulfilled.⁴⁷¹ Moreover, it is committed definitively, regardless of the length of the period during which the event continues.

(4) The Commission accordingly finds it possible to reach a conclusion on this first point without any hesitation by stating the principle that *the moment when the event begins is the moment when the breach of the international obligation requiring the State to prevent that event occurs.*

(5) With regard to the *duration of the breach* of an obligation requiring the State to prevent the occurrence of a given event, in other words, its "time of commission", the question might arise whether this duration should be considered as limited to the moment when the event "occurs", or as extending either backward or forward in time, or in both directions at once. If backward, it might in theory be possible to trace it back to the moment when the State began to adopt conduct inappropriate to its duty to ensure that the event did not occur. In practice, of course, the determination of this initial moment might often prove extremely difficult, or even altogether impossible. However, this consideration apart, the very idea of tracing back the time of commission of the breach of the obligation to such a moment is unacceptable. To repeat, the obligation is intended to achieve the result of ensuring that the State, by its conduct, should prevent the occurrence of a particular external act of man or nature, always assuming that it is physically capable of doing so. Without the combination of the two closely linked conditions of occurrence of the event and conduct of the State that has been unable to prevent it, there can be no breach, whether total or even partial. The breach of an obligation of the particular type forming the subject-matter of article 26 can in no way be compared with the breach of other obligations that are capable of occurring gradually in time through a succession of actions or omissions by a State, the first of which, in a given instance, initiate the violation and the others subsequently complete it. As long as the event to be prevented has not occurred, the fact that the State has adopted conduct insufficiently effective to prevent it constitutes neither a breach of the obligation nor even the mere inception of such a breach, to which the event, on occurring, would confer a definitive character. It is therefore clear that in such a case the duration of the breach can in no way encompass any period prior to the occurrence of the event to be prevented.

(6) On the other hand, it seems logical to conceive that the duration of the breach, should the event that has occurred be in any way of a continuing character, extends in time up to the moment at which the event ceases. For it is logical to consider that the obligation to prevent the occurrence of an event, should such an event nevertheless occur, entails the obligation to ensure that it is terminated.

⁴⁷¹ The situation is the same as in the case of breaches consisting of continuing acts of the State. As the Commission has pointed out, the moment of a breach of this kind is again the moment at which the continuing act begins, because in that case too the conditions for the existence of the breach are fulfilled from that moment.

(7) With regard to the determination of the duration of the breach of an obligation to prevent the occurrence of an event, the Commission accordingly arrived at the conclusion embodied in the second proposition of article 26: "Nevertheless, the time of commission of the breach extends over the entire period during which the event continues."

(8) It hardly seems necessary to emphasize that the determination of the time of commission of a breach of an international obligation to prevent an event may prove to be of practical importance in relation to the rule concerning the "national character of a claim". The initial moment of the time of commission of the breach being the moment when the event begins, it will be from that moment only that an individual who may be injured by the said event will have to have possessed the nationality of the State prepared to act on his behalf. As to the jurisdiction of an international tribunal that might be limited to disputes arising from "acts" or "situations" subsequent to a particular date, it seems logical that it should be held to be established in a case where the event occurred after the date in question. As regards the period of prescription that might apply to the right to invoke international responsibility arising from the breach, it is equally logical, in view of the conclusions arrived at above, that this period should begin to run only from the moment of cessation of the event having a continuing character.

(9) In drafting the text of article 26, the Commission was careful to choose wording in line with that of the other articles already adopted in the matter of determination of the *tempus commissi delicti* (articles 24 and 15). Here again, the title and text of the article distinguish between the question of the determination of the moment when the breach of the international obligation occurs and that of the determination of the duration or time of commission of that breach. The terminology employed also follows that used in those articles, as well as in article 23.

CHAPTER IV

IMPLICATION OF A STATE IN THE INTERNATIONALLY WRONGFUL ACT OF ANOTHER STATE

Commentary

(1) The general conditions for the existence of an internationally wrongful act having been set out in chapters II and III of the draft in respect of both the subjective and the objective element of such an act, chapter IV reviews the specific problems raised by the possible implication of other States in the internationally wrongful act of a given State. A State may be implicated in one way or another in the internationally wrongful act of another State, whether in cases where the first State participates in the wrongful act of the second or in cases pertaining to what is generally called "indirect responsibility". Those are the two conceptually distinct categories of cases dealt with in this chapter of the draft.

(2) The first case considered in this chapter thus concerns one where the existence of an internationally wrongful

act, unquestionably committed by a State, attributable to it as such and without the slightest doubt engaging its international responsibility, is accompanied by the existence of participation, by another State, in the commission by the first State of its own act. The characteristic element in this case is, precisely, the link between the conduct in fact adopted by a State—which, taken alone, may in certain cases be in no way internationally wrongful—and the act committed by another State, the wrongfulness of which, by contrast is established. The problem is then to determine whether such participation does not become tainted with international wrongfulness by the mere fact of being contributory to the commission of an internationally wrongful act by another State, and consequently whether such participation should not cause the participating State to bear some share of the international responsibility of the other State or, in any case, also to incur international responsibility, quite apart, of course, from the international responsibility it might also incur in cases in which its actions in themselves constituted a breach of an international obligation.

(3) The second of the cases dealt with in this chapter covers those whose common characteristic is not the part that may in fact be played by a State in the independent commission of an internationally wrongful act by another State, but the existence of a particular relationship between two States. The decisive element is the existence of a situation, in law or in fact, entailing a serious limitation of the freedom of decision and action of one of the States to the advantage of the other, either permanently or only on the specific occasion of the commission of the wrongful act in question. The problem that then arises is whether the conduct adopted by the first State in certain circumstances, in breach of its international obligations, should be treated, from the standpoint of its legal consequences, as if it were conduct of the second State. In other words, it is necessary to determine whether the situation created by the second State in its own favour does not render that State indirectly responsible, at the international level, for the wrongful act constituted by the conduct in question, in place of the State that adopted it.

Article 27. Aid or assistance by a State to another State for the commission of an internationally wrongful act

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.

Commentary

(1) Article 27 of the draft states the basic general rule that defines the conditions under which “participation” by a State in the internationally wrongful act of another State itself constitutes an internationally wrongful act separate from the principal wrong and accordingly entails the international responsibility of the participating State. In delimiting the subject-matter of the rule enunciated in this article, a clear distinction must be drawn between

the situations it covers and other situations, which are similar in some respects, but in which there is no question at all of “participation by a State in the internationally wrongful act of another State”.

(2) It is thus especially important to make it clear that the participation referred to in this article does not relate to cases in which the conduct of a State takes the form, not of actions or omissions intended to make it possible or easier for another State to commit an internationally wrongful act, but rather of action specifically intended to effect, with another State or other States, the breach of a given international obligation. In other words, the “participation” considered here excludes cases in which a State is or becomes a co-perpetrator of an internationally wrongful act. There can be no question, for example, of the participation of a State in the internationally wrongful act of another State in cases where identical offences are committed in concert, or sometimes even simultaneously, by two or more States, each acting through its own organs. If, for example, State A and State B are allies and proceed in concert to make an armed attack on a third State, each acting through its own military organs, two separate acts of aggression are committed by the two States. Such concerted action cannot be considered as a form of “participation” by one of the two States in an act of aggression committed by the other alone. A similar conclusion is called for in cases of parallel attribution of a single course of conduct to several States, as when the conduct in question has been adopted by an organ common to a number of States. According to the principles on which the articles of chapter II of the draft are based, the conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will concurrently have committed separate, although identical, internationally wrongful acts. It is self-evident that the parallel commission of identical offences by two or more States is altogether different from participation by one of those States in an internationally wrongful act committed by the other.

(3) It must now be considered whether certain courses of conduct by a State that are intended to cause another State to commit an internationally wrongful act are in fact real forms of “participation” by a State in the internationally wrongful act of another State and, as such, should be taken into account in formulating the rule to be stated in this article of the draft. In this connexion, consideration should first be given to the case in which a State, by one means or another, advises or incites another State to commit a breach of an international obligation incumbent on the latter, in other words, to the case which, in the general theory of internal law, appears under the name of “incitement” to commit an offence. There can be no doubt that, in internal criminal law for example, certain forms of incitement by one subject to the commission of a delict or a crime by another subject themselves constitute a criminal offence. In the international legal order, however, it is more than doubtful that the mere incitement by one State of another to commit a wrongful act is in itself an internationally wrongful act.

(4) International jurisprudence and practice do not appear to depart from the classical conclusion formulated by the Board of Commissioners set up to distribute the sum allocated by France under the Convention of 4 July 1831 between the United States of America and France concerning claims relating to measures for the confiscation of American merchandise taken by certain States subjected to the influence of Napoleonic France. The Commission refused to attribute to France responsibility for measures taken by States which, like Denmark, had not at the time been formally united to the French Empire or placed in a condition of dependence thereon, and had thus been independent. The fact that the Danish sovereign had taken measures to please the Emperor of the French played no part in the decisions of the Board of Commissioners,⁴⁷² which considered the Danish Government as solely and fully responsible for the measures taken. Commissioner Kane noted, in particular, that the claims against Denmark (Holstein and Hamburg cases), unlike those raised with respect to Holland, represented:

... a train of wrongs unworthy of a State unquestionably sovereign and professing to be free, committed against the citizens of a friendly nation, who had violated no law, and were entitled to protection by every title of hospitality and justice.

But the question before the Board regarded not Denmark, but France. One cannot be charged with the acts of the other; for neither was dependent. It may be that the conduct of King Frederic was dictated by his anxiety to conciliate the favour of the French Emperor; ... we had nothing to do with his motives or his fears. The act was his own: the Kingdom of Denmark was then, as now, independent...

...

[its] intervention ... was the voluntary pander to French avidity.⁴⁷³

(5) In international practice, protests have of course been made against States accused, rightly or wrongly, of having incited others to commit breaches of international obligations to the detriment of third States; but no cases are known in which, at the juridical level, a State has been alleged by another to be internationally responsible solely by reason of such incitement. Nor are any cases known in which States have agreed to absolve from its responsibility a State which, although it might have been incited by a third State, nevertheless, of its own free will, breached an international obligation binding it to another State. It therefore follows from international practice, and from the works on international law dealing specifically with

this question,⁴⁷⁴ that the fact that a State has incited another to commit an internationally wrongful act to the detriment of a third State does not give rise to the separate existence of an international responsibility derived specifically from the fact of incitement. Thus mere incitement of one State by another to commit an internationally wrongful act cannot fulfil the conditions required for its characterization as "participation" in that wrong, in the legal meaning of the term, and therefore will not, as such, have legal status and consequences. The situation would of course be quite different, as will be seen, if a particular course of conduct that began as mere "incitement" were subsequently to develop to the point of constituting a real case of "complicity".

(6) It would be wrong, in the Commission's view, to make unduly facile comparisons between incitement by one sovereign State of another sovereign State and the legal concept of "incitement to commit an offence" in internal criminal law. This legal concept has its origin and justification in the psychological motives determining individual conduct, to which the motives of State conduct in international relations cannot be assimilated. The decision of a sovereign State to adopt a certain course of conduct is certainly its own decision, even if it has received suggestions and advice on the matter from another State, which it was at liberty not to follow. Consequently, if the State in question, by virtue of the conduct adopted, has committed an internationally wrongful act, there can be no question of its avoiding or even reducing its responsibility by alleging "incitement" by another State. And neither the State that committed the internationally wrongful act nor the State injured by it can cast all or part of the responsibility for that act on another State which has done no more than encourage or incite the first State to follow a course of conduct it ultimately adopted with complete freedom of decision and choice.

(7) This conclusion would in no way be altered if the case considered were one in which the State that was incited to commit an internationally wrongful act was no more than a "puppet State" in the hands of the State inciting it to commit an international offence, or a State placed, for some reason, in a position of dependence on that other State. In such situations, it is possible that in certain circumstances the dominant State might be called upon to answer for an internationally wrongful act committed by the puppet or dependent State. But then it is the existence of the relationship established between the two States that would become the decisive factor in this transfer of responsibility from one subject to the other, not the specific circumstance of incitement of one State by another to commit a particular wrongful act. In such situations there would be no question, either, of an international responsibility separate from that generated by the wrongful act, the incitement to which, as such, would entail the responsibility of its author. In other words, the problems of international responsibility arising out of the conduct of organs of a puppet or dependent State would

⁴⁷² See *Notes on some of the Questions decided by the Board of Commissioners under the Convention with France of the 4th of July, 1831* (Philadelphia, 1836), in J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, Washington D. C., U.S. Government Printing Office, 1898, vol. V, pp. 4473 *et seq.*

⁴⁷³ *Ibid.*, pp. 4475 and 4476. The passage quoted has been favourably commented upon by C. L. Bouvé in "Russia's liability in tort for Persia's breach of contract", *American Journal of International Law*, Washington D. C., vol. 6, No. 2 (April 1912), p. 399, and by F. Klein, *Die mittelbare Haftung im Völkerrecht*, Frankfurt-am-Main, Klostermann, 1941, p. 279. The American claims against Denmark were settled satisfactorily by the agreement of 28 March 1830 (Moore, *op. cit.*, pp. 4549 *et seq.*).

⁴⁷⁴ See for example Ago, *loc. cit.*, pp. 523 and 524. For recent support for this view, see Gräfrath, Oeser and Steiniger, *op. cit.*, p. 64.

fall, if they arose, within the notion of "indirect responsibility", which is dealt with in the following article of chapter IV, rather than be a matter of participation by a State in the internationally wrongful act of another State, which is the subject of the present article.⁴⁷⁵

(8) Would conclusions similar to those expressed above with regard to incitement or instigation be justified in a case in which a State accompanies its incitement by pressure or coercion? Where a State, in order to make another State commit an internationally wrongful act, has recourse to measures of this kind, it would obviously be difficult to maintain that such measures, like mere "incitement" by persuasion and advice, are legally "neutral" in the eyes of international law. There is no doubt that in present-day international law, just as in the United Nations system, coercion that includes the use or threat of use of armed force is, save in exceptional cases, an international offence of the utmost gravity. Here, indeed, lies the most striking difference between contemporary international law and that of the past. As to the other forms of pressure, and in particular economic pressure it is well known that opinions still differ; some simply assimilate these pressures to the internationally prohibited forms of coercion, while others see them as measures which, although reprehensible, are not internationally wrongful. However, the differences of opinion on this point do not affect the question to be settled in article 27.

(9) Thus, in a case where it was concluded that the adoption by State A of certain measures to compel State B to breach its international obligations towards another subject of international law was in itself and beyond all doubt internationally wrongful, that would entail legal consequences for the relations between A and B. Conceivably too, in the most serious cases, it might entail further consequences for the relations between State A and all the other members of the international community. But that would be of no relevance to the problem under consideration here, which is to determine whether or not recourse to the aforesaid measures constitutes a form of "participation", by the State that takes them, in the breach, by the State subjected to those

measures, of an international obligation binding it to a third State—or, more generally, whether or not such measures would affect the relations between one or other of the first two States and the third State. Solely from the point of view of these relations with the third State, the answer will finally be the same, whether or not the coercion at the origin of the offence against the third State infringed an international subjective right of the State against which it was exercised.

(10) It certainly cannot be maintained that the State subjected to coercion adopted its conduct towards a third State in the free exercise of its sovereignty; nor can anyone doubt that this would not be without legal consequences. But such consequences are not those that flow from the participation by one State in the commission of an internationally wrongful act by another State. In the case now envisaged, the commission of the wrongful act remains exclusively the act of the State subjected to coercion. The State applying the coercion remains entirely foreign to the commission of the offence; it carries out none of the actions constituting the offence and provides no aid or practical assistance in its commission. In this sense, therefore, it certainly stops short of what would be real "participation" in the commission of the internationally wrongful act. But at the same time, its implication in the affair goes well beyond what would constitute participation, for it goes so far as to compel the will of the State it coerces, to the point of constraining it to decide to commit an international offence that it would not otherwise commit, and obliging it to behave, in the given case, as a State deprived of its sovereign decision-making capacity. That is the determining factor for the purposes here envisaged. In the Commission's view, there can be no question of attributing to the State that exercises the coercion a share in the wrongful act committed by another State under the effect of that coercion. That would be justified only if the State in question had taken an active part in performing the act, but that is not the case here. It follows that the case of coercion exercised by one State against another to induce the latter to breach its international obligation to a third State is not one that falls within the scope of the present article, since it cannot be defined as a case of "participation" in the commission by another State of an internationally wrongful act.

(11) The case in which one State exercises coercion against another so that the latter shall breach its international obligation to another subject of international law falls rather within the sphere of responsibility for the act of another, since the normal consequence of such a situation is the dissociation of the subject to which the act generating the responsibility is attributed from the subject on which that responsibility is laid. For in that case, State A, the coercing State, has not committed against State or subject C any offence separate from that committed as a result of the coercion to which State B has been subjected. Moreover, State B, which has committed the offence, acts in dependence on State A, its will being determined by the will of that State, or at least its freedom of choice being restricted by the control exercised over it by that State. In other words, only B has committed an international offence against C, but it has done so while its freedom of decision was seriously

⁴⁷⁵ A similar reasoning lay behind the conclusions of the Board of Commissioners mentioned in paragraph (4) above, regarding the Kingdom of Holland in the reign of Napoleon's brother, Louis, from June 1806 to July 1810, when Holland became part of the French Empire. The Commissioners accepted the Dutch contention that, at that time, Holland had been under the "present government" of France, and they recognized the responsibility of France for the confiscation and sale, to the financial gain of France, of all goods brought to Holland in American ships, even though those measures had been taken by the so-called Kingdom of Holland (see Bouvé, *loc. cit.*, pp. 398 and 399, and Klein, *op. cit.*, pp. 280 and 281). There are many more recent examples of analogous situations. For instance, in many international disputes arising out of the breach of an international obligation by States or governments reduced, during the Second World War, to the status of dependent States or governments, the State that had been the victim of the breach asserted that the resultant responsibility should be attributed not to the State whose organs had in fact acted, but to the State which, in pursuing its policy in regard to a given State, had created there a kind of pseudo-State, which was really no more than its *longa manus*. In this connexion, reference may be made to disputes about international responsibility for acts committed by States or governments set up in certain territories occupied by Nazi Germany or Fascist Italy.

fettered by A. Whether this condition of dependence is *de jure* or merely *de facto* in nature, whether it is permanent or purely temporary, or even occasional, in no way affects the problem. Moreover, State A, which has subjected State B to coercion in order to induce it to breach its international obligation, cannot escape being called to account internationally for the act committed by State B under its coercion. Clearly, therefore, this is one of the cases of indirect responsibility that will be considered in the following article of the draft.

(12) Incitement and coercion having been ruled out, for different reasons, the only remaining case of "participation" by one State in the commission of an internationally wrongful act by another State is that which the members of the Sixth Committee and of the Commission had in mind in 1975, when they stressed the need to deal with that question in the present draft articles,⁴⁷⁶ namely, the case where one State renders aid or assistance to another State in order to facilitate the commission by the latter of an internationally wrongful act. In such a case, the State in question does not confine itself to inciting another State, by its suggestions and advice, to commit an international offence, nor does it resort to coercion to make it do so. What it does is to facilitate, by its own action, the commission by the other State of the internationally wrongful act in question. Cases such as this can be defined as ones of "complicity", but obviously in the particular sense that that term may possess in international law, where it is far from having the same meaning as is attributed to it in the different internal legal orders of States.

(13) In this connexion, one of the most frequently mentioned examples is that of a State placing its territory at the disposal of another State to make it possible, or at least easier, for the latter to commit an offence against a third State or third subject of international law. In this context, reference has been made mainly to article 3 (f) of the Definition of Aggression approved by the General Assembly in 1974,⁴⁷⁷ which includes in the list of acts qualifying as acts of aggression

The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.

Another classic and frequently cited example of complicity is that of a State that supplies another with weapons to attack a third State. It is obvious, too, that aid or assistance in an act of aggression may also take other forms, such as the provision of land, sea or air transport, or even the placing at the disposal of the State that is preparing to commit aggression of military or other organs

⁴⁷⁶ See, for example, the statements made at the 1975 session of the General Assembly by the representatives of the German Democratic Republic (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee, Summary Records of Meetings*, p. 64, 1539th meeting, para. 3), Turkey (*ibid.*, p. 106, 1547th meeting, para. 20), Iran (*ibid.*, p. 112, 1548th meeting, para. 6) and Bolivia (*ibid.*, pp. 115 and 116, para. 30), during the discussion on the Commission's report. See also *Yearbook ... 1975*, vol. I, pp. 44 and 45, 1312th meeting, paras. 13 and 28; pp. 47 and 48, 1313th meeting, paras. 4, 9 and 10; p. 58, 1315th meeting, para. 19.

⁴⁷⁷ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

for use for that purpose. Furthermore, it is by no means only in the event of an act of aggression by a State that the possibility of assistance by another State may arise. For example, assistance may also take the form of provision of weapons or other supplies to assist another State to commit genocide,⁴⁷⁸ to support a régime of *apartheid*,⁴⁷⁹ or to maintain colonial domination by force, etc. Nor is it true to say that outside participation is possible only where the internationally wrongful act in which another State lends aid or assistance is one of those defined in article 19 of the present draft as an "international crime". There may equally well be assistance by another State for the purpose of commission of a less typical and less serious offence; providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, and assisting in the destruction of property belonging to nationals of a third country, are some of the examples that may be mentioned. The aid or assistance provided may consist in the provision of material means, but there can also be aid or assistance of a legal or political nature, such as the conclusion of a treaty that may facilitate the commission by the other party of an internationally wrongful act. Even incitement may sometimes assume forms that make it, in fact, aid or support for the "incited" State to commit the wrongful act.

(14) The conduct by which one State helps another State to commit an internationally wrongful act may sometimes in itself constitute a breach of an international obligation, quite independently of participation in the wrongful act of the State to which such conduct lends assistance. That would be the case, for example, if a State Member of the United Nations supplied arms to the Government of the Republic of South Africa in breach of the obligation provided for in Security Council resolution 418 (1977), calling for an embargo on the supply of arms to that country. In most cases, however, the conduct in question, taken in isolation, will be an act that is not, as such, of a wrongful character. For example, to supply another State with raw materials, means of transport and even arms, where this is not prohibited by a specific international obligation, is not in itself internationally wrongful in any way. What is of interest in the present context, however, is not whether the action, as such, does or does not constitute a breach of an international obligation, but whether the conduct adopted by the State, in addition to having materially facilitated the perpetration of the

⁴⁷⁸ Article III of the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948 (United Nations, *Treaty Series*, vol. 78, p. 280), includes "complicity in genocide" in the list of acts punishable under the Convention.

It is not specified, however, whether complicity by another State in the commission of genocide by a particular government does or does not come within the terms of this provision.

⁴⁷⁹ Article III of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, adopted on 30 November 1973 by the General Assembly of the United Nations (resolution 3068 (XXVIII), annex), provides for the criminal responsibility of individuals—including "representatives of the State"—who conspire in the commission of acts of *apartheid* or who directly co-operate in them. It is open to question, however, whether the complicity of another State in the commission of such acts, or in the pursuance of a policy of *apartheid* by a government, comes within the terms of the Convention.

international offence by the other State, was intended to enable another State to commit such an international offence or to make it easier for it to do so. The very idea of "aid or assistance" to another State for the commission of an internationally wrongful act necessarily presupposes an intent to collaborate in the execution of an act of this kind and hence, in the cases considered, knowledge of the specific purpose for which the State receiving certain supplies intends to use them.

(15) Examples taken from the recent practice of States show, moreover, that, whatever may have been the situation formerly, the idea of participation in the internationally wrongful act of another by providing "aid or assistance"—and thus, in this sense, of "complicity"—has now gained acceptance in international law. That this is the attitude of governments is shown, for example, by the statement made in 1958 by the United Kingdom Secretary of State for Colonial Affairs in reply to a parliamentary question concerning the supply of arms and military equipment by certain countries to Yemen, those arms having subsequently been used in an attack against Aden, which was then a British protectorate. The Secretary of State endeavoured to justify the delivery of arms in the case in point by pointing out that the supply of arms by one State to another was lawful *per se*, and that in the particular instance the supplier had probably been unaware, at the time when the arms were supplied, of the use to which the other State was to put them later.⁴⁸⁰ However, although it appears from the position taken by the spokesman for the United Kingdom Government that in his view the supply of arms by one State to another, in the absence of an express prohibition (for example by the United Nations), was lawful, it also appears, from the position he took, that a State that knowingly supplies arms to another State for the purpose of assisting the latter to act in a manner inconsistent with its international obligations cannot escape responsibility for complicity in such illegal conduct.⁴⁸¹

Further confirmation of the same conviction is provided by a statement of position made by the Government of the Federal Republic of Germany the same year. On 15 August 1958, that Government replied to a note of 26 July from the Government of the USSR taking it to task for participating in an act of aggression by allowing United States military aircraft to use airfields in the

territory of the Federal Republic in connexion with the United States intervention in Lebanon. In its reply, the Government of the Federal Republic of Germany argued that the measures taken in the Near East by the United States and the United Kingdom did not constitute intervention directed against any party, but constituted assistance to countries whose independence appeared to be seriously threatened and which were calling for help. Since, in the Federal Government's view, its allies were not guilty of any aggression in the Near or Middle East, it followed that the accusation made against it of supporting an act of aggression committed by other States was baseless. The Federal Government concluded by giving an assurance that it never had and never would have allowed the territory of the Federal Republic to be used for the commission of acts of aggression.⁴⁸² Quite apart from its assessment of the specific circumstances of the case, the Government of the Federal Republic of Germany thus showed its conviction, based on principle, that the act of a State in placing its own territory at the disposal of another State in order to facilitate the commission of an act of aggression by that other State would be a form of complicity in such aggression and would therefore constitute an internationally wrongful act. The authors of various recent works also give the impression that they accept as a separate internationally wrongful act the notion of "participation", in the sense of "aid" or "assistance" in the commission of a wrongful act by another.⁴⁸³

(16) In the light of the international practice and doctrine just described, the Commission concluded that a set of draft articles codifying the general rules governing the responsibility of States for internationally wrongful acts could not fail to include a rule concerning "participation in the internationally wrongful act of another" in the form of aid or assistance in the commission of such an act. Furthermore, this is an area of international law in which the requirements of the "progressive development" of international law cannot be ignored. The need to take into consideration such a form of "participation" by a State in the internationally wrongful act of another State is further attested by the fact that, as a general rule, aid or assistance in the commission of a wrongful act by another remains in international law, like "complicity" in internal law, an act separate from such commission, an act that is classified differently and that does not necessarily produce the same legal consequences. In other words, the wrongful act of participation by complicity is not necessarily an act of the same nature as the principal internationally wrongful act to which it pertains. The conduct of a State which supplies, for example, weapons or other means to another State in order to facilitate the commission of an act of aggression or genocide by that other State does not necessarily, and in every case, constitute conduct that can also be classified as aggression or

⁴⁸⁰ For the text of the statement, see British Institute of International and Comparative Law, *International and Comparative Law Quarterly*, London, vol. 7, part 3, July 1958, pp. 550 and 551.

⁴⁸¹ As was stated in a commentary on the position taken by the United Kingdom Government:

"...the Answer appears to proceed on the basis that the supply of arms by one State to another is, in the absence, for example, of any prohibition by the United Nations, quite lawful. In addition, the Answer suggests that the responsibility for the use of those arms—at least in the circumstances referred to in the Answer—must rest primarily upon the State which receives them. There is, however, nothing in the Answer to support the view that a State which knowingly supplies arms to another for the purpose of assisting the latter to act in a manner inconsistent with its international obligations can thereby escape legal responsibility for complicity in such illegal conduct." (*Ibid.*, p. 551 (commentary by E. Lauterpacht).)

⁴⁸² See the text of the Federal Government's note in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Stuttgart, vol. 20, Nos. 2-3, August 1960, pp. 663 and 664.

⁴⁸³ See for example I. Brownlie, *Principles of Public International Law*, 2nd ed., Oxford, Clarendon Press, 1973, p. 443. See also, by the same author, *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1963, pp. 369 *et seq.*

genocide. An argument in favour of a different conclusion could be drawn from the fact that the Definition of Aggression, for example, as has been seen, also treats as an act of aggression the placing by a State of its territory at the disposal of another State with a view to aggression by the latter against a third State. It would be inadmissible, however, to generalize the idea of such equivalence and to extend it beyond cases in which it is specifically stipulated in an express provision. Even in cases of this kind, moreover, it seems impossible to conclude that the position of international law in respect of any action of aid or assistance for the commission of a given internationally wrongful act is necessarily the same as the position of international law in respect of the principal wrongful act itself. In any case, the determination of such equivalence can be only a question of degree, since in the final analysis it depends on a variety of factors and above all, on the extent and seriousness of the aid or assistance actually furnished to the author of the principal wrongful act.

(17) Having unanimously agreed on the need to include in the text of the draft a rule concerning the "aid or assistance" rendered by a State to another State for the commission of an internationally wrongful act, the Commission also agreed on the following essential elements that should be brought out in the basic general rule to be enunciated: (a) the aid or assistance must have the effect of making it *materially* easier for the State receiving the aid or assistance in question to commit an internationally wrongful act; (b) the aid or assistance must have been rendered with *intent* to facilitate the commission of that internationally wrongful act by another; (c) the conduct by which a State thus participates in the commission by another State of an internationally wrongful act against a third subject must be characterized as *internationally wrongful precisely by reason of such participation*, even in cases where, in other circumstances, such conduct would be internationally lawful; (d) the internationally wrongful act of participation through aid or assistance for the commission of an internationally wrongful act by another *must not be confused with this principal offence, and consequently the international responsibility deriving from it must remain separate from that incurred by the State committing the principal offence*.

(18) In view of the foregoing, the Commission drafted article 27 in the following manner:

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.

This wording brings out clearly, first, that the *material* element characterizing the internationally wrongful act of participation on which the present discussion turns must consist in real *aid or assistance* in the commission by another State of an internationally wrongful act, but must also remain within the limits of such aid or assistance. That is what makes it possible to draw a clear distinction between the act envisaged here and those other possible forms of association in an internationally wrongful act where the degree of participation is such that the State in question becomes a veritable co-author of the principal internationally wrongful act. At the same time

the wording adopted for the article lays stress on the intellectual element of intent, which must also be present before it can be concluded that the internationally wrongful act of participation that it is sought to define has been committed. As the article states, the aid or assistance in question must be rendered "for the commission of an internationally wrongful act", i.e. with the specific object of facilitating the commission of the principal internationally wrongful act in question. Accordingly, it is not sufficient that aid or assistance provided without such intention could be used by the recipient State for unlawful purposes, or that the State providing aid or assistance should be aware of the eventual possibility of such use. The aid or assistance must in fact be rendered with a view to its use in committing the principal internationally wrongful act. Nor is it sufficient that this intention be "presumed"; as the article emphasizes, it must be "established". Unless these essential requirements are fulfilled, an act that is lawful *per se* cannot become an unlawful act, and a possibly wrongful act cannot be invested with additional wrongfulness.

(19) The words "carried out by the latter" specify a condition that would seem to be essential in a general rule on this subject, namely, that, in order to establish the existence of the internationally wrongful act of participation to which the article refers, the principal internationally wrongful act must actually be committed by the State which receives the aid or assistance in question. It is not impossible that special rules of international law may provide that the rendering of aid or assistance for the commission by another of a breach of certain obligations of fundamental importance for the international community is *per se* an internationally wrongful act, whether or not the principal internationally wrongful act is actually carried out. But the general rule defined in article 27, which is intended to apply to participation in the breach by another of all types of international obligations, cannot take account of these special cases.

(20) The wrongfulness of the aid or assistance rendered to another State for the commission by the latter of a breach of an international obligation does not depend on the gravity of the breach in question. The fact of aiding another State to commit an internationally wrongful act always entails the responsibility of the aiding State, regardless whether the principal wrongful act is defined as a crime or a delict, and even regardless of the degree of gravity of the crime or delict involved. That is why the article refers, without being more specific, to "aid or assistance ... rendered for the commission of an internationally wrongful act". This by no means signifies, however, that the consequences, as regards responsibility, of the internationally wrongful act of participation referred to in article 27 must always be the same, or that they may not vary according to circumstances, such as the extent or manner of the participation, the nature of the act in which the State participates, the gravity of the principal internationally wrongful act, etc. These, however, are questions that relate not to the part of the draft dealing with the origin of international responsibility but rather to the second part, i.e. that which will deal with the content, forms and degrees of international responsibility.

(21) The words "itself constitutes an internationally wrongful act" specify a point that is a primary concern of this article, by making it clear that participation consisting in the rendering of aid or assistance to another State for the commission by the latter of an internationally wrongful act is an act of wrongfulness different from that of the principal act. The responsibility of the State engaging in this form of participation is therefore entailed otherwise than is that of the State committing the principal act. The last part of the sentence, reading "even if, taken alone, such aid or assistance would not constitute the breach of an international obligation", emphasizes the distinct and separate nature of the particular wrongful

act to which the article refers, by stating that such form of participation is internationally wrongful regardless of the fact that, in other circumstances, the conduct that produces it would be internationally lawful.

(22) Finally, the Commission considers it useful to emphasize that aid or assistance rendered by a State to another State for the commission by the latter of an internationally wrongful act is itself an internationally wrongful act, whether the principal wrongful act is committed against a State or a particular group of States, a subject of international law other than a State, or the international community as a whole.

Chapter IV

SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

A. Introduction

1. HISTORICAL REVIEW OF THE WORK OF THE COMMISSION

95. At its nineteenth session, in 1967, the Commission made new arrangements for dealing with the topic "Succession of States and Governments",⁴⁸⁴ which was among the topics it had selected for codification in 1949.⁴⁸⁵ It decided to divide the topic among more than one special rapporteur, the basis for the division being the three main "headings" of the broad outline of the subject laid down in the report submitted in 1963 by its Sub-Committee on Succession of States and Governments.⁴⁸⁶ Those three headings were as follows:

- (a) Succession in respect of treaties;
- (b) Succession in respect of rights and duties resulting from sources other than treaties; and
- (c) Succession in respect of membership of international organizations.

96. In 1967, the Commission also appointed Sir Humphrey Waldock to be Special Rapporteur for succession in respect of treaties and Mr. Mohammed Bedjaoui to be Special Rapporteur for succession in respect of rights and duties resulting from sources other than treaties. It decided to leave aside for the time being the third heading, namely, succession in respect of membership of international organizations.⁴⁸⁷

97. In 1974, on the basis of the provisional draft articles which it had adopted earlier and in the light of the observations received thereon from governments of Member States, the Commission adopted a final set of 39 articles on succession of States in respect of treaties.⁴⁸⁸ The General Assembly, by its resolution 3496 (XXX) of 15 December 1975, decided to convene a conference of plenipotentiaries in 1977 to consider those draft articles and "to embody the results of its work in an international convention and such other instruments as it may deem appropriate". Pursuant to General Assembly resolution 31/18 of 24 November 1976, the United Nations Conference on Succession of States in Respect of Treaties met in Vienna

from 4 April to 6 May 1977. The Conference approved a report recommending that the General Assembly decide to reconvene the Conference in the first half of 1978, for a final session of four weeks.⁴⁸⁹ Upon its consideration of that report, the General Assembly, by its resolution 32/47 of 8 December 1977, approved the convening of the resumed session of the Conference at Vienna for a period of three weeks, or if necessary four, starting 31 July 1978.

98. Following his appointment as Special Rapporteur, Mr. Bedjaoui submitted to the Commission, at its twentieth session, in 1968, a first report on succession of States in respect of rights and duties resulting from sources other than treaties.⁴⁹⁰ In that report he considered *inter alia* the scope of the subject that had been entrusted to him and, accordingly, the appropriate title for the subject, as well as the various aspects into which it could be divided. Following the discussion of that report, the Commission, in the same year, took several decisions, one of which concerned the scope and title of the topic and another the priority to be given to one particular aspect of succession of States.

99. Endorsing the recommendations contained in the first report by the Special Rapporteur, the Commission considered that the criterion for demarcation between the topic entrusted to him and that concerning succession in respect of treaties should be "the subject-matter of succession", i.e. the content of succession and not its modalities. It decided, in accordance with the Special Rapporteur's suggestion, to delete from the title of the topic all reference to sources in order to avoid any ambiguity regarding its delimitation. The Commission accordingly changed the title of the topic and replaced the original title, "Succession in respect of rights and duties resulting from sources other than treaties", by the title "Succession in respect of matters other than treaties".⁴⁹¹

100. That decision was confirmed by the General Assembly in paragraph 4(b) of its resolution 2634 (XXV) of 12 November 1970, which recommended that the Commission should continue its work with a view to making "progress in the consideration of succession of States in respect of matters other than treaties". The absence of any reference to "succession of governments" in that recommendation by the General Assembly reflected the decision taken by the Commission at its twentieth

⁴⁸⁴ For a detailed account of the historical background of the topic as a whole, see *Yearbook ... 1968*, vol. II, pp. 213 *et seq.*, doc. A/7209/Rev.1, paras. 29-42, and *Yearbook ... 1969*, vol. II, pp. 222 *et seq.*, doc. A/7610/Rev.1, paras. 20-34.

⁴⁸⁵ See *Yearbook ... 1949*, p. 281, doc. A/925, para. 16.

⁴⁸⁶ *Yearbook ... 1963*, vol. II, p. 260, doc. A/5509, annex II.

⁴⁸⁷ *Yearbook ... 1967*, vol. II, p. 368, doc. A/6709/Rev.1, paras. 38-41.

⁴⁸⁸ *Yearbook ... 1974*, vol. II (Part One), pp. 174 *et seq.*, doc. A/9610/Rev.1, chap. II, sect. D.

⁴⁸⁹ A/CONF.80/15. See also *Official Records of the General Assembly, Thirty-second Session, Supplement No. 32 (A/32/32)*, p. 57.

⁴⁹⁰ *Yearbook ... 1968*, vol. II, p. 94, doc. A/CN.4/204.

⁴⁹¹ *Ibid.*, p. 216, doc. A/7209/Rev.1, para. 48. See also paras. 117 and 118 below.

session to give priority to State succession and to consider succession of governments for the time being "only to the extent necessary to supplement the study on State succession".⁴⁹²

101. As mentioned above,⁴⁹³ the first report by the Special Rapporteur reviewed various aspects of the topic of succession of States in respect of matters other than treaties. The report of the Commission on the work of its twentieth session notes that, during the debate,

some members of the Commission referred to certain particular aspects of the topic (public property; public debts; legal regime of the predecessor State; territorial problems; status of the inhabitants; acquired rights) and made a few preliminary comments on them.

It adds that, in view of the breadth and complexity of the topic,

the members of the Commission were in favour of giving priority to one or two aspects for immediate study, on the understanding that this did not in any way imply that all the other questions coming under the same heading would not be considered later.⁴⁹⁴

The report also notes that the predominant view of members of the Commission was that the economic aspects of succession should be considered first. It states:

At the outset, it was suggested that the problems of public property and public debts should be considered first. But, since that aspect appeared too limited, it was proposed that it should be combined with the question of natural resources so as to cover problems of succession in respect of the different economic resources (interests and rights), including the associated questions of concession rights and government contracts (acquired rights). The Commission accordingly decided to entitle that aspect of the topic "Succession of States in economic and financial matters" and instructed the Special Rapporteur to prepare a report on it for the next [twenty-first] session.⁴⁹⁵

102. The second report by the Special Rapporteur,⁴⁹⁶ submitted at the twenty-first session of the Commission (1969), was entitled "Economic and financial acquired rights and State succession". The report of the Commission on the work of that session notes that, during the discussion on the subject, most of the members were of the opinion that the topic of acquired rights was extremely controversial and that its study, at a premature stage could only delay the Commission's work on the topic as a whole, and therefore considered that "an empirical method should be adopted for the codification of succession in economic and financial matters, preferably commencing with a study of public property and public debts".⁴⁹⁷ The report notes that the Commission "requested the Special Rapporteur to prepare another report containing draft articles on succession of States in respect of economic and financial matters". It further records that "the Commission took note of the Special

Rapporteur's intention to devote his next report to public property and public debts".⁴⁹⁸

103. Between 1970 and 1972, at the Commission's twenty-second to twenty-fourth sessions, the Special Rapporteur submitted three reports to the Commission: his third report⁴⁹⁹ in 1970, his fourth⁵⁰⁰ in 1971 and his fifth⁵⁰¹ in 1972. Each of those reports dealt with succession of States to public property and contained draft articles on the subject. Being occupied with other tasks the Commission was unable to consider any of those reports during its twenty-second (1970), twenty-third (1971) or twenty-fourth (1972) sessions. However, it included a summary of the third and fourth reports in its report on the work of its twenty-third session⁵⁰² and an outline of the fifth report in its report on the work of its twenty-fourth session.⁵⁰³

104. At the twenty-fifth (1970), twenty-sixth (1971) and twenty-seventh (1972) sessions of the General Assembly, during the Sixth Committee's consideration of the report of the Commission, several representatives expressed the wish that progress should be made in the study on succession of States in respect of matters other than treaties.⁵⁰⁴ On 12 November 1970, the General Assembly adopted resolution 2634 (XXV), in paragraph 4(b) of which it recommended that the Commission should continue its work on succession of States with a view to making progress in the consideration of the subject. On 3 December 1971, in paragraph 4(a) of part I of its resolution 2780 (XXVI), the General Assembly again recommended that the Commission should make progress in the consideration of the topic. Lastly, on 28 November 1972, in paragraph 3(c) of part I of its resolution 2926 (XXVII), the General Assembly recommended that the Commission should "continue its work on succession of States in respect of matters other than treaties, taking into account the views and considerations referred to in the relevant resolutions of the General Assembly".

105. In 1973, at the twenty-fifth session of the Commission, the Special Rapporteur submitted a sixth report,⁵⁰⁵ dealing, like his three previous reports, with succession of States to public property. The sixth report revised and supplemented the draft articles submitted earlier in the light, *inter alia*, of the provisional draft on succession of States in respect of treaties adopted by the Commission in 1972.⁵⁰⁶ It contained a series of draft articles

⁴⁹⁸ *Ibid.*, pp. 228 and 229, para. 62.

⁴⁹⁹ *Yearbook ... 1970*, vol. II, p. 131, doc. A/CN.4/226.

⁵⁰⁰ *Yearbook ... 1971*, vol. II (Part One), p. 157, doc. A/CN.4/247 and Add.1.

⁵⁰¹ *Yearbook ... 1972*, vol. II, p. 61, doc. A/CN.4/259.

⁵⁰² *Yearbook ... 1971*, vol. II (Part One), pp. 341 *et seq.*, doc. A/8410/Rev.1, paras. 77-98.

⁵⁰³ *Yearbook ... 1972*, vol. II, p. 323, doc. A/8710/Rev.1, para. 71.

⁵⁰⁴ See *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, doc. A/8147, para. 72; *ibid.*, *Twenty-sixth Session, Annexes*, agenda item 88, doc. A/8537, para. 135; *ibid.*, *Twenty-seventh Session, Annexes*, agenda item 85, doc. A/8892, para. 194.

⁵⁰⁵ *Yearbook ... 1973*, vol. II, pp. 3 *et seq.*, doc. A/CN.4/267.

⁵⁰⁶ *Yearbook ... 1972*, vol. II, pp. 230 *et seq.*, doc. A/8710/Rev.1, chap. II, sect. C.

⁴⁹² *Yearbook ... 1963*, vol. II, p. 224, doc. A/5509, para. 57.

⁴⁹³ Para. 98.

⁴⁹⁴ *Yearbook ... 1968*, vol. II, pp. 220 and 221, doc. A/7209/Rev.1, paras. 73 and 78.

⁴⁹⁵ *Ibid.*, p. 221, para. 79.

⁴⁹⁶ *Yearbook ... 1969*, vol. II, p. 69, doc. A/CN.4/216/Rev.1.

⁴⁹⁷ *Ibid.*, p. 228, para. 61.

relating to public property in general. The articles divided public property into the following three categories: property of the State; property of territorial authorities other than States or of public enterprises or public bodies; and property of the territory affected by the State succession.

106. The Special Rapporteur's sixth report was considered by the Commission at its twenty-fifth session, in 1973. In view of the complexity of the subject, the Commission decided, after full discussion and on the proposal of the Special Rapporteur, to limit its study for the time being to only one of the three categories of public property dealt with by the Special Rapporteur, namely, property of the State.⁵⁰⁷ In the same year, it adopted on first reading the first eight draft articles, the text of which is reproduced below.⁵⁰⁸

107. The General Assembly, in paragraph 3(d) of its resolution 3071 (XXVIII) of 30 November 1973, recommended that the Commission should "proceed with the preparation of draft articles on succession of States in respect of matters other than treaties, taking into account the views and considerations referred to in the relevant resolutions of the General Assembly".

108. In 1974, at the twenty-sixth session of the Commission, the Special Rapporteur submitted a seventh report, dealing exclusively with succession of States to State property.⁵⁰⁹ The report contained 22 draft articles, together with commentaries, forming a sequel to the eight draft articles adopted in 1973. The Commission was unable to consider that report at its twenty-sixth session since, pursuant to paragraph 3(a) and (b) of General Assembly resolution 3071 (XXVIII), it had to devote most of the session to the second reading of the draft articles on succession of States in respect of treaties and to the preparation of a first set of draft articles on State responsibility.⁵¹⁰

109. In the same year the General Assembly, in section I, paragraph 4(b), of its resolution 3315 (XXXIX) of 14 December 1974, recommended that the Commission "proceed with the preparation, on a priority basis, of draft articles on succession of States in respect of matters other than treaties". Subsequently, the General Assembly made the same recommendation in paragraph 4(e) of resolution 3495 (XXX) of 15 December 1975, paragraph 4(c)(i) of resolution 31/97 of 15 December 1976 and paragraph 4(c)(i) of resolution 32/151 of 19 December 1977. In the last mentioned resolution, the General Assembly added that the Commission should so proceed "in an endeavour to complete the first reading of the set of articles concerning State property and State debts".

⁵⁰⁷ *Yearbook ... 1973*, vol. II, p. 202, doc. A/9010/Rev.1, para. 87.

⁵⁰⁸ For the text of articles 1 to 8 and the commentaries thereto adopted by the Commission at its twenty-fifth session, see *Yearbook ... 1973*, vol. II, pp. 202 *et seq.*, doc. A/9010/Rev.1, chap. III, sect. B. For the text of all the articles adopted so far by the Commission, see sect. B, 1, below.

⁵⁰⁹ *Yearbook ... 1974*, vol. II (Part One), p. 91, doc. A/CN.4/282.

⁵¹⁰ *Ibid.*, p. 304, doc. A/9610/Rev.1, para. 160.

110. At its twenty-seventh session, in 1975, the Commission considered draft articles 9 to 15 and X, Y and Z contained in the Special Rapporteur's seventh report, and referred them to the Drafting Committee, with the exception of article 10, relating to rights in respect of the authority to grant concessions,⁵¹¹ on which it reserved its position. Having examined the provisions referred to it (with the exception, for lack of time, of articles 12 to 15), the Drafting Committee submitted texts to the Commission for articles 9 and 11 and, on the basis of articles X, Y and Z, texts for article X and for subparagraph (e) of article 3. The Commission adopted on first reading all the texts submitted by the Committee, subject to a few amendments. These texts are reproduced below in the form agreed by the Commission.⁵¹²

111. At the twenty-eighth session of the Commission, in 1976, the Special Rapporteur submitted an eighth report,⁵¹³ dealing with succession of States in respect of State property and containing six additional draft articles (articles 12 to 17), with commentaries. The Commission, at that session, considered the eighth report and adopted on first reading texts for subparagraph (f) of article 3 and articles 12 to 16. The text of these articles is reproduced below.⁵¹⁴

112. At the twenty-ninth session of the Commission, in 1977, the Special Rapporteur submitted a ninth report,⁵¹⁵ dealing with succession of States to State debts and containing 20 draft articles, with commentaries. At the same session the Commission considered those draft articles, except one (article W), together with two new draft articles submitted by the Special Rapporteur during the session

⁵¹¹ Draft article 10 read as follows:

"Article 10.

Rights in respect of the authority to grant concessions.

"1. For the purpose of the present article, the term 'concession' means the act whereby the State confers, in the territory within its national jurisdiction, on a private enterprise, a person in private law or another State, the management of a public service or the exploitation of a natural resource.

"2. Irrespective of the type of succession of States, the successor State shall replace the predecessor State in its rights of ownership of all public property covered by a concession in the territory affected by the change of sovereignty.

"3. The existence of devolution agreements regulating the treatment to be accorded to concessions shall not affect the right of eminent domain of the State over public property and natural resources in its territory."

⁵¹² For the texts of subparagraph (e) of article 3 and articles 9, 11 and X and the commentaries thereto adopted by the Commission at its twenty-seventh session, see *Yearbook ... 1975*, vol. II, pp. 110 *et seq.*, doc. A/10010/Rev.1, chap. III, sect. B, 2. For the text of all the articles adopted so far by the Commission, see sect. B, 1, below.

⁵¹³ *Yearbook ... 1976*, vol. II (Part One), p. 55, doc. A/CN.4/292.

⁵¹⁴ For the texts of subparagraph (f) of article 3 and articles 12 to 16 and the commentaries thereto adopted by the Commission at its twenty-eighth session, see *Yearbook ... 1976*, vol. II (Part Two), pp. 127 *et seq.*, doc. A/31/10, chap. IV, sect. B, 2. For the text of all the articles adopted so far by the Commission, see sect. B, 1, below.

⁵¹⁵ *Yearbook ... 1977*, vol. II (Part One), p. 45, doc. A/CN.4/301 and Add.1.

and adopted on first reading the texts for articles 17 to 22. Those texts are also reproduced below.⁵¹⁶

113. At the current session, the Special Rapporteur submitted a tenth report (A/CN.4/313),⁵¹⁷ in which he continued his examination of succession of States to State debts by proposing two additional articles relating, respectively, to the passing of State debts in the case of separation of part or parts of the territory of a State (article 24) and the devolution of State debts in the case of dissolution of a State (article 25).

114. The Commission considered articles 24 and 25, as well as article W contained in the Special Rapporteur's ninth report, at its 1500th to 1505th meetings and referred them to the Drafting Committee. The Committee, having examined the three articles, submitted to the Commission texts for articles 23 (on the basis of article W), 24 and 25. The Commission adopted on first reading, with changes, the texts recommended by the Drafting Committee for articles 23⁵¹⁸ and 24 at its 1515th meeting, and that of article 25 at its 1516th meeting. These three articles complete section 2 (Provisions relating to each type of succession of States) of part II of the draft (Succession to State debts).⁵¹⁹

115. At the current session, the Commission received a volume of the United Nations Legislative Series entitled *Materials on succession of States in respect of matters other than treaties*,⁵²⁰ containing a selection of materials relating to the practice of States and international organizations regarding succession of States in respect of matters other than treaties. The publication, which was compiled by the Codification Division of the United Nations Office of Legal Affairs at the request of the Commission,⁵²¹ contains materials provided by governments of Member States and by international organizations as well as materials collected through research work conducted by the Division.

2. GENERAL REMARKS CONCERNING THE DRAFT ARTICLES

(a) *Form of the draft*

116. As in the case of the codification of other topics by the Commission, the form to be given to the codification of succession of States in respect of matters other than treaties cannot be determined until the study of the

⁵¹⁶ For the texts of articles 17 to 22 and the commentaries thereto adopted by the Commission at its twenty-ninth session, see *Yearbook ... 1977*, vol. II (Part Two), pp. 59 *et seq.*, doc. A/32/10, chap. III, sect. B, 2.

⁵¹⁷ Reproduced in *Yearbook ... 1978*, vol. II (Part One).

⁵¹⁸ Subsequently to the adoption of article 23, one member of the Commission submitted a memorandum on the subject of paragraph 2 of that article (A/CN.4/L.282 and Corr.1). The memorandum is reproduced in *Yearbook ... 1978*, vol. II (Part One).

⁵¹⁹ For the text of articles 23 to 25 and the commentaries thereto adopted by the Commission at its thirtieth session, see sect. B, 2, below. For the text of all the articles adopted so far by the Commission, see sect. B, 1, below.

⁵²⁰ United Nations publication, Sales No. E/F.77.V.9.

⁵²¹ See *Yearbook ... 1973*, vol. II, p. 202, doc. A/9010/Rev.1, para. 90.

subject has been completed. The Commission, in accordance with its Statute, will then formulate the recommendations it considers appropriate. Without prejudging those recommendations, it has already decided to set out its study in the form of *draft articles*, since it believes that this is the best method of discerning or developing the rules of international law in the matter. The draft is worded in a form that would permit its possible use as a basis for a convention, were it decided that a convention should be concluded.

(b) *Scope of the draft*

117. As noted above,⁵²² the expression "matters other than treaties" did not appear in the titles of the three topics into which the question of succession of States and governments was divided in 1967, namely, (a) succession in respect of treaties; (b) succession in respect of rights and duties resulting from sources other than treaties; (c) succession in respect of membership of international organizations. In 1968, in a report submitted at the twentieth session of the Commission, Mr. Bedjaoui, the Special Rapporteur for the second topic, pointed out that, if the title of that topic (succession in respect of rights and duties resulting from sources other than treaties) were compared with the title of the first topic (succession in respect of treaties), it would be found that the word "treaty" was considered, in the two titles, from two different points of view. In the first case the treaty was regarded as a subject-matter of the law of succession and in the second as a source of succession. The Special Rapporteur pointed out that, in addition to its lack of homogeneity, such division of the question had the drawback of excluding from the second topic all matters that were the subject of treaty provisions. He noted that in many cases State succession was accompanied by the conclusion of a treaty regulating *inter alia* certain aspects of the succession, which were thereby excluded from the second topic as entitled in 1967. Since those aspects did not come under the first topic either, the Commission would have been obliged, had that title been retained, to leave aside a substantial part of the subject-matter in its study on State succession.⁵²³

118. Consequently, the Special Rapporteur proposed taking the *subject-matter of succession* as the criterion for the second topic and entitling it "Succession in respect of matters other than treaties".⁵²⁴ That proposal was adopted by the Commission, which stated in its report on the work of its twentieth session:

All the members of the Commission who participated in the debate agreed that the criterion for demarcation between this topic and that concerning succession in respect of treaties was "the subject-matter of succession", i.e. the content of succession and not its modalities. In order to avoid all ambiguity, it was decided, in accordance with the Special Rapporteur's suggestion, to delete from the title of the topic all reference to "sources",

⁵²² See paras. 95 and 99.

⁵²³ *Yearbook ... 1968*, vol. II, pp. 96 and 97, doc. A/CN.4/204, paras. 18-21.

⁵²⁴ For reference to the General Assembly's insertion of the words "of States" after the word "succession" in the title of the topic, see para. 100 above.

since any such reference might imply that it was intended to divide up the topic by distinguishing between conventional and non-conventional succession.⁵²⁵

119. At its twentieth session, in 1968, the Commission considered that, in view of the magnitude and complexity of the topic, it would do well to begin by studying one or two particular aspects, and it gave priority to economic and financial matters. At the same time it specified that "this did not in any way imply that all the other questions coming under the same heading would not be considered later".⁵²⁶ Accordingly, at its twenty-fifth session, in 1973, the Commission expressed the intention, subject to any later decision, to include in the draft articles as many "matters other than treaties" as possible.⁵²⁷

(c) *Structure of the draft*

120. At the current stage of its work, the Commission has divided the draft into an introduction and a number of parts. The introduction will contain the provisions that apply to the draft as a whole, and each part will contain those that apply exclusively to one category of specific matters. The Commission moreover decided, in the circumstances outlined above,⁵²⁸ to devote part I of the draft to succession to State property. Part II is devoted to succession to State debts.

121. As described above,⁵²⁹ the Commission has so far, in the course of five sessions, adopted 25 articles, three of which belong to the introduction to the draft, 13 to part I and nine to part II. Parts I and II are each divided into two sections, entitled respectively "General provisions" (section 1) and "Provisions relating to each type of succession of States" (section 2). In part I, section 1 is formed of eight articles (articles 4, 5, 6, 7, 8, 9, 11 and X) and section 2 of five articles (articles 12 to 16). In part II, four articles (articles 17 to 20) form section 1, while five articles (articles 21 to 25) fall in section 2. To the extent possible, having in mind the characteristics proper to each category of specific matters dealt with in each part, the articles forming sections 1 and 2 of part II parallel those included in the corresponding sections of part I. Thus section 1 of each part has an article determining the "Scope of the articles in the present part" (articles 4 and 17); articles 5 and 18 respectively define the terms "State property" and "State debt"; and article 6 (Rights of the successor State to State property passing to it) parallels article 19 (Obligations of the successor State in respect of State debts passing to it). Likewise, section 2 of each part has an article relating to "Transfer of part of the territory of a State" (articles 12 and 21), an article relating to "Newly independent States" (articles 13 and 22), an article relating to "Uniting of States" (articles 14 and 23), an article relating to "Separation of part or parts of the territory of a State" (articles 15 and 24),

and an article relating to "Dissolution of a State" (articles 16 and 25). The text of each set of parallel articles has been drafted in such a manner as to maintain as close a correspondence between the language of the two provisions as the subject-matter of each allows.

122. With the adoption at its twenty-eighth session of articles 12 to 16, and subject to the eventual adoption, at a future session, of provisions specifically concerning archives,⁵³⁰ the Commission completed its study of succession to State property, forming part I. In the normal course of events, after ending that study, the Commission might have considered succession to the other categories of public property.⁵³¹ However, in view of the instructions laid down by the General Assembly in resolution 3315 (XXIX),⁵³² the Special Rapporteur proceeded directly, in his ninth and tenth reports, to the examination of succession to public debts, confining this to succession to State debts. Having completed its study of succession to State debts in part II, the Commission may consider, at its thirty-first session, the procedure for the peaceful settlement of disputes arising out of the application or interpretation of the draft articles, as well as provisions concerning archives, on which the Special Rapporteur is expected to submit a report.

(d) *Provisional character of the provisions adopted at the twenty-fifth and twenty-seventh to thirtieth sessions*

123. In its report on its twenty-fifth session, the Commission stated that it had deemed it necessary, for the information of the General Assembly, to place at the beginning of its draft articles a series of general provisions defining in particular the meaning of the expressions "succession of States" and "State property". It observed that the final content of provisions of that nature would depend to a considerable extent on the results reached by the Commission in its further work. It therefore decided that, during the first reading of the draft, it would reconsider the text of the articles adopted at the twenty-fifth session with a view to making any amendments that might be found necessary.⁵³³ At its twenty-seventh to twenty-ninth sessions, and again at the current session, the Commission extended that decision to the articles adopted during those four sessions.

B. Draft articles on succession of States in respect of matters other than treaties

124. The text of articles 1 to 9, 11, X and 12 to 25 adopted by the Commission at its twenty-fifth and twenty-seventh to thirtieth sessions, together with the text of articles 23 to 25, and the commentaries thereto adopted by the Commission at the current session, are reproduced below for the information of the General Assembly.

⁵²⁵ *Yearbook ... 1968*, vol. II, pp. 216 and 217, doc. A/7209/Rev.1, para. 46.

⁵²⁶ See para. 101 above.

⁵²⁷ *Yearbook ... 1973*, vol. II, p. 202, doc. A/9010/Rev.1, para. 85.

⁵²⁸ Paras. 105 and 106.

⁵²⁹ See paras. 106, 110-112 and 114.

⁵³⁰ See *Yearbook ... 1976*, vol. II (Part Two), p. 130, doc. A/31/10, chap. IV, sect. B, 2, introductory commentary to section 2 of part I of the draft, para. (7).

⁵³¹ See paras. 105 and 106 above.

⁵³² See para. 109 above.

⁵³³ *Yearbook ... 1973*, vol. II, p. 202, doc. A/9010/Rev.1, para. 91.

1. TEXT OF ALL THE DRAFT ARTICLES ADOPTED SO FAR
BY THE COMMISSION

INTRODUCTION

Article 1. Scope of the present articles

The present articles apply to the effects of succession of States in respect of matters other than treaties.

Article 2. Cases of succession of States covered by the present articles

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

Article 3. Use of terms

For the purposes of the present articles:

(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(e) "third State" means any State other than the predecessor State or successor State;

(f) "newly independent State" means a successor State the territory of which, immediately before the date of the succession of States, was a dependent territory for the international relations of which the predecessor State was responsible.

PART I

SUCCESSION TO STATE PROPERTY

SECTION 1. GENERAL PROVISIONS

Article 4. Scope of the articles in the present Part

The articles in the present Part apply to the effects of succession of States in respect of State property.

Article 5. State property

For the purposes of the articles in the present Part, "State property" means property, rights and interests which, on the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

Article 6. Rights of the successor State to State property passing to it

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State property as passes to the successor State in accordance with the provisions of the present articles.

Article 7. Date of the passing of State property

Unless otherwise agreed or decided, the date of the passing of State property is that of the succession of States.

Article 8. Passing of State property without compensation

Without prejudice to the rights of third parties, the passing of State property from the predecessor State to the successor State in accordance with the provisions of the present articles shall take place without compensation unless otherwise agreed or decided.

Article 9. General principle of the passing of State property

Subject to the provisions of the articles of the present Part and unless otherwise agreed or decided, State property which, on the date of the succession of States, is situated in the territory to which the succession of States relates shall pass to the successor State.

[*Article 11. Passing of debts owed to the State*

Subject to the provisions of the articles of the present Part and unless otherwise agreed or decided, debts owed (*créances dues*) to the predecessor State by virtue of its sovereignty over, or its activity in, the territory to which the succession of States relates, shall pass to the successor State.]

Article X. Absence of effect of a succession of States on third party State property*

A succession of States shall not as such affect property, rights and interests which, on the date of the succession of States, are situated in the territory [of the predecessor State or] of the successor State and which, at that date, are owned by a third State according to the internal law of the predecessor State [or the successor State as the case may be].

SECTION 2. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

Article 12. Transfer of part of the territory of a State

1. When a part of the territory of a State is transferred by that State to another State, the passing of State property of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement:

(a) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.

Article 13. Newly independent States

When the successor State is a newly independent State:

1. If immovable and movable property, having belonged to an independent State which existed in the territory before the territory became dependent, became State property of the administering State during the period of dependence, it shall pass to the newly independent State.

* Provisional designation.

2. Immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State.

3. (a) Movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(b) Movable State property of the predecessor State other than the property mentioned in subparagraph (a), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory.

4. When a newly independent State is formed from two or more dependent territories, the passing of the State property of the predecessor States to the newly independent State shall be determined in accordance with the provisions of paragraphs 1 to 3.

5. When a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, the passing of the State property of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraphs 1 to 3.

6. Agreements concluded between the predecessor State and the newly independent State to determine succession to State property otherwise than by the application of the foregoing paragraphs shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

Article 14. Uniting of States

[1. When two or more States unite and thus form a successor State, the State property of the predecessor States shall, subject to paragraph 2, pass to the successor State.

2. The allocation of the State property of the predecessor States as belonging to the successor State or, as the case may be, to its component parts shall be governed by the internal law of the successor State.]

Article 15. Separation of part or parts of the territory of a State

1. When a part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree:

(a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(c) movable State property of the predecessor State, other than that mentioned in subparagraph (b), shall pass to the successor State in an equitable proportion.

2. The provisions of paragraph 1 apply when a part of the territory of a State separates from that State and unites with another State.

3. Paragraphs 1 and 2 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

Article 16. Dissolution of a State

1. When a predecessor State dissolves and disappears and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) immovable State property of the predecessor State situated outside its territory shall pass to one of the successor States, the other successor States being equitably compensated;

(c) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned;

(d) movable State property of the predecessor State other than that mentioned in subparagraph (c) shall pass to the successor States in an equitable proportion.

2. Paragraph 1 is without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

PART II

SUCCESSION OF STATES TO STATE DEBTS

SECTION 1. GENERAL PROVISIONS

Article 17. Scope of the articles in the present Part

The articles in the present Part apply to the effects of succession of States in respect of State debts.

Article 18. State debt

For the purposes of the articles in the present Part, "State debt" means any [international] financial obligation which, at the date of the succession of States, is chargeable to the State.

Article 19. Obligations of the successor State in respect of State debts passing to it

A succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the articles in the present Part.

Article 20. Effects of the passing of State debts with regard to creditors

1. The succession of States does not as such affect the rights and obligations of creditors.

2. An agreement between predecessor and successor States or, as the case may be, between successor States concerning the passing of the State debts of the predecessor State cannot be invoked by the predecessor or the successor State or States, as the case may be, against a creditor third State or international organization [or against a third State which represents a creditor] unless:

(a) the agreement has been accepted by that third State or international organization; or

(b) the consequences of that agreement are in accordance with the other applicable rules of the articles in the present Part.

SECTION 2. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

Article 21. Transfer of part of the territory of a State

1. When a part of the territory of a State is transferred by that State to another State, the passing of the State debt of the predecessor State to the successor State, is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.

Article 22. Newly independent States

When the successor State is a newly independent State:

1. No State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

2. The provisions of the agreement referred to in the preceding paragraph should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor should their implementation endanger the fundamental economic equilibria of the newly independent State.

Article 23. Uniting of States

1. When two or more States unite and thus form a successor State, the State debt of the predecessor States shall pass to the successor State.

2. Without prejudice to the foregoing provision, the successor State may, in accordance with its internal law, attribute the whole or any part of the State debt of the predecessor States to its component parts.

Article 24. Separation of part or parts of the territory of a State

1. When a part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account all relevant circumstances.

2. The provisions of paragraph 1 apply when a part of the territory of a State separates from that State and unites with another State.

Article 25. Dissolution of a State

When a predecessor State dissolves and disappears and the parts of its territory form two or more States, and unless the successor States otherwise agree, an equitable proportion of the State debt of the predecessor State shall pass to each successor State, taking into account all relevant circumstances.

2. TEXT OF ARTICLES 23 TO 25, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS THIRTIETH SESSION

PART II

SUCCESSION OF STATES TO STATE DEBTS

SECTION 2. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES (*continued*)

Article 23. Uniting of States

1. When two or more States unite and thus form a successor State, the State debt of the predecessor States shall pass to the successor State.

2. Without prejudice to the foregoing provision, the successor State may, in accordance with its internal law, attribute the whole or any part of the State debt of the predecessor States to its component parts.

Commentary

(1) Article 23, dealing with the passing of the State debt in the case of uniting of States, corresponds to article 14 in part I relating to succession to State property. As noted in the commentary to that article, the term "uniting of States" is used in the present draft to mean the "uniting in one State of two or more States, which had separate international personalities at the date of the succession", and covers the case where one State merges with another State even if the international personality of the latter continues after they have united.⁵³⁴ It should also be recalled that the position taken by the Commission is that the succession of States, in a case of uniting of States, does not take account of the particular form of the internal constitutional organization adopted by the successor State. Unification could thus lead to a wholly unitary State, to a federation or to any other form of constitutional arrangement, and the degree of separate identity retained by the original States after their uniting is irrelevant for the operation of the provisions. On the other hand, associations of States having the character of inter-governmental organizations, as well as some unions that do not result in a new State, are by definition completely outside the scope of the present article.⁵³⁵

(2) When two or more States unite and form one successor State, it seems logical for the latter to succeed to the debt of the former just as it succeeds to their property. *Res transit cum suo onere*; that basic rule is laid down in paragraph 1. This rule is generally accepted in the doctrine. According to one author, for instance, "when States merge to form a new State, their debts become the responsibility of that State".⁵³⁶

(3) In the practice of States, there seem to be only a few cases where the passing of the State debt upon uniting of States was regulated at the *international* level; questions relating to State debts have usually been defined in *internal* laws of States. One example of an international arrangement is the union of Belgium and the Netherlands through an Act of 21 July 1814.⁵³⁷ Article 1 of the Act provided:

This union shall be intimate and complete so that the two countries form but one single State, governed by the Constitution already established in Holland, which will be modified by agreement in accordance with the new circumstances.

⁵³⁴ *Yearbook ... 1976*, vol. II (Part Two), p. 147, doc. A/31/10, chap. IV, sect. B, 2, article 14, para. (1) of the commentary.

⁵³⁵ *Ibid.*, para. (2) of the commentary.

⁵³⁶ P. Fauchille, *Traité de droit international public* (8th ed. of *Manuel de droit international* by H. Bonfils), Paris, Rousseau, 1922, vol. I, p. 380.

⁵³⁷ Act signed by the Secretary of State of H. R. H. the Prince of the Netherlands in acceptance of the sovereignty of the Belgian provinces on the agreed bases, The Hague, 21 July 1814 (G. F. de Martens, ed., *Nouveau Recueil de traités*, Göttingen, Dieterich, 1887, vol. II, p. 38).

In view of the "intimate and complete" nature of the union thus achieved, article VI of the Act quite naturally concluded that

since the burdens as well as the benefits are to be common, debts contracted up to the time of the union by the Dutch provinces on the one hand and by the Belgian provinces on the other, shall be borne by the General Treasury of the Netherlands.

The Act of 21 July 1814 was later annexed to the General Act of the Congress of Vienna,⁵³⁸ and the article VI cited was invoked on a number of occasions to provide guidance for the apportionment of the debts between Holland and Belgium.

(4) A second example that may be cited is the unification of Italy—a somewhat ambiguous example, however, because scholarly opinion differs in describing the manner in which unity was achieved. As one author sums it up:

Some have regarded the Kingdom of Italy as an enlargement of the Kingdom of Sardinia, arguing that it was formed by means of successive annexations to the Kingdom of Sardinia; others have regarded it as a new subject of law created by the merger of all the former Italian States, including the Kingdom of Sardinia, which thus ceased to exist.⁵³⁹

In a general way, the Kingdom of Italy acknowledged the debts of the formerly separate States and continued the practice that had already been instituted by the King of Sardinia. Thus the Treaty of Vienna of 3 October 1866,⁵⁴⁰ under which "His Majesty the Emperor of Austria [agreed] to the union of the Lombardo-Venetian Kingdom with the Kingdom of Italy" (article III), included an article VI which provided as follows:

The Italian Government shall assume responsibility for: (1) that part of Monte Lombardo Veneto which was retained by Austria under the agreement concluded at Milan in 1860 in application of article 7 of the Treaty of Zurich; [⁵⁴¹] (2) the additional debts contracted by Monte Lombardo Veneto between 4 June 1859 and the date of conclusion of this Treaty; (3) a sum of 35 million Austrian florins in cash, representing the portion of the 1854 loan attributable to Venetia in respect of the cost of non-transportable war materials. The mode of payment of this sum of 35 million Austrian florins in cash shall, in accordance with the earlier Treaty of Zurich, be specified in an additional article.

(5) Certain treaties relating to the uniting of Central American States may also be mentioned. The Treaty of 15 June 1897 concluded by Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua⁵⁴² to form the Republic of Central America, as well as the Covenant of Union of Central America of 19 January 1921⁵⁴³ concluded by Costa Rica, El Salvador, Guatemala and Hon-

duras after the dissolution of the Republic of Central America, contained some provisions relating to the treatment of debts. Although those treaties were more directly concerned with the allocation of debts among component parts of the united States concerned, there is no doubt that in its international relations the new State as a whole assumed the debts that had been owed by various predecessor States. The Treaty of 1897, according to which the union had "for its one object the maintenance in its international relations of a single entity" (article III), provided that

The pecuniary or other obligations contracted, or which may be contracted in the future, by any of the States, are matters of individual responsibility (article XXXVII).

The 1921 Covenant stipulated that the Federal Government should administer the national finances, which should be distinct from those of the component States, and that the component States should "continue the administration of their present internal and external debts" (article V, para. (m)). It then went on to provide:

The Federal Government shall be under an obligation to see that the said administration is faithfully carried out, and that the revenues pledged thereto are earmarked for that purpose.

(6) As indicated above, it is usually through the internal laws of States that questions relating to State debts have been regulated. Such laws often provide for the internal allocation of the State debt and thus are not directly relevant to the present article. Some examples, however, may be mentioned, because they assume that the State debt of the predecessor State passes to the successor State; otherwise no question of its allocation among component parts would arise.

(7) The union of Austria and Hungary was based essentially on two instruments: the "[Austrian] Act concerning matters of common interest to all the countries of the Austrian Monarchy and the manner of dealing with them" of 21 December 1867, and the "Hungarian Act [No. 12] relating to matters of common interest to the countries of the Hungarian Crown and the other countries subject to the sovereignty of His Majesty and the manner of dealing with them", of 12 June 1867.⁵⁴⁴ The Austrian Act provided, in article 4, that

The contribution to the costs of the pre-existing public debt shall be determined by agreement between the two halves of the Empire.

Act No. 12 of 1867 of Hungary, for its part, contained the following:

Article 53. As regards public debts, Hungary, by virtue of its constitutional status, cannot, in strict law, be obliged to assume debts contracted without the legally expressed consent of the country.

Article 54. However, the present Diet has already declared "that, if a genuine constitutional régime is really applied as soon as possible in our country and also in His Majesty's other countries, it is prepared, for considerations of equity and on political grounds, to go beyond its legitimate obligations and to do whatever shall be compatible with the independence and the constitutional

⁵³⁸ *Ibid.*, p. 379. See also E. H. Feilchenfeld, *Public Debts and State Succession*, New York, MacMillan, 1931, pp. 123 and 124.

⁵³⁹ D. Anzilotti, *Corso di diritto internazionale*, 4th ed., Padua, CEDAM, 1955, p. 171.

⁵⁴⁰ G. F. de Martens, ed., *Nouveau Recueil général de traités*, Göttingen, Dieterich, 1873, vol. XVIII, pp. 405 and 406.

⁵⁴¹ The Treaty of Zurich of 10 November 1859, concluded between Austria and France, ceded Lombardy to France. The "new Government of Lombardy", under article 7 of the Treaty, was to assume three fifths of the debt of Monte Lombardo Veneto (*ibid.*, 1860, vol. XVI, part II, p. 518).

⁵⁴² *Ibid.*, Leipzig, Dieterich, 1905, second series, vol. XXXII, p. 279.

⁵⁴³ League of Nations, *Treaty Series*, vol. V, p. 9.

⁵⁴⁴ F.-R. Dareste and P. Dareste, *Les Constitutions modernes*, vol. I, 3rd ed., Paris, Challamel, 1910, pp. 394 *et seq.* (for the Austrian Act) and pp. 403 *et seq.* (for the Hungarian Act).

rights of the country to the end that His Majesty's other countries, and Hungary with them, may not be ruined by the weight of the expenses accumulated under the régime of absolute power and that the untoward consequences of the tragic period which has just elapsed may be averted".

Article 55. For this reason, and for this reason alone, Hungary is prepared to assume a portion of the public debts and to conclude an agreement to that effect, after prior negotiations, with His Majesty's other countries, as a free people with a free people.

(8) The Constitution of the Federation of Malaya (1957)⁵⁴⁵ contained a long article 167 entitled "Rights, liabilities and obligations", including the following provisions:

(1) ... all rights, liabilities and obligations of—

(a) Her Majesty in respect of the government of the Federation, and

(b) the Government of the Federation or any public officer on behalf of the Government of the Federation, shall on and after Merdeka Day [the date of uniting] be the rights, liabilities and obligations of the Federation.

(2) ... all rights, liabilities and obligations of—

(a) Her Majesty in respect of the government of Malacca or the government of Penang,

(b) His Highness the Ruler in respect of the government of any State, and

(c) the government of any State, shall on and after Merdeka Day be the rights, liabilities and obligations of the respective States.

These provisions thus appear to indicate that each State entity was concerned only with the assets and liabilities of its particular sphere. "Rights, liabilities and obligations" were apportioned according to the division of spheres of competence established between the Federation and the member States. Debts contracted were thus the responsibility of the States in respect of matters which, as from the date of uniting, fell within their respective spheres of competence. Article 167 continued:

(3) All rights, liabilities and obligations relating to any matter which was immediately before Merdeka Day the responsibility of the Federation Government but which on that date becomes the responsibility of the Government of a State, shall on that day devolve upon that State.

(4) All rights, liabilities and obligations relating to any matter which was immediately before Merdeka Day the responsibility of the Government of a State but which on that day becomes the responsibility of the Federal Government, shall on that day devolve upon the Federation.

(9) The Federation of Malaya was succeeded by Malaysia in 1963. The Malaysia Bill, which was annexed to the Agreement relating to Malaysia and came into force on 16 September 1963, contained in its part IV, relating to transitional and temporary provisions, a section 76 entitled "Succession to rights, liabilities and obligations", which read, *inter alia*:

(1) All rights, liabilities and obligations relating to any matter which was immediately before Malaysia Day the responsibility of the government of a Borneo State or of Singapore, but which on

that day becomes the responsibility of the Federal Government, shall on that day devolve upon the Federation, unless otherwise agreed between the Federal Government and the government of the State.

(2) This section does not apply to any rights, liabilities or obligations in relation to which section 75 has effect, nor does it have effect to transfer any person from service under the State to service under the Federation or otherwise affect any rights, liabilities or obligations arising from such service or from any contract of employment; but, subject to that, in this section rights, liabilities and obligations include rights, liabilities and obligations arising from contract or otherwise.

...

(4) In this section references to the government of a State include the government of the territories comprised therein before Malaysia Day.⁵⁴⁶

Similar provisions may be noted in the individual Constitutions of the member States of the Federation. For example, article 50 of the Constitution of the State of Sabah (Rights, liabilities and obligations) stated:

(1) All rights, liabilities and obligations of Her Majesty in respect of the government of the colony of North Borneo shall on the commencement of this Constitution become rights, liabilities and obligations of the State.⁵⁴⁷

(10) The Provisional Constitution of the United Arab Republic, of 5 March 1958,⁵⁴⁸ although not very explicit as regards succession to debts of the two predecessor States, Egypt and Syria, provided in article 29 that

The Government may not contract any loans, nor undertake any project which would be a burden on the State Treasury over one or more future years, except with the consent of the National Assembly.

This provision may be interpreted as giving the legislative authority of the United Arab Republic, to the exclusion of Syria and Egypt, sole power to contract loans. Furthermore, since article 70 provided for a single budget for the two regions, there may be grounds agreeing with an eminent authority that "the United Arab Republic would seem to have been the only entity competent to service the debts of the two regions".⁵⁴⁹

(11) *Paragraph 2* of the present article 23 is a subsidiary provision of the basic rule enunciated in paragraph 1. It is intended to make it clear that, provided the requirement under paragraph 1 is met, the successor State may make internal arrangements regarding the ultimate allocation of the burden to service the State debt. Thus the

⁵⁴⁶ United Nations, *Treaty Series*, vol. 750, p. 60.

⁵⁴⁷ *Ibid.*, p. 110. See also p. 134 (Constitution of the State of Sarawak, article 48), and p. 176 (Constitution of the State of Singapore, article 104).

⁵⁴⁸ English text in E. Cotran, "Some legal aspects of the formation of the United Arab Republic and the United Arab States", *International and Comparative Law Quarterly*, London, vol. 8, part 2, April 1959, pp. 374-387.

⁵⁴⁹ D. P. O'Connell, *State Succession in Municipal and International Law*, vol. I, Cambridge, University Press, 1967, p. 386. It may be noted that in UNESCO the arrears of contributions due to the organization from Egypt and Syria before their union came into being were treated as a liability of the United Arab Republic (*Materials on Succession of States in respect of Matters other than Treaties* (United Nations publication, Sales No. E/F. 77.V.9), p. 545).

⁵⁴⁵ *Malayan Constitutional Documents* (Kuala Lumpur, the Government Printer, 1959), p. 27.

successor State may allocate the whole burden to service a debt among its component parts, it may assume the whole burden itself or it may share the burden with its component parts, to the extent that such arrangements do not prejudice the application of the paramount rule set forth in paragraph 1. As a rule of international law, however, the present article does not attempt to regulate the manner in which such internal arrangements are to be made. It is a matter to be left to the internal law of the successor State concerned. As explained in the commentary to article 14, the "internal law" referred to in paragraph 2 includes in particular the constitution of the State and any other kind of internal legal rules, written or unwritten, including those that effect the incorporation in internal law of international agreements.⁵⁵⁰

(12) Certain members of the Commission expressed the view that the allocation of the State debt of the successor State among its component parts should be made subject to the consent of the creditors of the debt concerned, since a change of debt-servicing entity might be a matter of great concern to creditors. Other members, however, were opposed to the inclusion of such a requirement in paragraph 2, on the grounds that it might constitute interference in the domestic affairs of the successor State and that it would be impracticable in some cases to obtain the consent of all the creditors, who might include private creditors if the Commission so decided when it re-examined article 18. It was also pointed out that creditors were already protected under other articles, in particular those in section 1 of the present part. The Commission adopted the present text of paragraph 2 as a compromise between those opposing views; the text makes it quite clear that the rule contained in paragraph 1 is the basic rule that should remain valid in all cases, and that the successor State should ultimately be responsible for the whole debt, whatever internal arrangement it may enter into regarding the allocation of the burden for servicing its debt.

(13) The Commission is aware of the view that paragraph 2 may not be necessary, since it relates to the purely domestic allocation of debt-servicing, the international aspect of the passing of debts being defined in paragraph 1. It has retained paragraph 2, however, because very often a component part of a successor State continues to be responsible for servicing the debt incurred by it as a State before it united with another State or other States. If the possibility of internal arrangement is not expressly indicated, as it is in paragraph 2, the creditors—in particular the private creditors who could be brought within the scope of the present draft—would be placed in a very difficult situation in finding out where to go to collect their debts.

(14) During its consideration of article 23, the Commission came to realize that certain questions relating to the protection of creditors still remained unsettled. It therefore decided that it would give further consideration to those questions at the second reading, especially in conjunction with articles 18, 19 and 20.

(15) Although the present article corresponds to article 14, it should be noted that the Commission has adopted, in particular for paragraph 2, a different formulation. More significantly, the present article, unlike article 14, is not placed between square brackets. The Commission believes that, at the second reading, article 14 should also be re-examined in the light of the formulation adopted for article 23.

Article 24. Separation of part or parts of the territory of a State

1. When a part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account all relevant circumstances.

2. The provisions of paragraph 1 apply when a part of the territory of a State separates from that State and unites with another State.

Article 25. Dissolution of a State

When a predecessor State dissolves and disappears and the parts of its territory form two or more States, and unless the successor States otherwise agree, an equitable proportion of the State debt of the predecessor State shall pass to each successor State, taking into account all relevant circumstances.

Commentary to articles 24 and 25

(1) The topics of succession of States covered by articles 24 and 25 correspond to those dealt with by articles 15 and 16 respectively in part I; hence the use of exactly the same introductory phrases in the corresponding articles to define the scope of each. Articles 24 and 25 both concern cases where a part or parts of the territory of a State separate from that State to form one or more individual States. They differ, however, in that, while under article 24 the predecessor State continues its existence, under article 25 it ceases to exist after the separation of parts of its territory. The latter case is referred to as "dissolution of a State" in articles 16 and 25.⁵⁵¹

(2) In establishing the rule for article 24 and 25, the Commission believes that, unless there is a compelling reason to the contrary, the passing of the State debt in the two types of succession covered by these articles should be governed by a common basic rule, as are articles 15 and 16, relating to State property. It is on the basis of this assumption that State practice and legal doctrine will be examined in the following paragraphs.

(3) The practice of States offers few examples of separation of part or parts of the territory. Some cases may nevertheless be mentioned, one of them being the establishment of the Irish Free State. By a Treaty of 1921, Ireland obtained from the United Kingdom the status of

⁵⁵⁰ *Yearbook ... 1976*, vol. II (Part Two), p. 148, doc. A/31/10, chap. IV, sect. B, 2, article 14, para. (3) of the commentary.

⁵⁵¹ *Ibid.*, p. 150, articles 15 and 16, para. (1) of the commentary.

a Dominion and became the Irish Free State. The Treaty apportioned debts between the predecessor State and the successor State on the following terms:

The Irish Free State shall assume liability for the service of the Public Debt of the United Kingdom as existing at the date hereof and towards the payment of war pensions as existing at that date in such proportion as may be fair and equitable, having regard to any just claims on the part of Ireland by way of set off or counter-claim, the amount of such sums being determined in default of agreement by the arbitration of one or more independent persons being citizens of the British Empire.⁵⁵²

(4) Another example is the separation of Singapore which, after joining the Federation of Malaya in 1963, withdrew from it and achieved independence in 1965. Article VIII of the Agreement relating to the separation of Singapore from Malaysia as an independent and sovereign State, signed at Kuala Lumpur on 7 August 1965, provides:

With regard to any agreement entered into between the Government of Singapore and any other country or corporate body which has been guaranteed by the Government of Malaysia, the Government of Singapore hereby undertakes to negotiate with such country or corporate body to enter into a fresh agreement releasing the Government of Malaysia of its liabilities and obligations under the said guarantee, and the Government of Singapore hereby undertakes to indemnify the Government of Malaysia fully for any liabilities, obligations or damage which it may suffer as a result of the said guarantee.⁵⁵³

(5) The two above-mentioned examples relate to cases where separation took place by agreement between the predecessor and successor States. However, it is far from certain that separation is always achieved by agreement. For example, the apportionment of State debts between Bangladesh and Pakistan does not seem to have been settled since the failure of the negotiations held at Dacca from 27 to 29 June 1974.⁵⁵⁴ This is one of the points that clearly distinguishes cases of separation, covered by article 24, from cases of transfer of a part of a State's territory, dealt with in article 21. The latter article, it should be recalled, concerns the transfer of relatively small or unimportant territories, effected by theoretically peaceful procedures and, in principle, by agreement between the ceding and beneficiary States.

⁵⁵² Article V of the Treaty of 6 December 1921 between Great Britain and Ireland (League of Nations, *Treaty Series*, vol. XXVI, p. 10).

⁵⁵³ United Nations, *Treaty Series*, vol. 563, p. 94. The Constitution of Malaysia (Singapore Amendment) Act, 1965, also contains some provisions relating to "succession to liabilities and obligations", including the following paragraph:

"9. All property, movable and immovable, and rights, liabilities and obligations which before Malaysia Day belonged to or were the responsibility of the Government of Singapore and which on that day or after became the property of or the responsibility of the Government of Malaysia shall on Singapore Day revert to and vest in or devolve upon and become once again the property of or the responsibility of Singapore." (*Ibid.*, p. 100.)

⁵⁵⁴ Ch. Rousseau, *Droit international public*, vol. III, Paris, Sirey, 1977, p. 454. According to the same author, "Bangladesh claimed 56 per cent of all common property, while at the same time remaining very reticent regarding the apportionment of existing debts, a problem that it apparently did not want to tackle until after settlement of the apportionment of assets—an approach that Pakistan is said to have refused" (*ibid.*).

(6) With regard to dissolution of a State, covered by article 25, the following historical precedents may be cited: the dissolution of Great Colombia (1829-1831), the break-up of the Belgian-Dutch State (1830), the dissolution of the Union of Norway and Sweden (1905), the disappearance of the Austro-Hungarian Empire (1919); the disappearance of the Federation of Mali (1960), the dissolution of the United Arab Republic (1961), and the dissolution of the Federation of Rhodesia-Nyasaland (1963). Some of these cases are considered below, with a view to establishing how the parties concerned attempted to settle the passing of State debts.

(7) Great Colombia, which was formed in 1821 by the union of New Granada, Venezuela and Ecuador, was not to be long-lived. Within about 10 years, internal struggles had put an end to the union, whose dissolution was fully consummated in 1831.⁵⁵⁵ The successor States agreed to assume responsibility for the debts of the Union. New Granada and Ecuador first established the principle in the Treaty of Peace and Friendship concluded at Pasto on 8 December 1832. Article VII of the Treaty provided:

It has been agreed, and is hereby agreed, in the most solemn manner, and under the Regulations of the Laws of both States, that New Granada and Ecuador shall pay such share of the Debts, Domestic and Foreign, as may proportionably belong to them as integral parts which they formed, of the Republic of Colombia, which Republic recognized the said debts *in solidum*. Moreover, each State agrees to answer for the amount of which it may have disposed belonging to the said Republic.⁵⁵⁶

Reference may also be made to the Convention of Bogotá of 23 December 1834, concluded between New Granada and Venezuela, to which Ecuador subsequently acceded on 17 April 1857.⁵⁵⁷ These two instruments indicate that the successor States were to apportion the debts of Great Colombia among themselves in the following proportions: New Granada, 50 per cent; Venezuela, 28.5 per cent; Ecuador, 21.5 per cent.⁵⁵⁸

(8) The break-up of the Belgian-Dutch State (Kingdom of the Netherlands) in 1830 has been described as "one of the oddest cases because of the numerous negotiations to which it gave rise and the statements made in the course of those negotiations".⁵⁵⁹ What came to be known as "the Belgian-Dutch question" had necessitated the intervention of the five Powers of the Holy Alliance, in the form of a conference that opened in London in 1830 and that culminated only in 1839 in the Treaty of London

⁵⁵⁵ See V.-L. Tapié, *Histoire de l'Amérique latine au XIX^{ème} siècle*, Paris, Montaigne, 1945. See, in particular, the discussion of the break-up of Great Colombia, pp. 57-60.

⁵⁵⁶ G. F. de Martens, ed., *Nouveau Recueil de traités*, Göttingen, Dieterich, 1838, vol. XIII, p. 63. [Quoted in English.]

⁵⁵⁷ Convention for the acknowledgment and division of the active and passive credits of Colombia (*British and Foreign State Papers*, vol. XXIII, 1834-1835, London, Ridgway, 1852, p. 1342. See Feilchenfeld, *op. cit.*, pp. 296-298 (especially p. 296, where the pertinent articles of the Convention are quoted).

⁵⁵⁸ A. Sanchez de Bustamante y Sirvén, *Droit international public* (French translation by P. Goulé), Paris, Sirey, 1936, vol. III, p. 337; H. Accioly, *Traité de droit international public* (French translation by P. Goulé), Paris, Sirey, 1940, vol. I, p. 199; O'Connell, *op. cit.*, p. 388.

⁵⁵⁹ Sanchez de Bustamante y Sirén, *op. cit.*, p. 336.

of 19 April of that year.⁵⁶⁰ During the nine years of negotiations, a number of documents had to be prepared before the claims regarding the debts of the Kingdom of the Netherlands could be settled.

(9) One such document, the Twelfth Protocol of the London Conference, dated 27 January 1831, prepared by the five Powers, was the first to propose a fairly specific mode of settlement of the debts, which was to be included among the general principles to be applied in the draft treaty of London. The five Powers first sought to justify their intervention by asserting that "experience ... had only too often demonstrated to them the complete impossibility of the Parties directly concerned agreeing on such matters, if the benevolent solicitude of the five Courts did not facilitate agreement".⁵⁶¹ They cited the existence of relevant precedents that they had helped to establish and that had "in the past led to decisions based on principles which, far from being new, were those that have always governed the reciprocal relations of States and that have been cited and confirmed in special agreements concluded between the five Courts; those agreements cannot therefore be changed in any case without the participation of the Contracting Powers".⁵⁶² One of the leading precedents relied upon by these five monarchies was apparently the aforementioned Act of 21 July 1814⁵⁶³ by which Belgium and the Netherlands were united. Article VI of that Act provided that

Since the burdens as well as the benefits are to be common, debts contracted up to the time of the union by the Dutch provinces on the one hand and by the Belgian provinces on the other shall be borne by the General Treasury of the Netherlands.

From that provision the five Powers drew the conclusion of principle that, "upon the termination of the union, the community in question likewise should probably come to an end, and, as a further corollary of the principle, the debts which, under the system of the union, had been merged, might under the system of separation, be re-divided".⁵⁶⁴ Applying that principle in the case of the Netherlands, the five Powers concluded that "each country should first reassume exclusive responsibility for the debts it owed before the union", and that Belgium should in addition assume "*in fair proportion*, the debts contracted since the date of the said union and during the period of the union by the General Treasury of the Kingdom of the Netherlands, as they are shown in the budget of that Kingdom".⁵⁶⁵ That conclusion was incorporated in the "Bases for establishing the separation of Belgium and Holland" annexed to the Twelfth Protocol. Articles X and XI of those "bases" read as follows:

Article X. The debts of the Kingdom of the Netherlands for which the Royal Treasury is at present liable, namely (1) the out-

standing debt on which interest is payable; (2) the deferred debt; (3) the various bonds of the Amortization Syndicate; and (4) the reimbursable annuity funds secured on State lands by special mortgages, shall be apportioned between Holland and Belgium in proportion to the average share of the direct, indirect and excise taxes of the Kingdom paid by each of the two countries during the years 1827, 1828 and 1829.

Article XI. Inasmuch as the average share in question makes Holland liable for 15/31 and Belgium liable for 16/31 of the aforesaid debts, it is understood that Belgium will continue to be liable for the payment of appropriate interest.⁵⁶⁶

These provisions were objected to by France, which considered that "His Majesty's Government has not found their bases equitable enough to be acceptable".⁵⁶⁷ The four courts to which the French communication was addressed replied that:

The principle established in Protocol No. 12, with regard to the debt, was as follows: When the Kingdom of the Netherlands was formed by the union of Holland with Belgium, the then existing debts of those two countries were merged by the Treaty of 1815 into a single whole and declared to be the national debt of the United Kingdom. It is therefore necessary and just that, when Holland and Belgium separate, each should resume responsibility for the debt for which it was responsible before their union and that these debts, which were united at the same time as the two countries, should likewise be separated.

Subsequent to the union, the United Kingdom has an additional debt which, upon the separation of the United Kingdom, must be *fairly* apportioned between the two States; the Protocol does not, however, specify what exactly the fair proportion should be and leaves this question to be settled later.⁵⁶⁸

(10) The Netherlands proved particularly satisfied and its plenipotentiaries were authorized to indicate their full and complete acceptance of all the basic articles designed to establish the separation of Belgium and Holland, which basic provisions derived from the London protocols of 20 and 27 January 1831.⁵⁶⁹ The Belgian point of view was reflected in a report dated 15 March 1831 to the Regent by the Belgian Minister for Foreign Affairs, which stated:

Protocols Nos. 12 and 13 dated 27 January ... have shown in the most obvious manner the partiality, no doubt involuntary, of some of the plenipotentiaries in the Conference. These Protocols, dealing with the fixing of the boundaries, the armistice and, above all, the apportionment of the debts, arrangements which would consummate the ruin of Belgium, were restored ... by a note of 22 February, the last act of the Diplomatic Committee.⁵⁷⁰

Belgium thus rejected the provisions of the "Bases designed to establish the separation of Belgium and Holland". More precisely, it made its acceptance dependent on the facilities to be accorded it by the Powers in the acquisition, against payment, of the Grand Duchy of Luxembourg.

⁵⁶⁰ See G. F. de Martens, ed., *Nouveau Recueil de traités*, Göttingen, Dieterich, 1842, vol. XVI, p. 773. The five Powers of the Holy Alliance were Austria, France, Great Britain, Prussia and Russia.

⁵⁶¹ *Ibid.*, 1836, vol. X, p. 164.

⁵⁶² *Ibid.*, p. 165.

⁵⁶³ See article 23 above, para. (3) of the commentary.

⁵⁶⁴ G. F. de Martens, ed., *Nouveau Recueil de traités*, Göttingen, Dieterich, 1836, vol. X, p. 165.

⁵⁶⁵ *Ibid.*, pp. 165 and 166.

⁵⁶⁶ *Ibid.*, p. 172.

⁵⁶⁷ Twentieth Protocol of the London Conference, dated 17 March 1831 (annex A). Communication to the Conference by the plenipotentiary of France, Paris, 1 March 1831 (*ibid.*, p. 228).

⁵⁶⁸ *Ibid.*, (annex B). The plenipotentiaries of the four Courts to the plenipotentiary of France (*ibid.*, p. 233).

⁵⁶⁹ Eleventh Protocol of the London Conference, dated 20 January 1831, determining the boundaries of Holland (*ibid.*, p. 158) and Eighteenth Protocol, dated 18 February 1831 (*ibid.*, p. 196).

⁵⁷⁰ *Ibid.*, p. 222.

(11) The Twenty-fourth Protocol of the London Conference, dated 21 May 1831, clearly showed that "acceptance by the Belgian Congress of the bases for the separation of Belgium from Holland would be very largely facilitated if the five Courts consented to support Belgium in its wish to obtain, against payment, the Grand Duchy of Luxembourg".⁵⁷¹ As its wish could not be satisfied, Belgium refused to agree to the debt apportionment proposals that been had made to it. The Powers thereupon took it upon themselves to devise another formula for the apportionment of the debts: that was the object of the Twenty-fifth Protocol, dated 26 June 1831, of the London Conference. The new protocol contained a draft treaty consisting of 18 articles, article XII of which stated:

The debts shall be apportioned in such a way that each of the two countries shall be liable for all the debts which originally, before the union, encumbered the territories composing them, and in such a way that debts which were jointly contracted shall be divided up in a just proportion.⁵⁷²

That was in fact only a reaffirmation, not spelt out in figures, of the principle of the apportionment of debts contained in the Twelfth Protocol, of 27 January 1831. Unlike the latter, however, the new protocol did not specify the debts for which the parties were liable. This time it was the Kingdom of the Netherlands that rejected the proposals of the Conference,⁵⁷³ and Belgium that agreed to them.⁵⁷⁴

(12) Before the Conference adjourned on 1 October 1832, it made several unsuccessful proposals and counter-proposals.⁵⁷⁵ Not until seven years later did the Belgian-

Netherlands Treaty of 9 April 1839 devise a solution to the problem of the succession to debts arising out of the separation of Belgium and Holland.

(13) The Belgian-Dutch dispute concerning succession to the State debts of the Netherlands was finally settled by the Treaty of 19 April 1839, article 13 of the annex to which contained the following provisions:

1. As from 1 January 1839, Belgium shall, by reason of the apportionment of the public debts of the Kingdom of the Netherlands, continue to be liable for a sum of 5 million Netherlands florins in annuity bonds, the principal of which shall be transferred from the debit side of the Amsterdam ledger or of the ledger of the General Treasury of the Kingdom of the Netherlands to the debit side of the ledger of Belgium.

2. The principal transferred and the annuity bonds entered on the debit side of the ledger of Belgium in accordance with the preceding paragraph, up to a total of 5 million Netherlands florins in annuity payments, shall be considered as part of the Belgian national debt, and Belgium undertakes not to allow, either now or in future, any distinction to be made between the portion of its public debt resulting from its union with Holland and any other existing or future Belgian national debt.

...

4. By the creation of the said sum of 5 million florins of annuities, Belgium shall be discharged vis-à-vis Holland of any obligation resulting from the apportionment of the public debts of the Kingdom of the Netherlands.⁵⁷⁶

The five Powers of the Holy Alliance, under whose auspices the 1839 Treaty was signed, guaranteed its provisions in two conventions of the same date signed by them and by Belgium and Holland. It was stated in those instruments that the articles of the Belgian-Dutch Treaty "are deemed to have the same force and value as they would have if they had been included textually in the present instrument, and are consequently placed under the guarantee of Their Majesties".⁵⁷⁷

⁵⁷¹ *Ibid.*, p. 269.

⁵⁷² *Ibid.*, p. 290.

⁵⁷³ See Twenty-eighth Protocol of the London Conference, dated 25 July 1831 (annex A), "The Government of the Netherlands to the Conference", The Hague, 12 July 1831 (*ibid.*, 1837, vol. XI, pp. 212-222, and particularly p. 221).

⁵⁷⁴ See Twenty-seventh Protocol of the London Conference, dated 12 July 1831 (annex), "The Belgian Government to the Conference", Brussels, 9 July 1831 (*ibid.*, p. 210).

⁵⁷⁵ These proposals and counter-proposals included those made in two protocols and a treaty:

(a) The Forty-fourth Protocol of the London Conference, dated 26 September 1831 (annex A), Proposals by the London Conference, item 3 of which comprised 12 articles (articles VII-XVIII), of which the first three provided:

"VII. Belgium, including the Grand Duchy of Luxembourg, shall be liable for the debts which it had lawfully contracted before the establishment of the Kingdom of the Netherlands.

"Debts lawfully contracted from the time of the establishment of the Kingdom until 1 October 1830 shall be equally apportioned.

"VIII. Expenditures by the Treasury of the Netherlands for special items which remain the property of one of the two Contracting Parties shall be charged to it, and the amount shall be deducted from the debt allocated to the other Party.

"IX. The expenditures referred to in the preceding article include the amortization of the debt, both outstanding and deferred, in the proportion of the original debts, in accordance with article VII." (*Ibid.*, p. 291.)

These proposals, which were the subject of strong criticism by both the States concerned, were not adopted.

(b) The Forty-ninth Protocol of the London Conference, dated 14 October 1831 (annex A), Articles concerning the separation of Belgium from Holland, of which the first two paragraphs of a long article XIII read as follows:

"1. As from 1 January 1832, Belgium shall, by reason of the apportionment of the public debts of the Kingdom of the Netherlands, continue to be liable for a sum of 8,400,000 Netherlands florins in annuity bonds, the principal of which shall be transferred from the debit side of the Amsterdam ledger or of the ledger of the General Treasury of the Kingdom of the Netherlands to the debit side of the ledger of Belgium.

"2. The principal transferred and the annuity bonds entered on the debit side of the ledger of Belgium in accordance with the preceding paragraph, up to a total of 8,400,000 Netherlands florins of annuity bonds, shall be considered as part of the Belgian national debt, and Belgium undertakes not to allow, either now or in future, any distinction to be made between this portion of its public debt resulting from its union with Holland and any other existing or future Belgian national debt." (*Ibid.*, pp. 328 and 329.)

Belgium agreed to this provision (*ibid.*, pp. 350 and 351).

(c) The treaty for the final separation of Belgium from Holland, signed at London by the five Courts and by Belgium on 15 November 1831 (*ibid.*, p. 390), used the wording of provisions of the Forty-ninth Protocol reproduced above. This time too, however, it was not accepted by Holland (see Fifty-third Protocol of the London Conference, dated 4 January 1832, annex A) (*ibid.*, vol. XII, pp. 285 *et seq.*).

⁵⁷⁶ *Ibid.*, 1842, vol. XVI, pp. 782 and 783.

⁵⁷⁷ Article 2 of the London Treaty of 19 April 1839, signed by the five Courts and the Netherlands (*ibid.*, p. 773), and article 1 of the London Treaty of 19 April 1839, signed by the five Courts and Belgium (*ibid.*, p. 790).

(14) The dissolution of the Union of Norway and Sweden was effected by several conventions signed at Stockholm on 26 October 1905.⁵⁷⁸ The treatment of debts was decided by the Agreement of 23 March 1906 relating to the settlement of economic questions arising in connexion with the dissolution of the union between Norway and Sweden,⁵⁷⁹ which is commonly interpreted to mean that each State continued to be liable for its debts.⁵⁸⁰ The Agreement provided:

Article 1. Norway shall pay to Sweden the share applicable to the first half of 1905 of the appropriations voted by Norway out of the common budget for the foreign relations of Sweden and Norway in respect of that year, into the Cabinet Fund, and also, out of the appropriations voted by Norway for contingent and unforeseen expenditures of the Cabinet Fund for the same year, the share attributable to Norway of the cost-of-living allowances paid to the agents and officials of the Ministry of Foreign Relations for the first half of 1905.

Article 2. Norway shall pay to Sweden the share applicable to the period 1 January-31 October 1905 of the appropriations voted by Norway out of the common budget for that year, into the Consulates Fund, and also the share attributable to Norway of the following expenditures incurred in 1904 and not accounted for in the appropriations for that year.

(a) the actual service expenditures of the consulates for the whole of 1904; and

(b) the office expenses actually attributed to the remunerated consulates, subject to production of documentary evidence, for the second half of 1904.⁵⁸¹

These provisions, the purpose of which was to make Norway assume its share of common budget expenditures, become clearer if it is remembered that, by a duplication of functions, the King of Sweden was also the King of Norway, and that the Swedish institutions were exclusively responsible for the diplomatic and consular representation of the Union. In this connexion, it should be noted that the cause of the break between the two States was Norway's wish to ensure its own consular service.⁵⁸² From the foregoing considerations, it may be inferred that the consequences of the dissolution of the Swedish-Norwegian Union were, first, the continued liability of each of the two States for its own debts and, secondly, an apportionment of the common debts between the two successor States.

(15) The Federation of which Northern Rhodesia, Southern Rhodesia and Nyasaland had been members since 1953 was dissolved in 1963 by an Order in Council of the United Kingdom Government. The Order also apportioned the federal debt among the three territories in the following proportions: Southern Rhodesia, 52 per

cent; Northern Rhodesia, 37 per cent; Nyasaland, 11 per cent. The apportionment was made on the basis of the share of the federal income allocated to each territory.⁵⁸³ This apportionment of the debts, as operated by the United Kingdom Government's Order in Council, was challenged both as to its principle and as to its procedure. It was first pointed out that, "since the dissolution was an exercise of Britain's sovereign power, Britain should assume responsibility."⁵⁸⁴ This observation was all the more pertinent as the debts thus apportioned among the successor States by a British act of authority included debts contracted, under the administering Power's guarantee, with IBRD. This explains the statement by Northern Rhodesia that "it had at no time agreed to the allocation laid down in the Order, and had only reluctantly acquiesced in the settlement".⁵⁸⁵ Zambia, formerly Northern Rhodesia, later dropped its claim, because of the aid granted to it by the United Kingdom Government.⁵⁸⁶

(16) One of the cases considered above, the dissolution of Great Colombia, gave rise to two arbitral awards almost 50 years after the apportionment among the successor States of the debts of the predecessor State. These were the *Sarah Campbell* and *W. Ackers-Cage* cases,⁵⁸⁷ taken up by the Mixed Commission of Caracas set up between Great Britain and Venezuela under an agreement of 21 September 1868, whereby two claimants—Alexander Campbell (later, his widow Sarah Campbell) and W. Ackers-Cage—sought to obtain from Venezuela payment of a debt owing to them by Great Colombia. Sturup, the umpire, in his award of 1 October 1869, held that "the two claims should be paid by the Republic. However, since they both form part of the country's external debt, it would be unjust to require that they be paid in full."⁵⁸⁸

(17) Two authors who commented on this award considered that "the responsibility of Venezuela for the debts of the former Republic of Colombia, from which it had originated, was not and could not be contested" because, in their opinion (citing Bonfils and Fauchille), it could be regarded as a rule of international law that "where a State ceases to exist by breaking up or dividing into several new States, the new States should each bear, in an equitable proportion, a share of the debts of the original State as a whole".⁵⁸⁹ Another author took the same view, adding pertinently that "the umpire, Sturup, simply took account of the resources of the successor State in imposing an equitable reduction of the amount of the claims".⁵⁹⁰

(18) In connexion with the dissolution of a State in general, the following rule has been suggested:

If a State ceases to exist by breaking up and dividing into several

⁵⁷⁸ See L. Jordan, *La séparation de la Suède et de la Norvège*, Paris, Pédone, 1906 [thesis]; Fauchille, *op. cit.*, p. 234.

⁵⁷⁹ Baron Descamps and L. Renault, *Recueil international des traités du XX^e siècle, année 1906*, Paris, Rousseau, pp. 858-862.

⁵⁸⁰ Thus Fauchille (*op. cit.*, p. 389) writes:

"After Sweden and Norway had dissolved their real union in 1905, a convention between the two countries, dated 23 March 1906, left each of them responsible for its personal debts."

⁵⁸¹ Descamps and Renault, *op. cit.*, pp. 858 and 859.

⁵⁸² Académie diplomatique internationale, *Dictionnaire diplomatique*, edited by A.-F. Frangulis, Paris, Lang, Blanchong [1933], vol. II, p. 233.

⁵⁸³ O'Connell, *op. cit.*, p. 393.

⁵⁸⁴ *Ibid.*, p. 394.

⁵⁸⁵ *Ibid.*, p. 393.

⁵⁸⁶ *Ibid.*, foot-note 6.

⁵⁸⁷ A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux*, Paris, Pédone, 1923, vol. II, pp. 552-556.

⁵⁸⁸ *Ibid.*, pp. 554 and 555.

⁵⁸⁹ *Ibid.*, p. 555.

⁵⁹⁰ Rousseau, *op. cit.*, p. 431.

new States, each of the latter shall in equitable proportion assume responsibility for a share of the debts of the original State as a whole, and each of them shall also assume exclusive responsibility for the debts contracted in the exclusive interest of its territory.⁵⁹¹

(19) A comparable formula is offered by an authority on the subject, article 49 of whose codification of international law provides that:

If a State should divide into two or more new States, none of which is to be considered as the continuation of the former State, that former State is deemed to have ceased to exist and the new States replace it with the status of new persons.⁵⁹²

He, too, recommends the equitable apportionment of the debts of the extinct predecessor State, citing as an example "the division of the Netherlands into two kingdoms: Holland and Belgium", although he considers that "the former Netherlands was in a way continued by Holland particularly as regards the colonies."⁵⁹³

(20) From the foregoing survey, two conclusions may be drawn that are worth noting in the context of articles 24 and 25. The first relates to the classification of the type of State succession exemplified by the precedents cited. In choosing historical examples of the practice of States with a view to their classification as cases of separation-secession and dissolution respectively, the Commission has mainly taken into account the fact that, in a case of the first type, the predecessor State survives the transfer of territory, whereas in a case of the second type it ceases to exist. In the first case, the problem of the apportionment of debts arises between a predecessor State and one or more successor States, whereas in the second it affects successor States *inter se*. Yet even this apparently very dependable criterion of the State's disappearance or survival cannot ultimately provide sure guidance, for it raises, in particular, the thorny problems of the State's continuity and identity.

(21) In the case of the disappearance of the Kingdom of the Netherlands in 1830, which the Commission has considered, not without some hesitation, as one of the examples of dissolution of a State, the predecessor State—the Belgian-Dutch monarchical entity—seems genuinely to have disappeared and to have been replaced by two new successor States, Belgium and Holland, each of which assumed responsibility for one half of the debts of the predecessor State. It might be said that it was actually the mode of settlement of the apportionment of the debts that confirmed the nature of the event that had occurred in the Dutch monarchy and made it possible to describe it as a "dissolution of a State". It is also possible, on the other hand, to regard the Netherlands example as a case of secession, and to hold, like one of the authors cited above, that, "from a legal point of view, the independence of Belgium was nothing more than a secession of a province".⁵⁹⁴ That approach might have proved seriously prejudicial to Holland's interests had it

been acted upon, precisely in so far as it was not apparently demonstrated that the secessionist province was legally bound to participate—let alone in equal proportion—in the servicing of the debt of the dismembered State. But that approach was not, in fact, adopted by the London Conference, or even by the parties themselves, least of all by Belgium. Both States regarded their separation as the dissolution of a union, and each claimed for itself the title of successor State to a predecessor State that had ceased to exist. That was the treatment adopted in the above-mentioned Treaty of London of 19 April 1839, concluded between the five Powers and the Netherlands, article 3 of which provided that

*The Union** which existed between Holland and Belgium under the Treaty of Vienna of 31 May 1815 is recognized by His Majesty the King of the Netherlands, Grand Duke of Luxembourg, as being *dissolved**.⁵⁹⁵

(22) The break-up of the Kingdom of the Netherlands is not the only example. There are other cases concerning which opinions differ as to whether they should be regarded as falling under article 24 or under article 25. In any event, it is clear that there is a relationship between the two types of succession, and that the solutions adopted in the two cases should at least be analogous.

(23) The second conclusion concerns the nature of the problems arising in connexion with succession of States in respect of debts. In cases of separation of a part of the territory of a State as well as of dissolution of a State, the problems posed by the devolution of the State debt would involve, in the final analysis, an endeavour to adjust the interests of the States concerned. Such interests are often substantial and almost always conflicting, and their reconciliation will in many cases call for difficult negotiations between the States directly affected by the succession. Only these States really know what are their own interests, and are often the best qualified to defend them, and in any event they alone know how far they can go in making concessions. These considerations are most strikingly illustrated by the case of the dissolution of the Belgian-Dutch State, where the two successor States refused to submit to the many settlement proposals made by third States, which happened to be the major Powers at that time. The solution was worked out by the States concerned themselves, although a certain kinship is discernible between the various types of settlement proposed to them and the solutions they ultimately adopted. While it is undeniably more than desirable—and indeed necessary—to leave the parties concerned the widest latitude in seeking an agreement acceptable to each of them, nevertheless this "face-to-face" confrontation might in some situations prove prejudicial to the interests of the weaker party.

(24) In the light of the foregoing remarks, the best solution in the two types of succession envisaged under articles 24 and 25 would be to adopt a common residual rule to be applied in cases where the States concerned cannot reach agreement on the devolution of the debt of the predecessor State. Furthermore, the historical pre-

⁵⁹¹ Fauchille, *op. cit.*, p. 380.

⁵⁹² J. C. Bluntschli, *Das moderne Völkerrecht*, 3rd ed., Nördlingen, Beck, 1878, pp. 81 and 82.

⁵⁹³ *Ibid.*

⁵⁹⁴ Feilchenfeld, *op. cit.*, p. 208.

⁵⁹⁵ G. F. de Martens, ed., *Nouveau Recueil de traités*, vol. XVI (*op. cit.*), p. 770.

decents analysed above, together with the theoretical considerations amply developed throughout the present draft articles, lead the Commission to conclude that such a rule should be based on equity.

(25) *Paragraph 1 of article 24*, as well as *article 25*, thus state that, unless the States concerned otherwise agree, "an equitable proportion of the State debt of the predecessor State" shall pass to the successor State or States, "taking into account all relevant circumstances". The States concerned are "the predecessor State and the successor State" in the case of *article 24*, and "the successor States" themselves in the case of *article 25*, where the predecessor State disappears. It should be noted that in *article 25* the Commission has omitted the word "concerned", which appears after the words "the successor States" in *articles 16*, because of the different situation covered by *article 25*, which involves the passing of a debt rather than of property. Such debt cannot be imposed on one of the successor States by agreement between the other successor States alone.

(26) Regarding the phrase "unless ... otherwise agree", the Commission wishes to point out that it is by no means intended to imply that the parties may agree on a solution that is not equitable. As demonstrated by State practice, especially in the case of the break-up of the Kingdom of the Netherlands, an equitable or "just" apportionment of debts should always be the guiding principle for negotiations. In the opinion of certain members, however, *paragraph 1 of article 24*, as drafted, could be interpreted as enabling the predecessor State to enter into an agreement that would not provide for an equitable allocation of the State debt. Moreover, this provision appears to contradict that of *article 20, paragraph 2*, which allows creditors to deny the effect of such agreement. It is accordingly suggested that the Commission re-examine *article 20, paragraph 2*, and its relationship with *article 24, paragraph 1*, at the second reading.

(27) With regard to the expression "taking into account all relevant circumstances", used in *articles 24 and 25*, the Commission adopted that formula despite the fact that it did not conform to the one already used in *article 21, paragraph 2*, namely, "taking into account, *inter alia* the property, rights and interests which pass to the successor State in relation to that State debt". Although the latter phrase could theoretically be considered as including "all relevant circumstances", the Commission preferred the new expression for *articles 24 and 25* in order to avoid a division of opinion among its members as to whether those articles should expressly mention, as one of the factors to be taken into account, the "tax-paying capacity" or "debt-servicing capacity", which would best convey the meaning of the French term "capacité contributive". Some members considered such capacity as one of the most important factors in dealing with the passing of

State debts. Other members were of the view that it should nowhere be mentioned because, if that factor were to be singled out, there might be a danger of excluding others that could equally be important. In addition, the term "capacité contributive" was thought to be too vague to be uniformly interpreted. The expression "taking into account all relevant circumstances" should therefore be understood to embrace all the factors relevant to a given situation, including "capacité contributive", both actual and potential, and the "property, rights and interests" passing to the successor State in relation to the State debt in question. Other factors, too, might deserve particular consideration in certain cases, their relative importance varying according to the specific situation.

(28) In adopting the expression "taking into account all relevant circumstances" for *articles 24 and 25*, the Commission was well aware of the need to maintain uniformity of terminology throughout the draft articles. It did not, however, undertake a review of similar expressions already adopted in other articles since that would be a task for the second reading of the draft articles as a whole.

(29) In the opinion of one member, the phrase "unless the predecessor State and the successor State otherwise agree", in *article 24, paragraph 1*, did not cover a situation where there were two or more successor States, all of which concluded an agreement with the predecessor State. He suggested that the Commission should discuss that point at the second reading.

(30) The same member was of the view that *article 25* should not exclude the possibility for certain successor States concerned to agree on a reallocation of the debts passing to those States. He suggested that the Commission should consider on second reading the inclusion in that article of a second paragraph based on the following model:

The provisions of *paragraph 1* are without prejudice to the redistribution by the successor States concerned of their respective shares of the State debt of the predecessor State.

(31) *Paragraph 2 of article 24* is identical with *paragraph 2 of article 15*, the purpose of which is to assimilate cases of separation of a part of the territory of a State that unites with another independent State to those where a part of the territory of a State separates and forms a new State. The rationale for such assimilation is given in the commentary to *article 15*, in the context of succession to State property.⁵⁹⁶ The Commission finds no reason to deal with such cases differently in the context of succession to State debts.

⁵⁹⁶ *Yearbook ... 1976*, vol. II (Part Two), pp. 152 and 153, doc. A/31/10, chap. IV, sect. B, 2, articles 15 and 16, para. (17) of the commentary.

Chapter V

QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

A. Introduction

125. In its report on the work of its twenty-sixth session,⁵⁹⁷ the Commission described the circumstances in which it had come to undertake the study of treaties to which an international organization was a party, as well as the method it had decided to follow in so doing. A number of General Assembly resolutions—resolution 3315 (XXXIX) of 14 December 1974, section I, paragraph 4(d); resolution 3495 (XXX) of 15 December 1975, paragraph 4(d); resolution 31/97 of 15 December 1976, paragraph 4(c)(ii)—have recommended that the Commission should continue its work on that topic. Paragraph 4 of General Assembly resolution 32/151 of 19 December 1977 recommended that the Commission should:

(c) Proceed with the preparation, on a priority basis, of draft articles on:

...

(ii) Treaties concluded between States and international organizations or between international organizations.

126. At its twenty-sixth,⁵⁹⁸ twenty-seventh⁵⁹⁹ and twenty-ninth sessions,⁶⁰⁰ the Commission adopted provisions corresponding in general to articles 1 to 34 of the Vienna Convention on the Law of Treaties.⁶⁰¹ At its twenty-ninth session, the Commission also quickly considered articles 35 to 38 as submitted by the Special Rapporteur in his sixth report,⁶⁰² and referred them to the Drafting Committee, but it did not have time to consider them further.

127. Articles 35 to 38 were examined by the Drafting Committee at the Committee's current session. On the Committee's report, the Commission adopted on first reading, at its 1509th to 1512th meetings, the text of subparagraph (h) of paragraph 1 of article 2 and the texts of articles 35, 36, 36 bis,⁶⁰³ 37 and 38. At its 1507th to 1509th meetings, it also considered articles 39, 40 and 41 as submitted by the Special Rapporteur in his seventh

report (A/CN.4/312),⁶⁰⁴ and referred them to the Drafting Committee, but it had no time to consider them further.

128. The texts of all the draft articles on treaties concluded between States and international organizations or between international organizations adopted so far, followed by the texts of articles 35 to 38 adopted by the Commission at its current session, with the commentaries thereto, are reproduced below for the information of the General Assembly.⁶⁰⁵

129. The articles considered and adopted by the Commission at its thirtieth session relate exclusively to the effects of treaties on third States and third international organizations. As with the other articles of the draft, the Commission adhered to the general course that it had adopted previously, namely, that of following the texts of the articles of the Vienna Convention as far as possible; in so doing at the current session, it did not encounter any great drafting problems, although the length of the articles in comparison with the corresponding provisions of the Vienna Convention was both noticeable and inevitable. However, the Commission encountered some problems of substance that it could not entirely overcome.

130. The Commission has drawn attention on more than one occasion to the general source of these problems⁶⁰⁶—the fact that the Vienna Convention is based entirely on consensus, which itself rests on the equality of the contracting parties, namely, States. International organizations, however, differ among themselves and above all from States. It therefore becomes necessary, while respecting the general rules of consensus, which a large majority of the Commission's members regard as valid even for treaties to which international organizations are parties, to consider what departures have to be made from the text of the Vienna Convention to take account of the inherent characteristics of international organizations, whose entire operation is based on functions and capacities less extensive than those of States.

131. In the matter of draft articles on the effects of treaties to which organizations are parties with respect to third States or third organizations, the Commission

⁵⁹⁷ *Yearbook ... 1974*, vol. II (Part One), pp. 290 *et seq.*, doc. A/9610/Rev.1, chap. IV.

⁵⁹⁸ *Ibid.*, pp. 294 *et seq.*, doc. A/9610/Rev.1, chap. IV, sect. B.

⁵⁹⁹ *Yearbook ... 1975*, vol. II, pp. 169 *et seq.*, doc. A/10010/Rev.1, chap. V, sect. B.

⁶⁰⁰ *Yearbook ... 1977*, vol. II (Part Two), pp. 95 *et seq.*, doc. A/32/10, chap. IV, sect. B.

⁶⁰¹ 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 is hereinafter referred to as "the Vienna Convention".

⁶⁰² *Yearbook ... 1977*, vol. II (Part One), p. 119, doc. A/CN.4/298.

⁶⁰³ See foot-note 619 below.

⁶⁰⁴ Reproduced in *Yearbook ... 1978*, vol. II (Part One).

⁶⁰⁵ See section B. Subsection 1 contains the texts of all the provisions hitherto adopted by the Commission. Subsection 2 contains the texts of the provisions adopted at the thirtieth session and the commentaries thereto. For the commentaries to the articles adopted at the twenty-ninth session, see foot-note 600 above; for the commentaries to the articles adopted at the twenty-sixth and twenty-seventh sessions, see respectively foot-notes 597 and 599 above.

⁶⁰⁶ See *Yearbook ... 1975*, vol. II, pp. 169-171, doc. A/10010, Rev.1, paras. 123 *et seq.*; *Yearbook ... 1977*, vol. II (Part Two) pp. 96-98, doc. A/32/10, paras. 66 *et seq.*

had already adopted, at its twenty-ninth session, an article 34⁶⁰⁷ laying down the fundamental rule concerning what has sometimes been called "the relative effect" of conventions, namely, that treaties have no effect on third parties, be they States or international organizations. It was that fundamental rule—simply a generalization from the rule laid down in the Vienna Convention in regard to treaties between States—that was to dominate the formulation of articles 35 to 38, which follow from it logically. Leaving aside article 38, whose scope is merely that of a saving clause, article 35 deals with the case of consent to the establishment of obligations for third States or third international organizations, article 36 with the creation of rights, and article 37 with the revocation or modification of obligations and rights.

132. The general problem that arose in regard to the consents contemplated in articles 35, 36 and 37 was that of the means by which consent should be expressed. The Vienna Convention, having regard to States, distinguished on that point between obligations and rights, requiring express acceptance in writing for the former but allowing presumed assent for the latter. In the case of the effects of treaties to which one or more international organizations were parties, the Commission considered that those rules should again govern any consent by third States. As far as international organizations were concerned, however, the Commission was more exacting: not only did it require that the consent of an organization should be governed by the relevant rules of the organizations, but also, in the case of assent by an organization to the creation of a right in its favour, it did away with the possibility of presumed assent and required such assent at all times, without however making such assent generally subject to particular formalities (other than those required by the relevant rules of the organization). In article 37, the provisions of the Vienna Convention were amplified to cover the cases dealt with in articles 35 and 36.

133. A further problem that arose—one that the Commission as a whole could not disregard, although it did not adopt the text proposed on the subject by the Drafting Committee—concerned the particular case of the effects of a treaty to which at least one international organization was a party with respect to States members of that organization. Although the Commission came to no definite conclusion on that point, the majority of its members held that the problem was a real one and should not be ignored. Under the system of definitions and principles laid down by the Commission, the States members of an international organization did not become parties to the treaties concluded by that organization simply by virtue of its concluding them; in regard to those treaties, therefore, they were third States. As such, they would be unlikely to forgo the benefit of articles 35 and 36 when it came to their consenting to such treaties producing effects for them. Having regard to the practice and needs of present-day international society, should not the provisions of those two articles be made more flexible? And if so, how?

⁶⁰⁷ See sect. B, 1, below.

134. Members of the Commission expressed widely diverging views in regard to those two questions, both on the realities of the problem and on the nature and formulation of possible solutions to it. Although article 36 *bis* was not approved, and although its wording, quite apart from its substance, appeared to require further elaboration, the majority of the Commission's members thought that the governments and organizations concerned should have an opportunity to comment on the text of the article as it stood and thus to give the Commission some guidance for future consideration of the question.

B. Draft articles on treaties concluded between States and international organizations or between international organizations

135. The texts of articles 1 to 4, 6⁶⁰⁸ to 19, 19 *bis*, 19 *ter*, 20, 20 *bis*, 21 to 23, 23 *bis*, 24, 24 *bis*, 25, 25 *bis*, 26 to 36, 36 *bis*,⁶⁰⁹ 37 and 38, adopted by the Commission at its twenty-sixth, twenty-seventh, twenty-ninth and thirtieth sessions, as well as the texts of articles 35, 36, 36 *bis*,⁶¹⁰ 37 and 38, and of subparagraph (*h*) of paragraph 1 of article 2, with the commentaries thereto, as adopted by the Commission at its thirtieth session, are reproduced below for the information of the General Assembly.

1. TEXT OF ALL THE DRAFT ARTICLES ADOPTED SO FAR BY THE COMMISSION

PART I

INTRODUCTION

Article 1. Scope of the present articles

The present articles apply to:

- (a) treaties concluded between one or more States and one or more international organizations, and
- (b) treaties concluded between international organizations.

Article 2. Use of terms

1. For the purpose of the present articles:

(a) "treaty" means an international agreement governed by international law and concluded in written form:

- (i) between one or more States and one or more international organizations, or
- (ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "ratification" means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

⁶⁰⁸ The draft does not include a provision corresponding to article 5 of the Vienna Convention.

⁶⁰⁹ See foot-note 619 below.

⁶¹⁰ *Ibid.*

(b bis) "act of formal confirmation" means an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty;

(b ter) "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State or an international organization establishes on the international plane its consent to be bound by a treaty;

(c) "full powers" means a document emanating from the competent authority of a State and designating a person or persons to represent the State for the purpose of negotiating, adopting or authenticating the text of a treaty between one or more States and one or more international organizations, expressing the consent of the State to be bound by such a treaty, or performing any other act with respect to such a treaty;

(c bis) "powers" means a document emanating from the competent organ of an international organization and designating a person or persons to represent the organization for the purpose of negotiating, adopting or authenticating the text of a treaty, communicating the consent of the organization to be bound by a treaty, or performing any other act with respect to a treaty;

(d) "reservation" means a unilateral statement, however phrased or named, made by a State or by an international organization when signing or consenting [by any agreed means] to be bound by a treaty whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization;

(e) "negotiating State" and "negotiating organization" mean respectively:

- (i) a State,
- (ii) an international organization

which took part in the drawing-up and adoption of the text of the treaty;

(f) "contracting State" and "contracting organization" mean respectively:

- (i) a State,
- (ii) an international organization

which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(g) "party" means a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force;

(h) "third State" or "third international organization" means a State or an international organization not a party to the treaty;

(i) "international organization" means an intergovernmental organization;

(j) "rules of the organization" means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be given to them in the internal law of any State or by the rules of any international organization.

Article 3. International agreements not within the scope of the present articles

The fact that the present articles do not apply

(i) to international agreements to which one or more international organizations and one or more entities other than State or international organizations are [parties];

(ii) or to international agreements to which one or more States, one or more international organizations and one or more entities other than States or international organizations are [parties];

(iii) or to international agreements not in written form concluded between one or more States and one or more international organizations, or between international organizations shall not affect:

(a) the legal force of such agreements;

(b) the application to such agreements of any of the rules set forth in the present articles to which they would be subject under international law independently of the articles;

(c) the application of the present articles to the relations between States and international organizations or to the relations of international organizations as between themselves, when those relations are governed by international agreements to which other entities are also [parties].

Article 4. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the articles, the articles apply only to such treaties after the [entry into force] of the said articles as regards those States and those international organizations.

PART II

CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 1. CONCLUSION OF TREATIES

Article 6. Capacity of international organizations to conclude treaties

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.

Article 7. Full powers and powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty between one or more States and one or more international organizations or for the purpose of expressing the consent of the State to be bound by such a treaty if:

(a) he produces appropriate full powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the State for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty between one or more States and one or more international organizations;

(b) heads of delegations of States to an international conference, for the purpose of adopting the text of a treaty between one or more States and one or more international organizations;

(c) heads of delegations of States to an organ of an international organization, for the purpose of adopting the text of a treaty between one or more States and that organization;

(d) heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between one or more States and that organization;

(e) heads of permanent missions to an international organization, for the purpose of signing, or signing *ad referendum*, a treaty between one or more States and that organization, if it appears from practice or from other circumstances that those heads of permanent missions are considered as representing their States for such purposes without having to produce full powers.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty if:

(a) he produces appropriate powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the organization for such purposes without having to produce powers.

4. A person is considered as representing an international organization for the purpose of communicating the consent of that organization to be bound by a treaty if:

(a) he produces appropriate powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the organization for that purpose without having to produce powers.

Article 8. Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or organization.

Article 9. Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the participants in the drawing-up of the treaty except as provided in paragraph 2.

2. The adoption of the text of a treaty between States and one or more international organizations at an international conference in which one or more international organizations participate takes place by the vote of two thirds of the participants present and voting, unless by the same majority the latter shall decide to apply a different rule.

Article 10. Authentication of the text

1. The text of a treaty between one or more States and one or more international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the States and international organizations participating in its drawing-up; or

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States and international organizations of the text of the treaty or of the final act of a conference incorporating the text.

2. The text of a treaty between international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the international organizations participating in its drawing-up; or

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those international

organizations of the text of the treaty or of the final act of a conference incorporating the text.

Article 11. Means of establishing consent to be bound by a treaty

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

2. The consent of an international organization to be bound by a treaty is established by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.

Article 12. Signature as a means of establishing consent to be bound by a treaty

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by the signature of the representative of that State when:

(a) the treaty provides that signature shall have that effect;

(b) the participants in the negotiation were agreed that signature should have that effect; or

(c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is established by the signature of the representative of that organization when:

(a) the treaty provides that signature shall have that effect; or

(b) the intention of that organization to give that effect to the signature appears from the powers of its representative or was established during the negotiation.

3. For the purposes of paragraphs 1 and 2:

(a) the initialling of a text constitutes a signature when it is established that the participants in the negotiation so agreed;

(b) the signature *ad referendum* by a representative of a State or an international organization, if confirmed by his State or organization, constitutes a full signature.

Article 13. An exchange of instruments constituting a treaty as a means of establishing consent to be bound by a treaty

1. The consent of States and international organizations to be bound by a treaty between one or more States and one or more international organizations constituted by instruments exchanged between them is established by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) those States and those organizations were agreed that the exchange of instruments should have that effect.

2. The consent of international organizations to be bound by a treaty between international organizations constituted by instruments exchanged between them is established by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) those organizations were agreed that the exchange of instruments should have that effect.

Article 14. Ratification, act of formal confirmation, acceptance or approval as a means of establishing consent to be bound by a treaty

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by ratification when:

- (a) the treaty provides for such consent to be expressed by means of ratification;
- (b) the participants in the negotiation were agreed that ratification should be required;
- (c) the representative of the State has signed the treaty subject to ratification; or
- (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is established by an act of formal confirmation when:

- (a) the treaty provides for such consent to be established by means of an act of formal confirmation;
- (b) the participants in the negotiation were agreed that an act of formal confirmation should be required;
- (c) the representative of the organization has signed the treaty subject to an act of formal confirmation; or
- (d) the intention of the organization to sign the treaty subject to an act of formal confirmation appears from the powers of its representative or was established during the negotiation.

3. The consent of a State to be bound by a treaty between one or more States and one or more international organizations, or the consent of an international organization to be bound by a treaty, is established by acceptance or approval under conditions similar to those which apply to ratification or to an act of formal confirmation.

Article 15. Accession as a means of establishing consent to be bound by a treaty

1. The consent of a State to be bound by a treaty between one or more States and one or more international organizations is expressed by accession when:

- (a) the treaty provides that such consent may be expressed by that State by means of accession;
- (b) the participants in the negotiation were agreed that such consent might be expressed by that State by means of accession; or
- (c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

2. The consent of an international organization to be bound by a treaty is established by accession when:

- (a) the treaty provides that such consent may be established by that organization by means of accession;
- (b) the participants in the negotiation were agreed that such consent might be given by that organization by means of accession; or
- (c) all the parties have subsequently agreed that such consent may be given by that organization by means of accession.

Article 16. Exchange, deposit or notification of instruments of ratification, formal confirmation, acceptance, approval or accession

1. Unless the treaty otherwise provides, instruments of ratification, formal confirmation, acceptance, approval or accession establish the consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations upon:

- (a) their exchange between the contracting States and the contracting international organizations;
 - (b) their deposit with the depositary; or
 - (c) their notification to the contracting States and to the contracting international organizations or to the depositary, if so agreed.
2. Unless the treaty otherwise provides, instruments of formal confirmation, acceptance, approval or accession establish the consent of an international organization to be bound by a treaty between international organizations upon:
- (a) their exchange between the contracting international organizations;
 - (b) their deposit with the depositary; or
 - (c) their notification to the contracting international organizations or to the depositary, if so agreed.

Article 17. Consent to be bound by part of a treaty and choice of differing provisions

1. Without prejudice to articles [19 to 23], the consent of a State or of an international organization to be bound by part of a treaty between one or more States and one or more international organizations is effective only if the treaty so permits or if the other contracting States and contracting international organizations so agree.

2. Without prejudice to articles [19 to 23], the consent of an international organization to be bound by part of a treaty between international organizations is effective only if the treaty so permits or if the other contracting international organizations so agree.

3. The consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

4. The consent of an international organization to be bound by a treaty between international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force

1. A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty between one or more States and one or more international organizations when:

- (a) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, an act of formal confirmation, acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty; or

- (b) that State or that organization has established its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

2. An international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty between international organizations when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to an act of formal confirmation, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

- (b) it has established its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

SECTION 2. RESERVATIONS

Article 19. Formulation of reservations in the case of treaties between several international organizations

An international organization may, when signing, formally confirming, accepting, approving or acceding to a treaty between several international organizations, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 19 bis. Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States

1. A State, when signing, ratifying, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States, may formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

2. When the participation of an international organization is essential to the object and purpose of a treaty between States and one or more international organizations or between international organizations and one or more States, that organization, when signing, formally confirming, accepting, approving or acceding to that treaty, may formulate a reservation if the reservation is expressly authorized by the treaty or if it is otherwise agreed that the reservation is authorized.

3. In cases not falling under the preceding paragraph, an international organization, when signing, formally confirming, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States, may formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 19 ter. Objection to reservations

1. In the case of a treaty between several international organizations, an international organization may object to a reservation.

2. A State may object to a reservation envisaged in article 19 bis, paragraphs 1 and 3.

3. In the case of a treaty between States and one or more international organizations or between international organizations and one or more States, an international organization may object to a reservation formulated by a State or by another organization if:

- (a) the possibility of objecting is expressly granted to it by the treaty or is a necessary consequence of the tasks assigned to the international organization by the treaty; or
- (b) its participation in the treaty is not essential to the object and purpose of the treaty.

Article 20. Acceptance of reservations in the case of treaties between several international organizations

1. A reservation expressly authorized by a treaty between several international organizations does not require any subsequent acceptance by the other contracting organizations unless the treaty so provides.

2. When it appears from the object and purpose of a treaty between several international organizations that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. In cases not falling under the preceding paragraphs and unless the treaty between several international organizations otherwise provides:

(a) acceptance by another contracting organization of a reservation constitutes the reserving organization a party to the treaty in relation to that other organization if or when the treaty is in force for those organizations;

(b) an objection by another contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving organizations unless a contrary intention is definitely expressed by the objecting organization;

(c) an act expressing the consent of an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting organization has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty between several international organizations otherwise provides, a reservation is considered to have been accepted by an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 20 bis. Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States

1. A reservation expressly authorized by a treaty between States and one or more international organizations or between international organizations and one or more States, or otherwise authorized, does not, unless the treaty so provides, require subsequent acceptance by the contracting State or States or the contracting organization or organizations.

2. When it appears from the object and purpose of a treaty between States and one or more international organizations or between international organizations and one or more States that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation formulated by a State or by an international organization requires acceptance by all the parties.

3. In cases not falling under the preceding paragraphs and unless the treaty between States and one or more international organizations or between international organizations and one or more States otherwise provides:

(a) acceptance of a reservation by a contracting State or a contracting organization constitutes the reserving State or organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force between the State and the organization or between the two States or between the two organizations;

(b) an objection to a reservation by a contracting State or a contracting organization does not prevent the treaty from entering into force

between the objecting State and the reserving State,
between the objecting State and the reserving organization,
between the objecting organization and the reserving State,
or

between the objecting organization and the reserving organization
unless a contrary intention is definitely expressed by the objecting
State or organization;

(c) an act expressing the consent of a State or an international
organization to be bound by the treaty and containing a reservation
is effective as soon as at least one other contracting State or orga-
nization has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty
otherwise provides, a reservation is considered to have been accepted
by a contracting State or organization if it shall have raised no
objection to the reservation by the end of a period of twelve months
after it was notified of the reservation or by the date on which it
expressed its consent to be bound by the treaty, whichever is later.

*Article 21. Legal effects of reservations
and of objections to reservations*

1. A reservation established with regard to another party in
accordance with articles 19, 19 *ter*, 20 and 23 in the case of treaties
between several international organizations, or in accordance with
articles 19 *bis*, 19 *ter*, 20 *bis* and 23 *bis* in the case of treaties
between States and one or more international organizations or
between international organizations and one or more States:

(a) modifies for the reserving party in its relations with that
other party the provisions of the treaty to which the reservation
relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other
party in its relations with the reserving party.

2. The reservation does not modify the provisions of the treaty
for the other parties to the treaty *inter se*.

3. When a party objecting to a reservation has not opposed the
entry into force of the treaty between itself and the reserving party,
the provisions to which the reservation relates do not apply as
between the two parties to the extent of the reservation.

*Article 22. Withdrawal of reservations
and of objections to reservations*

1. Unless a treaty between several international organizations,
between States and one or more international organizations or
between international organizations and one or more States other-
wise provides, a reservation may be withdrawn at any time and the
consent of the State or international organization which has accepted
the reservation is not required for its withdrawal.

2. Unless a treaty mentioned in paragraph 1 otherwise provides,
an objection to a reservation may be withdrawn at any time.

3. Unless a treaty between several international organizations
otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in
relation to another contracting organization only when notice of it
has been received by that organization;

(b) the withdrawal of an objection to a reservation becomes
operative only when notice of it has been received by the inter-
national organization which formulated the reservation.

4. Unless a treaty between States and one or more international
organizations or between international organizations and one or
more States otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation
to a contracting State or organization only when notice of it has
been received by that State or organization;

(b) the withdrawal of an objection to a reservation becomes
operative only when notice of it has been received by the State or
international organization which formulated the reservation.

*Article 23. Procedure regarding reservations in treaties
between several international organizations*

1. In the case of a treaty between several international orga-
nizations, a reservation, an express acceptance of a reservation and
an objection to a reservation must be formulated in writing and
communicated to the contracting organizations and other inter-
national organizations entitled to become parties to the treaty.

2. If formulated when signing, subject to formal confirmation,
acceptance or approval, a treaty between several international
organizations, a reservation must be formally confirmed by the
reserving organization when expressing its consent to be bound by
the treaty. In such a case the reservation shall be considered as
having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation
made previously to confirmation of the reservation does not itself
require confirmation.

4. The withdrawal of a reservation or of an objection to a
reservation must be formulated in writing.

*Article 23 bis. Procedure regarding reservations in treaties between
States and one or more international organizations or between
international organizations and one or more States*

1. In the case of a treaty between States and one or more inter-
national organizations or between international organizations and
one or more States, a reservation, an express acceptance of a
reservation and an objection to a reservation must be formulated in
writing and communicated to the contracting States and organi-
zations and other States and international organizations entitled
to become parties to the treaty.

2. If formulated by a State when signing, subject to ratification,
acceptance or approval, a treaty mentioned in paragraph 1 or if
formulated by an international organization when signing, subject
to formal confirmation, acceptance or approval, a treaty mentioned
in paragraph 1, a reservation must be formally confirmed by the
reserving State or international organization when expressing its
consent to be bound by the treaty. In such a case the reservation shall
be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation
made previously to a confirmation of the reservation does not itself
require confirmation.

4. The withdrawal of a reservation or of an objection to a
reservation must be formulated in writing.

SECTION 3. ENTRY INTO FORCE AND PROVISIONAL
APPLICATION OF TREATIES

*Article 24. Entry into force of treaties
between international organizations*

1. A treaty between international organizations enters into
force in such manner and upon such date as it may provide or as the
negotiating organizations may agree.

2. Failing any such provision or agreement, a treaty between
international organizations enters into force as soon as consent to
be bound by the treaty has been established for all the negotiating
organizations.

3. When the consent of an international organization to be
bound by a treaty between international organizations is established

on a date after the treaty has come into force, the treaty enters into force for that organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty between international organizations regulating the authentication of its text, the establishment of the consent of international organizations to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 24 bis. Entry into force of treaties between one or more States and one or more international organizations

1. A treaty between one or more States and one or more international organizations enters into force in such manner and upon such date as it may provide or as the negotiating State or States and organization or organizations may agree.

2. Failing any such provision or agreement, a treaty between one or more States and one or more international organizations enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States and organizations.

3. When the consent of a State or an international organization to be bound by a treaty between one or more States and one or more international organizations is established on a date after the treaty has come into force, the treaty enters into force for that State or organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty between one or more States and one or more international organizations regulating the authentication of its text, the establishment of the consent of the State or States and the international organization or organizations to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25. Provisional application of treaties between international organizations

1. A treaty between international organizations or a part of such a treaty is applied provisionally pending its entry into force if:

- (a) the treaty itself so provides; or
- (b) the negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating organizations have otherwise agreed, the provisional application of a treaty between international organizations or a part of such a treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

Article 25 bis. Provisional application of treaties between one or more States and one or more international organizations

1. A treaty between one or more States and one or more international organizations or a part of such a treaty is applied provisionally pending its entry into force if:

- (a) the treaty itself so provides; or
- (b) the negotiating State or States and organization or organizations have in some other manner so agreed.

2. Unless a treaty between one or more States and one or more international organizations otherwise provides or the negotiating State or States and organization or organizations have otherwise agreed:

(a) the provisional application of the treaty or a part of the treaty with respect to a State shall be terminated if that State notifies the other States, the international organization or organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty;

(b) the provisional application of the treaty or a part of the treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations, the State or States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

PART III

OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

SECTION 1. OBSERVANCE OF TREATIES

Article 26. Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27. Internal law of a State, rules of an international organization and observance of treaties

1. A State party to a treaty between one or more States and one or more international organizations may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization.

3. The preceding paragraphs are without prejudice to [article 46].

SECTION 2. APPLICATION OF TREATIES

Article 28. Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29. Territorial scope of treaties between one or more States and one or more international organizations

Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more international organizations is binding upon each State party in respect of its entire territory.

Article 30. Application of successive treaties relating to the same subject-matter

1. The rights and obligations of States and international organizations parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated [or suspended in operation under article 59], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between two States, two international organizations, or one State and one international organization which are parties to both treaties, the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, as between a State party to both treaties and an international organization party to only one of the treaties, as between an international organization party to both treaties and an international organization party to only one of the treaties, and as between an international organization party to both treaties and a State party to only one of the treaties, the treaty which binds the two parties in question governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice [to article 41], [or to any question of the termination or suspension of the operation of a treaty under article 60 or] to any question of responsibility which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards a State or an international organization not party to that treaty, under another treaty.

6. The preceding paragraphs are without prejudice to Article 103 of the Charter of the United Nations.

SECTION 3. INTERPRETATION OF TREATIES

Article 31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33. Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4. TREATIES AND THIRD STATES OR THIRD INTERNATIONAL ORGANIZATIONS

Article 34. General rule regarding third States and third international organizations

1. A treaty between international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

2. A treaty between one or more States and one or more international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

Article 35. Treaties providing for obligations for third States or third international organizations

1. [Subject to article 36 *bis*,] an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

2. An obligation arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation in the sphere of its activities and the third organization expressly accepts that obligation.

3. Acceptance by a third international organization of the obligation referred to in paragraph 2 shall be governed by the relevant rules of that organization and shall be given in writing.

Article 36. Treaties providing for rights for third States or third international organizations

1. [Subject to article 36 *bis*,] a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and if the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A right arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third organization, or to a group of organizations to which it belongs, or to all organizations, and if the third organization assents thereto.

3. The assent of the third international organization, as provided for in paragraph 2, shall be governed by the relevant rules of that organization.

4. A State or an international organization exercising a right in accordance with paragraph 1 or 2 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

[Article 36 bis,⁶¹¹ *Effects of a treaty to which an international organization is party with respect to third States members of that organization*

Third States which are members of an international organization shall observe the obligations, and may exercise the rights, which arise for them from the provisions of a treaty to which that organization is a party if:

(a) the relevant rules of the organization applicable at the moment of the conclusion of the treaty provide that the States members of the organization are bound by the treaties concluded by it; or

(b) the States and organizations participating in the negotiation of the treaty as well as the States members of the organization acknowledged that the application of the treaty necessarily entails such effects.]

Article 37. Revocation or modification of obligations or rights of third States or third international organizations

1. When an obligation has arisen for a third State in conformity with paragraph 1 of article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When an obligation has arisen for a third international organization in conformity with paragraph 2 of article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third organization, unless it is established that they had otherwise agreed.

3. When a right has arisen for a third State in conformity with paragraph 1 of article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

4. When a right has arisen for a third international organization in conformity with paragraph 2 of article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third organization.

[5. When an obligation or a right has arisen for third States which are members of an international organization under the conditions provided for in subparagraph (a) of article 36 bis, the obligation or the right may be revoked or modified only with the consent of the parties to the treaty, unless the relevant rules of the organization applicable at the moment of the conclusion of the treaty otherwise provide or unless it is established that the parties to the treaty had otherwise agreed.]

[6. When an obligation or a right has arisen for third States which are members of an international organization under the conditions provided for in subparagraph (b) of article 36 bis, the obligation or the right may be revoked or modified only with the consent of the parties to the treaty and of the States members of the organization, unless it is established that they had otherwise agreed.]

7. The consent of an international organization party to the treaty or of a third international organization, as provided for in the foregoing paragraphs, shall be governed by the relevant rules of that organization.

⁶¹¹ See foot-note 619 below.

Article 38. Rules in a treaty becoming binding on third States or third international organizations through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or a third international organization as a customary rule of international law, recognized as such.

2. TEXT OF SUBPARAGRAPH (h) OF PARAGRAPH 1 OF ARTICLE 2 AND OF ARTICLES 35, 36, 36 bis,⁶¹² 37 AND 38, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS THIRTIETH SESSION

Article 2. Use of terms

[1. For the purpose of the present articles:

...]

(h) "third State" or "third international organization" means a State or an international organization not a party to the treaty.⁶¹³

Commentary

Article 34, adopted by the Commission at its twenty-ninth session,⁶¹⁴ had already made use of those terms; their definition is based directly on the Vienna Convention.

PART III

OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

SECTION 4. TREATIES AND THIRD STATES OR THIRD INTERNATIONAL ORGANIZATIONS (*continued*)

*Article 35. Treaties providing for obligations for third States or third international organizations.*⁶¹⁵

1. [Subject to article 36 bis,] an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

⁶¹² *Ibid.*

⁶¹³ Corresponding provision of the Vienna Convention:
"Article 2: Use of terms.

"1. For the purposes of the present Convention:

"...
"(h) "third State" means a State not a party to the treaty."

⁶¹⁴ See subsection 1 above.

⁶¹⁵ Corresponding provision of the Vienna Convention:

"Article 35: *Treaties providing for obligations for third States.*
"An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing."

2. An obligation arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation in the sphere of its activities and the third organization expressly accepts that obligation.

3. Acceptance by a third international organization of the obligation referred to in paragraph 2 shall be governed by the relevant rules of that organization and shall be given in writing.

Commentary

(1) Article 35 follows the rule stated in article 35 of the Vienna Convention in maintaining for third States the requirement of express acceptance in writing if a provision of a treaty is to establish obligations for them, and it extends that rule to third international organizations. The Commission deemed it advisable, however, to make two points concerning the obligations that organizations could thus assume in the form of a collateral undertaking.

(2) First, an organization could not accept an obligation that was not "in the sphere of its activities". All organizations pursued their activities in a sphere whose extent was determinable externally, and it was logical that the parties to a treaty would not intend to create an obligation for an international organization outside that sphere of activity.

(3) Further, the Commission consider it necessary to draw attention to a fundamental rule, that a third international organization, in the matter of accepting an obligation laid down in a treaty to which it was not a party, remained subject to the relevant rules of the organization.

(4) Since the Commission did not adopt article 36 *bis*,⁶¹⁶ the reference to that article at the beginning of paragraph 1 of article 35 was placed in square brackets to indicate that it was subject to the régime laid down in the article to which reference is made.

*Article 36. Treaties providing for rights for third States or third international organizations.*⁶¹⁷

1. [Subject to article 36 *bis*,] a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and if the third State assents thereto. Its assent shall

be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A right arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third organization, or to a group of organizations to which it belongs, or to all organizations, and if the third organization assents thereto.

3. The assent of the third international organization, as provided for in paragraph 2, shall be governed by the relevant rules of that organization.

4. A State or an international organization exercising a right in accordance with paragraph 1 or 2 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Commentary

(1) The text of article 36 distinguishes between the case where a right arises for a State and the case where it arises for an organization. The solution embodied in article 36 of the Vienna Convention is proposed in the former circumstance (paragraph 1), but a somewhat stricter régime in the latter (paragraph 2).

(2) The presumption of consent provided for in article 36, paragraph 1, of the Vienna Convention and in paragraph 1 of the present article in respect of States has thus been eliminated in regard to the expression of the consent of an organization to accept a right accorded it by a treaty to which it is not a party. This stricter régime is justified by the fact that the international organization has not been given unlimited capacity and that, consequently, it is not possible to stipulate that its consent shall be presumed in respect of a right.⁶¹⁸ The consent of the organization is therefore never presumed, but paragraph 2 of the article lays down no special conditions as to the means whereby such consent is to be expressed.

(3) Paragraph 2 has nevertheless been supplemented by a paragraph 3 which points out, like paragraph 3 of article 35, that the organization's consent is always governed by its relevant rules; under those rules, the formulation of consent might be subject to special requirements.

(4) Paragraph 4 of article 36 simply reproduces, subject to the appropriate drafting changes, the rule laid down in article 36, paragraph 2, of the Vienna Convention. As in the case of article 35, and for the same reasons, the initial reference in article 36 to article 36 *bis*, which was not adopted, has been placed in square brackets.

⁶¹⁶ See foot-note 619 below.

⁶¹⁷ Corresponding provision of the Vienna Convention:

"Article 36 :

Treaties providing for rights for third States.

"1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

"2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty."

⁶¹⁸ It is possible to go even further and to argue that the very idea of a right, in the sense of a "subjective right", of an organization seldom corresponds to all the facts. The "rights" of an organization correspond to "functions", which the organization is not at liberty to modify. In other words, the exercise by an organization of certain "rights" is generally also a matter of performing an "obligation", at least in regard to its members, and for that reason the situation of an organization cannot be fully equated with that of a State.

[Article 36 bis.⁶¹⁹ *Effects of a treaty to which an international organization is party with respect to third States members of that organization.*⁶²⁰

Third States which are members of an international organization shall observe the obligations, and may exercise the rights, which arise for them from the provisions of a treaty to which that organization is a party if:

(a) the relevant rules of the organization applicable at the moment of the conclusion of the treaty provide that the States members of the organization are bound by the treaties concluded by it; or

(b) the States and organizations participating in the negotiation of the treaty as well as the States members of the organization acknowledged that the application of the treaty necessarily entails such effects.]

Commentary

(1) Article 36 bis deals with the special situation of States members of an international organization in regard to treaties concluded by that organization but to which they themselves are not parties. These States are third

⁶¹⁹ The Commission agreed at its 1512th meeting to take no decision concerning article 36 bis and to consider the article further in the light of comments made on the text of the article by the General Assembly, Governments and international organizations.

⁶²⁰ This is a new provision in relation to the Vienna Convention. The Special Rapporteur's initial proposal (*Yearbook ... 1977*, vol. II (Part One), pp. 128 and 129, doc. A/CN.4/298, article 36 bis) was as follows:

"Effects of a treaty to which an international organization is party with respect to States members of that organization.

"1. A treaty concluded by an international organization gives rise directly for States members of an international organization to rights and obligations in respect of other parties to that treaty if the constituent instrument of that organization expressly gives such effects to the treaty.

"2. When, on account of the subject-matter of a treaty concluded by an international organization and the assignment of the areas of competence involved in that subject-matter between the organization and its member States, it appears that such was indeed the intention of the parties to that treaty, the treaty gives rise for a member State to:

"(a) rights which the member State is presumed to accept, in the absence of any indication of intention to the contrary;

"(b) obligations when the member State accepts them, even implicitly."

Following the discussion at the twenty-ninth session, the Special Rapporteur submitted the following text to the Drafting Committee at the thirtieth session:

"1. A treaty concluded by an international organization gives rise directly for States members of an international organization to rights and obligations in respect of other parties to that treaty if the constituent instrument of that organization [as interpreted within the organization,] expressly gives such effects to the treaty.

"2. A treaty concluded by an international organization, where, by reason of the distribution as between the organization and its members of the competences affected by the object of the treaty, it appears that such was in fact the intention of the parties to the treaty, gives rise for a member State to:

"(a) rights which the member State, in the absence of any indication of a contrary intention, is presumed to accept;

"(b) obligations where the member State accepts them explicitly."

States in relation to such treaties; however, some members of the Commission expressed reservations concerning the expression "third States members of an international organization". In principle, therefore, the States in question are subject to articles 35 and 36. If the treaties provide for rights for them, they are presumed, under the general rule in article 36, to have accepted those rights; if the treaties provide for obligations for them, they are bound by those obligations, under the rule in article 35, only if they have expressly accepted them in writing. These are the general rules that necessarily follow from the draft articles adopted by the Commission.

(2) The first question to arise—in some sense a preliminary one—is this: for what reasons, in what cases and to what extent might this system be made more flexible? In his initial proposal,⁶²¹ the Special Rapporteur took the view that some degree of relaxation of those rules could be envisaged, at least in two particular cases that will now be dealt with in turn.

(3) The first case was that in which, under the constituent instrument of an organization, treaties concluded by the organizations might have the effect of creating rights and obligations for its member States; the States or organizations dealing with a particular organization might, from one standpoint, be assumed to be cognizant of the provisions of its constituent charter and therefore to have consented to such effects.

(4) That proposition, although not disputed by some members of the Commission, was subjected to sharp criticism on several points. First, it was observed that the only provision which, although not corresponding exactly to the formulation proposed in article 36 bis, seemed to have prompted that article, was article 228 of the Treaty establishing EEC,⁶²² and that the examples adduced in support of article 36 bis also served to show that it had been inspired by rules or problems peculiar to the European Communities. Such an approach, it was maintained, was unacceptable from all points of view, since the European Communities, while possessing some of the characteristics of international organizations, moved from that category into that of supranational institutions whenever their treaty-making capacity replaced that of their member States, and since rules applying to international organizations did not admit of any room for rules applying solely to institutions of an altogether different nature. It was further argued that there was not even any reason to expect that such rules would spread beyond the ambit of Western Europe, in view of the respect attached by the socialist systems to the maintenance of State sovereignty, and the desire of developing countries not to relinquish any element of their independence.

(5) In addition to that first case, the Special Rapporteur had allowed some relaxation of the provisions of articles 35 and 36 in another case, namely, that of treaties that necessarily entailed the effects in question and where

⁶²¹ See foot-note 620 above.

⁶²² United Nations, *Treaty Series*, vol. 298, p. 90. For the official English text, see *Treaties establishing the European Communities*, Luxembourg, Office for Official Publications of the European Communities, 1973, p. 333.

the States members of the organization and the States and international organizations participating in the negotiation of the treaty had "acknowledged" that the application of the treaty entailed such effects. The Special Rapporteur had given the following example: if a customs union, acting as such, concluded tariff agreements with a State that was not a member of the customs union, the States members of the union were obliged to apply those tariff agreements to imports from territories outside the union; they could invoke the argument that they had not expressly consented in writing to such an effect of the tariff agreements concluded by the customs union. Similarly, it would seem that agreements concluded by an international organization concerning the privileges and immunities necessary to its functioning and, in particular, concerning the status of representatives of its member States, produced their effects immediately with regard to the member States, in respect of both the obligations and the rights of the latter.⁶²³ One member of the Commission strongly objected to that interpretation.

(6) That second case also gave rise to objections on the part of some members of the Commission. On the question of principle, first, it was maintained that the agreements concluded by the United Nations in regard to privileges and immunities dealt primarily with rights accorded to Member States and that the rule in article 36, namely, that member States were presumed to assent, was sufficient to account for the fact that such agreements produced effects with regard to member States. It was also argued that, as article 36 *bis*, subparagraph (b), now stood, there was no longer any distinction between the creation of rights and the creation of obligations, and that further objections could be raised: the excessive flexibility of the word "acknowledged"; the need to recognize that the consent of all member States and, consequently, a form of right of veto for each of them, was required; the uncertainties that might arise in regard to the limits of the period of negotiation.

(7) Still in connexion with that second case, some members of the Commission concluded that the principle of separating and differentiating the régime of consent for third States according to whether a treaty was to create obligations or rights for them was rather less straightforward than it appeared, because many treaties established both rights and obligations. Which régime should then prevail in regard to third States—the one relating

to rights or the one relating to obligations? If rights and obligations could not be separated, the most common answer was that the stricter régime should prevail, in other words, the régime relating to obligations. In the light of that interpretation, the rule laid down in article 35 might seem too severe. The reason why a number of members of the Commission found it possible to accept article 36 *bis*, subparagraph (b), was precisely because, in certain cases—examples of which have been given above—the States members of an international organization had "acknowledged" both the obligations and the rights arising for them from agreements concluded by that organization without expressly accepting the obligations in writing. In the final analysis, therefore, the exception provided for in article 36 *bis*, subparagraph (b), would be a fairly limited one; it would reflect practices that were in no way exceptional or extraordinary; in addition, it would respect the right of each member State to refuse to agree to the organization's simultaneously creating obligations and rights in its regard. Certain members of the Commission considered that the "acknowledgment" of the States members of the organization was a collective one and that its expression was dependent on the rules of the organization.

(8) However, since it was primarily for the parties to interpret articles 35 and 36 of the Vienna Convention, and since it was primarily for the governments and international organizations concerned to indicate what needs arose from international practice, the Commission, taking note of the divergent opinions expressed by its members, decided to elicit the comments of all those concerned on the various points before taking a stand on the matter.

Article 37. Revocation or modification of obligations or rights of third States or third international organizations.⁶²⁴

1. When an obligation has arisen for a third State in conformity with paragraph 1 of article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When an obligation has arisen for a third international organization in conformity with paragraph 2 of article 35, the obligation may be revoked or modified only

⁶²³ To cite only a few examples: the Agreement of 26 June 1947 between the United Nations and the United States of America regarding the Headquarters of the United Nations (United Nations, *Treaty Series*, vol. II, p. 12), in its article V, grants privileges and immunities to members of the permanent delegations of States Members of the United Nations and of specialized agencies, but subjects them to conditions and obligations ("subject to corresponding conditions and obligations"), and in its article IV, section 13 (b), provides an exception for cases of abuse of privileges and immunities; on that point, see the legal opinion of the United Nations Secretariat dated 13 February 1975 (United Nations, *Juridical Yearbook*, 1975, (United Nations publication, Sales No. E.77.V.3), p. 155), and the Agreement of 14 April 1951 between ICAO and the Government of Canada regarding the headquarters of ICAO (United Nations, *Treaty Series*, vol. 96, p. 155).

⁶²⁴ Corresponding provision of the Vienna Convention:

Article 37:
Revocation or modification of obligations or rights of third States.

"1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

"2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modifications without the consent of the third State."

with the consent of the parties to the treaty and of the third organization, unless it is established that they had otherwise agreed.

3. When a right has arisen for a third State in conformity with paragraph 1 of article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

4. When a right has arisen for a third international organization in conformity with paragraph 2 of article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third organization.

[5. When an obligation or a right has arisen for third States which are members of an international organization under the conditions provided for in subparagraph (a) of article 36 *bis*, the obligation or the right may be revoked or modified only with the consent of the parties to the treaty, unless the relevant rules of the organization applicable at the moment of the conclusion of the treaty otherwise provide or unless it is established that the parties to the treaty had otherwise agreed.]

[6. When an obligation or a right has arisen for third States which are members of an international organization under the conditions provided for in subparagraph (b) of article 36 *bis*, the obligation or the right may be revoked or modified only with the consent of the parties to the treaty and of the States members of the organization, unless it is established that they had otherwise agreed.]

7. The consent of an international organization party to the treaty or of a third international organization, as provided for in the foregoing paragraphs, shall be governed by the relevant rules of that organization.

Commentary

(1) Whereas article 37 of the Vienna Convention devotes two paragraphs to the question of the revocation or modification of obligations or rights of third States, the present article subdivides each of those paragraphs into two to distinguish the case of third States (paragraphs 1 and 3) from that of international organizations (paragraphs 2 and 4). Two further paragraphs (paragraphs 5 and 6) relate to the two specific cases dealt with in article 36 *bis*; for the reasons stated above,⁶²⁵ they have been placed in square brackets, indicating that the Commission did not adopt article 36 *bis*. Paragraph 7 reiterates the general principle that the consent of international organizations, as provided for in article 37 as a whole, is governed at all times by the relevant rules of the organization concerned.

(2) With regard to third States, paragraphs 1 and 3 of the draft article follow the wording of the provisions of article 37 of the Vienna Convention. Paragraphs 2 and 4 transpose the régime adopted for States to international

organizations. Consideration had been given to adopting a different course for the obligations arising for a third organization, and accordingly to reversing the presumption stated in paragraph 2 by stipulating that an obligation arising for a third organization would be revocable or subject to modification with the consent of the parties to the treaty except if an intention to the contrary were established; that formulation was based on the idea that organizations were mainly intended to exercise *functions* entrusted to them by States, and from that point of view had no "acquired rights" vis-à-vis States.⁶²⁶ The Commission considered, however, that the particular interests of organizations required them to enjoy the same protection as States.

(3) Paragraph 5, dealing with the special case covered by article 36 *bis*, states the rule that an obligation or right created for third States that are members of an international organization by virtue of a treaty concluded by that organization may be revoked or modified only with the consent of the parties to the treaty, unless it is established that the parties to the treaties had otherwise agreed. A further exception to this rule is the case where the relevant rules of the organization applicable at the time of the conclusion of the treaty provide otherwise; this exception is based on the idea that underlies article 36 *bis*, subparagraph (a), namely, that the parties to a treaty concluded by a given organization are cognizant of the relevant rules of the organization relating to the treaties concluded by it and have agreed to be bound conventionally on the basis of those rules. However, criticism was expressed not only of the rule in paragraph 5 of article 37, but also of the possibility of derogating from that rule under the relevant rules of the organization in force at the time of the conclusion of the treaty.

(4) Paragraph 6, dealing with the particular case contemplated in article 36 *bis*, subparagraph (b), states the rule that an obligation or right created for third States that are members of an international organization by virtue of a treaty concluded by that organization may be revoked or modified only with the consent of those that agreed to the creation of that right or obligation, namely, the parties to the treaty and the States members of the organization. It was pointed out that, from a drafting point of view, it would have been more correct to stipulate that the consent of all the States members of the organization was necessary.

(5) Paragraph 7 restates a rule expressed in articles 35 and 36, namely, that the consent of an international organization is governed by the relevant rules of that organization. The consent of an international organization referred to in the preceding paragraphs is thus that of international organizations that are parties to the treaty, and in addition, in paragraphs 2 and 4, that of third organizations.

⁶²⁵ See article 35, para. (4) of the commentary.

⁶²⁶ See *Yearbook ... 1977*, vol. II (Part One), p. 134, doc. A/CN.4/298, article 37, para. (3) of the commentary, as well as foot-note 618 above.

Article 38. Rules in a treaty becoming binding on third States or third international organizations through international custom.⁶²⁷

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or a third international organization as a customary rule of international law, recognized as such.

Commentary

(1) Article 38 differs from the corresponding article in the Vienna Convention only in that it refers to both third States and third international organizations. Its adoption by the Commission gave rise, in regard to international organizations, to difficulties similar to those encountered in regard to States at the Vienna Conference on the Law of Treaties.

(2) In its final report on the draft articles on the law of treaties, the Commission explained the significance of article 34⁶²⁸ in the following terms:

... It [the Commission] did not, therefore, formulate any specific provisions concerning the operation of custom in extending the application of treaty rules beyond the contracting States. On the other hand, having regard to the importance of the process and to the nature of the provisions in articles 30 to 33,⁶²⁹ it decided to include in the present article a general reservation stating that nothing in those articles precludes treaty rules from becoming binding on non-parties as customary rules of international law.

⁶²⁷ Corresponding provision of the Vienna Convention:

“Article 38 :

Rules in a treaty becoming binding on third States through international custom

“Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.”

⁶²⁸ Renumbered to become article 38 in the Vienna Convention.

⁶²⁹ Renumbered to become articles 34 to 37 in the Vienna Convention.

The Commission desired to emphasize that the provision in the present article is purely and simply a reservation designed to negate any possible implication from articles 30 to 33 that the draft articles reject the legitimacy of the above-mentioned process...⁶³⁰

(3) Doubts were nevertheless expressed at the Vienna Conference on the Law of Treaties, and Sir Humphrey Waldock (Expert Consultant) again pointed out, at the end of one of his statements, that:

Article 34 was simply a reservation designed to obviate any misunderstanding about articles 30 to 33. It in no way affected the ordinary process of the formulation of customary law. The apprehensions under which certain delegations seemed to be labouring originated in a misunderstanding of the purpose and meaning of the article.⁶³¹

(4) Following other statements,⁶³² the Conference adopted article 34 (which subsequently became article 38) by a very large majority.⁶³³

(5) The present draft article does not prejudice in one way or the other the possibility that the effects of the process of the formulation of customary law might extend to international organizations, and it was with that consideration in mind that the article was adopted by the Commission.

⁶³⁰ *Yearbook ... 1966*, vol. II, p. 231, doc. A/6309/Rev.1, part II, article 34, paras. (2) and (3) of the commentary.

⁶³¹ *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), p. 201, 36th meeting of the Committee of the Whole, para. 43.

⁶³² Sir Francis Vallat, for example, said that

“...article 34 was essentially a saving clause intended to prevent the preceding articles from being construed possibly as excluding the application of the ordinary rules of international law. Article 34 had never been intended as a vehicle for describing the origins, authority or sources of international law”. (*Ibid.*, *Second Session, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 63, 14th plenary meeting, para. 38.)

⁶³³ *Ibid.*, p. 71, 15th plenary meeting, para. 58.

Chapter VI

STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG
NOT ACCOMPANIED BY DIPLOMATIC COURIER

136. At its 1527th meeting, held on 27 July 1978, the Commission considered the report of the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/L.285), which was introduced by its Chairman, Mr. Abdullah El-Erian. At the same meeting, the Commission approved the report and decided to include it in the present chapter of its report to the General Assembly (paragraphs 137-144 below). The Commission wishes to bring those paragraphs to the attention of the Secretary-General, so that he may take them into account in the analytical report that he was requested to prepare by the General Assembly in paragraph 5 of its resolution 31/76 of 13 December 1976, on ways and means to ensure the implementation of the Vienna Convention on Diplomatic Relations of 1961.⁶³⁴

137. In 1976, after considering an item entitled "Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961", the General Assembly adopted resolution 31/76, in which it recognized, in the preamble, "the advisability of studying the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", and provided as follows in its paragraphs 3 to 5:

3. *Invites* Member States to submit or to supplement their comments and observations on ways and means to ensure the implementation of the provisions of the Vienna Convention on Diplomatic Relations of 1961 and on the desirability of elaborating provisions concerning the status of the diplomatic courier in accordance with paragraph 4 of General Assembly resolution 3501 (XXX), with due regard also to the question of the status of the diplomatic bag not accompanied by diplomatic courier;

4. *Requests* the International Law Commission at the appropriate time to study, in the light of the information contained in the report of the Secretary-General on the implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961 and other information on this question to be received from Member States through the Secretary-General, the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, which would constitute development and concretization of the Vienna Convention on Diplomatic Relations of 1961;

5. *Requests* the Secretary-General to submit to the General Assembly at its thirty-third session an analytical report on ways and means to ensure the implementation of the Vienna Convention on Diplomatic Relations of 1961 on the basis of comments and observations on this question received from Member States and also taking into account the results, if available and ready, of the study by the International Law Commission of the proposals on the elaboration of the above-mentioned protocol.

138. Pursuant to the request contained in paragraph 4

of that resolution, the Commission included in the agenda of its twenty-ninth session an item entitled "Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", and established a Working Group presided by Mr. Abdullah El-Erian to ascertain the most suitable ways and means of dealing with the topic. The Working Group reached a series of conclusions, which the Commission subsequently approved.⁶³⁵

139. In those conclusions, the Working Group recommended, *inter alia*, that the Commission should undertake the study of the topic during its 1978 session in order to enable the Secretary-General to take into account the results of such a study in the report he had been requested to submit to the General Assembly at its thirty-third session, and that such a study should be conducted without curtailing the time allocated to the consideration of the topics to which priority had been given.

140. At the current session, the Commission again established, at its 1475th meeting, on 9 May 1978, a Working Group on the status of the diplomatic courier and of the diplomatic bag not accompanied by diplomatic courier, composed of the same members as at the twenty-ninth session, namely, Mr. Abdullah El-Erian (Chairman), Mr. Juan José Calle y Calle, Mr. Emmanuel Kodjoe Dadzie, Mr. Laurel B. Francis, Mr. Willem Riphagen, Mr. Stephen M. Schwebel, Mr. Sompong Sucharitkul, Mr. Nikolai Ushakov, and Mr. Alexander Yankov. The Working Group held four meetings, on 8 and 29 June and 20 and 25 July 1978.

141. The Working Group had before it three working papers. The first, prepared by the Secretariat pursuant to the request made by the Commission at its twenty-ninth session, contained a classification of the general views of Member States on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, as well as the proposals submitted by Member States on the elaboration of such a protocol, and a description of certain practical measures proposed either by Member States in their written comments during 1976-1978 or by their representatives in the Sixth Committee at the thirtieth and thirty-first sessions of the General Assembly. The working paper also reproduced, in a comparative table, the relevant provisions of the 1961 Vienna Convention on Diplomatic Relations,⁶³⁶ of the 1963 Vienna Convention on Consular Relations,⁶³⁷ of the 1969 Convention

⁶³⁵ *Yearbook ... 1977*, vol. II (Part Two), p. 125, doc. A/32/10, paras. 83 and 84.

⁶³⁶ See foot-note 634 above.

⁶³⁷ United Nations, *Treaty Series*, vol. 596, p. 261.

⁶³⁴ United Nations, *Treaty Series*, vol. 500, p. 95.

on Special Missions,⁶³⁸ and of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.⁶³⁹ It further contained, in an annex, the comments on the elaboration of such a protocol received from Member States since 1977, those received up to the end of 1976 being reproduced in document A/31/145 and Add. 1. The second working paper contained the suggestions by the Chairman of the Working Group for an outline of issues on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier based on the comments and proposals of Member States as classified in the preceding working paper. The third working paper, prepared by the Secretariat at the request of the Working Group, set out the relevant provisions of the four multilateral conventions mentioned above under each of the headings contained in the second working paper, as orally revised by the Working Group.

142. On the basis of the working papers as well as of other relevant material, the Working Group studied the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, together with the provisions of the four above-mentioned multilateral conventions.⁶⁴⁰ The Working Group adopted as its basic position that there had been considerable developments in various aspects of the question in recent years, as reflected in the three multilateral conventions adopted subsequent to the 1961 Vienna Convention on Diplomatic Relations, and that the relevant provisions of those conventions, if any, should therefore form the bases for any further study of the question. The Working Group tentatively identified 19 issues and examined each of them in order to ascertain whether any of the four conventions adequately covered the issue concerned and what further elements could be considered as appropriately falling within each of those issues. Although, pursuant to the request of the General Assembly resolution quoted above,⁶⁴¹ the issues were so formulated as to be applicable to the "diplomatic" courier or bag, certain members of the Working Group were of the view that they were also relevant with respect to the other couriers or bags defined under the above-mentioned three conventions and should therefore subsequently be made applicable to such couriers or bags as well.

143. The issues tentatively identified were as follows:

- (1) Definition of "diplomatic courier"
- (2) Function of the diplomatic courier
- (3) Multiple appointment of the diplomatic courier
- (4) Privileges and immunities of the diplomatic courier
 - (a) Personal inviolability
 - (i) Immunity from arrest or detention
 - (ii) Exemption from personal examination or control
 - (iii) Exemption from inspection of personal baggage

⁶³⁸ General Assembly resolution 2530 (XXIV), annex.

⁶³⁹ *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207.

⁶⁴⁰ See para. 141.

⁶⁴¹ See para. 137.

- (b) Inviolability of residence
- (c) Inviolability of means of transport
- (d) Immunity from jurisdiction
- (e) Waiver of immunities
- (5) Facilities accorded to the diplomatic courier
- (6) Duration of privileges and immunities of the diplomatic courier
- (7) Nationality of the diplomatic courier
- (8) End of functions of the diplomatic courier
- (9) Consequences of the severance or suspension of diplomatic relations, of the recall of diplomatic missions or of armed conflict
- (10) Granting of visas to the diplomatic courier
- (11) Persons declared not acceptable
- (12) Status of the diplomatic courier *ad hoc*
- (13) Definition of "diplomatic bag"
- (14) Status of the diplomatic bag accompanied by diplomatic courier
- (15) Status of the diplomatic bag not accompanied by diplomatic courier
 - (a) General
 - (b) The diplomatic bag entrusted to the captain of a commercial aircraft or of a ship
- (16) Respect for the laws and regulations of the receiving State
- (17) Obligations of the receiving State
 - (a) General
 - (b) Obligations of the receiving State in the event of death or accident of the diplomatic courier precluding him from the performance of his functions
- (18) Obligations of the transit State
 - (a) General
 - (b) Obligations of the transit State in the event of death or accident of the diplomatic courier precluding him from the performance of his functions
- (19) Obligations of the third State in cases of *force majeure*

144. As a result of the study thus undertaken by the Working Group, the following provisions of the four aforementioned conventions⁶⁴² were deemed relevant, as appropriate, to each of the issues listed in the preceding paragraph; additional points made in the course of the Working Group's discussions are also reflected under each issue.

(1) DEFINITION OF "DIPLOMATIC COURIER"

No definition of "diplomatic courier" as such is contained in the existing conventions.⁶⁴³ However, the following provisions may be considered as containing elements for a possible definition.

⁶⁴² See para. 141 above.

⁶⁴³ The words "existing conventions" as used below refer to the Vienna Convention on Diplomatic Relations (known as the "1961 Vienna Convention"), the Vienna Convention on Consular Relations (known as the "1963 Vienna Convention"), the Convention on Special Missions, and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (known as the "1975 Vienna Convention"). For references, see foot-notes 634 and 637-639 above.

(a) 1961 Vienna Convention (article 27, paragraphs 1 and 5):

1. ... In communicating with the Government and the other missions and consulates of the sending States, wherever situated, the mission may employ all appropriate means, including diplomatic couriers...

5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag ...

(b) 1963 Vienna Convention (article 35, paragraphs 1 and 5):

1. ... In communicating with the Government, the diplomatic missions and other consular posts, wherever situated, of the sending State, the consular post may employ all appropriate means, including diplomatic or consular couriers...

5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag...

(c) Convention on Special Missions (article 28, paragraphs 1, 3 and 6):

1. ... In communicating with the Government of the sending State, its diplomatic missions, its consular posts and its other special missions or with sections of the same mission, wherever situated, the special mission may employ all appropriate means, including couriers...

3. Where practicable, the special mission shall use the means of communication, including... the courier, of the permanent diplomatic mission of the sending State.

6. The courier of the special mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag...

(d) 1975 Vienna Convention (article 27, paragraphs 1 and 5, and article 57, paragraphs 1, 3 and 6):

Article 27

1. ... In communicating with the Government of the sending State, its permanent diplomatic missions, consular posts, permanent missions, permanent observer missions, special missions, delegations and observer delegations, wherever situated, the mission may employ all appropriate means, including couriers...

...

5. The courier of the mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag...

Article 57

1. ... In communicating with the Government of the sending State, its permanent diplomatic missions, consular posts, permanent missions, permanent observer missions, special missions, other delegations, and observer delegations, wherever situated, the delegation may employ all appropriate means, including couriers...

...

3. Where practicable, the delegation shall use the means of communication, including... the courier, of the permanent diplomatic mission, of a consular post, of the permanent mission or of the permanent observer mission of the sending State.

...

6. The courier of the delegation, who shall be provided with an official document indicating his status and the number of packages constituting the bag...

(2) FUNCTION OF THE DIPLOMATIC COURIER

The provisions of the existing conventions mentioned under heading (1) above are also relevant under this heading. Some members stressed the need to make it clear that the function of the courier was that of the State and not of the individual. It was also pointed out that the function of the courier was not limited to the carrying of diplomatic bags; he might also carry messages orally.

(3) MULTIPLE APPOINTMENT OF THE DIPLOMATIC COURIER

No provision is contained in the existing conventions.

(4) PRIVILEGES AND IMMUNITIES OF THE DIPLOMATIC COURIER

On the general question of the privileges and immunities to be granted to the diplomatic courier, certain members stressed the importance of according the fullest possible diplomatic status to the courier, whereas others took the view that such privileges and immunities should be strictly limited to the needs of his functions.

In connexion with the same general question, it was pointed out that the existing conventions did not cover cases where the courier had another status as well, such as that of a diplomatic agent or consular officer.

(a) *Personal inviolability*

The existing conventions contain the following provisions.

(d) 1961 Vienna Convention (article 27, paragraph 5):

5. ... He [the diplomatic courier] shall enjoy personal inviolability...

(b) 1963 Vienna Convention (article 35, paragraph 5):

5. ... He [the consular courier] shall enjoy personal inviolability...

(c) Convention on Special Missions (article 28, paragraph 6):

6. ... He [the courier of the special mission] shall enjoy personal inviolability...

(d) 1975 Vienna Convention (article 27, paragraph 5, and article 57, paragraph 6):

Article 27

...

5. ... He [the courier of the mission] shall enjoy personal inviolability...

Article 57

...

6. ... He [the courier of the delegation] shall enjoy personal inviolability...

(i) *Immunity from arrest or detention*

The existing conventions provide as follows.

(d) 1961 Vienna Convention (article 27, paragraph 5):

5. ... He [the diplomatic courier]... shall not be liable to any form of arrest or detention.

(b) 1963 Vienna Convention (article 35, paragraph 5):

5. ... He [the consular courier]... shall not be liable to any form of arrest or detention.

(c) Convention on Special Missions (article 28, paragraph 6):

6. ... He [the courier of the special mission]... shall not be liable to any form of arrest or detention.

(d) 1975 Vienna Convention (article 27, paragraph 5, and article 57, paragraph 6):*Article 27*

...

5. ... He [the courier of the mission]... shall not be liable to any form of arrest or detention.

Article 57

...

6. ... He [the courier of the delegation]... shall not be liable to any form of arrest or detention.

(ii) Exemption from personal examination or control

No provision is contained in the existing conventions.

(iii) Exemption from inspection of personal baggage

No provision is contained in the existing conventions.

(b) Inviolability of residence

No provision is contained in the existing conventions. Emphasis was placed on the need to provide for protection of the place where the courier was staying while performing his functions.

(c) Inviolability of means of transport

No provision is contained in the existing conventions. Emphasis was placed on the need to ensure adequate protection of the means of transport of the courier.

(d) Immunity from jurisdiction

No provision is contained in the existing conventions. It was stated that such immunity should be granted to the courier in connexion with the performance of his functions.

(e) Waiver of immunities

No provision is contained in the existing conventions.

(5) FACILITIES ACCORDED TO THE DIPLOMATIC COURIER

No provision is contained in the existing conventions.

(6) DURATION OF PRIVILEGES AND IMMUNITIES OF THE DIPLOMATIC COURIER

No provision is contained in the existing conventions. However, the following provisions relating to the courier *ad hoc* may be taken into account.

(a) 1961 Vienna Convention (article 27, paragraph 6):

6. ... the immunities [which a diplomatic courier *ad hoc* enjoys] shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.

(b) 1963 Vienna Convention (article 35, paragraph 6):

6. ... the immunities [which a consular courier *ad hoc* enjoys] shall cease to apply when such a courier has delivered to the consignee the consular bag in his charge.

(c) Convention on Special Missions (article 28, paragraph 7):

7. ... the immunities [which a courier *ad hoc* for the special mission enjoys] shall cease to apply when the courier *ad hoc* has delivered to the consignee the special mission's bag in his charge.

(d) 1975 Vienna Convention (article 27, paragraph 6, and article 57, paragraph 7):*Article 27*

...

6. ... the immunities [which a courier *ad hoc* of the mission enjoys] shall cease to apply when the courier *ad hoc* has delivered to the consignee the mission's bag in his charge.

Article 57

...

7. ... the immunities [which a courier *ad hoc* of the delegation enjoys] shall cease to apply when the courier *ad hoc* has delivered to the consignee the delegation's bag in his charge.

The view was expressed that the jurisdictional immunities *ratione materiae* should continue even after a courier ceased to exercise his functions.

(7) NATIONALITY OF THE DIPLOMATIC COURIER

The following provision appears in the 1963 Vienna Convention (article 35, paragraph 5):

5. ... Except with the consent of the receiving State he shall be neither a national of the receiving State, nor, unless he [the consular courier] is a national of the sending State, a permanent resident of the receiving State...

(8) END OF FUNCTIONS OF THE DIPLOMATIC COURIER

No provision is contained in the existing conventions. It was stated that the termination of a courier's functions should be the moment when he returned to his home base.

(9) CONSEQUENCES OF THE SEVERANCE OR SUSPENSION OF DIPLOMATIC RELATIONS, OF THE RECALL OF DIPLOMATIC MISSIONS OR OF ARMED CONFLICT

No provision is contained in the existing conventions.

(10) GRANTING OF VISAS TO THE DIPLOMATIC COURIER

No provision is contained in the existing conventions. It was considered desirable to establish a rule aimed at facilitating the granting of visas where visas were required. It was maintained that full diplomatic status should be given to couriers with respect to visas.

(11) PERSONS DECLARED NOT ACCEPTABLE

No provision is contained in the existing conventions.

(12) STATUS OF THE DIPLOMATIC COURIER *ad hoc*

The existing conventions provide the following.

(a) 1961 Vienna Convention (article 27, paragraph 6):

6. The sending State or the mission may designate diplomatic couriers *ad hoc*. In such cases the provisions of paragraph 5⁶⁴⁴ of this article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.

(b) 1963 Vienna Convention (article 35, paragraph 6):

6. The sending State, its diplomatic missions and its consular posts may designate consular couriers *ad hoc*. In such cases the provisions of paragraph 5⁶⁴⁵ of this Article shall also apply except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the consular bag in his charge.

(c) Convention on Special Missions (article 28, paragraph 7):

7. The sending State or the special mission may designate couriers *ad hoc* of the special mission. In such cases the provisions of paragraph 6⁶⁴⁶ of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the special mission's bag in his charge.

(d) 1975 Vienna Convention (articles 27, paragraph 6, and 57, paragraph 7):

Article 27

...

6. The sending State or the mission may designate couriers *ad hoc* of the mission. In such cases the provisions of paragraph 5⁶⁴⁷ of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the mission's bag in his charge.

Article 57

...

7. The sending State or the delegation may designate couriers *ad hoc* of the delegation. In such cases the provisions of paragraph 6⁶⁴⁸ of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the delegation's bag in his charge.

It was pointed out that the courier *ad hoc* might have another status, such as that of a diplomatic agent or consular officer, and that such a case was not covered by the existing conventions. It was also pointed out that there was need to define his status during the time when, after delivering a bag in his charge, he had to wait for some time until he was entrusted with another bag.

⁶⁴⁴ See items (1) (a) and (4) (a) above, and (17) (a) (i) below.

⁶⁴⁵ See items (1) (b) and (4) (a) above, and (17) (a) (ii) below.

⁶⁴⁶ See items (1) (c) and (4) (a) above, and (17) (a) (iii) below.

⁶⁴⁷ See items (1) (d) and (4) (a) above, and (17) (a) (iv) below.

⁶⁴⁸ *Ibid.*

(13) DEFINITION OF "DIPLOMATIC BAG"

No definition of "diplomatic bag" as such is contained in the existing conventions. The following provisions, however, may be considered as relevant.

(a) 1961 Vienna Convention (article 27, paragraphs 2 and 4):

2. ... Official correspondence means all correspondence relating to the mission and its functions.

4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.

(b) 1963 Vienna Convention (article 35, paragraphs 1, 2 and 4):

1. ... In communicating with the Government, the diplomatic missions and other consular posts, wherever situated, of the sending State, the consular post may employ all appropriate means, including... diplomatic or consular bags...

2. ... Official correspondence means all correspondence relating to the consular post and its functions.

4. The packages constituting the consular bag shall bear visible external marks of their character and may contain only official correspondence and documents or articles intended exclusively for official use.

(c) Convention on Special Missions (article 28, paragraphs 2, 3 and 5):

2. ... Official correspondence means all correspondence relating to the special mission and its functions.

3. Where practicable, the special mission shall use the means of communication, including the bag... of the permanent diplomatic mission of the sending State.

5. The packages constituting the bag of the special mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the special mission.

(d) 1975 Vienna Convention (articles 27, paragraphs 2 and 4, and 57, paragraphs 2, 3 and 5):

Article 27

...

2. ... Official correspondence means all correspondence relating to the mission and its functions.

...

4. The packages constituting the bag of the mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the mission.

Article 57

...

2. ... Official correspondence means all correspondence relating to the delegation and its tasks.

3. Where practicable, the delegation shall use the means of communication, including the bag... of the permanent diplomatic mission, of a consular post, of the permanent mission or of the permanent observer mission of the sending State.

...

5. The packages constituting the bag of the delegation must bear visible external marks of their character and may contain only documents or articles intended for the official use of the delegation.

(14) STATUS OF THE DIPLOMATIC BAG
ACCOMPANIED BY DIPLOMATIC COURIER

The following provisions in the existing conventions may be considered as relevant.

(a) 1961 Vienna Convention (article 27, paragraph 3):

3. The diplomatic bag shall not be opened or detained.

(b) 1963 Vienna Convention (article 35, paragraph 3):

3. The consular bag shall be neither opened nor detained. Nevertheless, if the competent authorities of the receiving State have serious reasons to believe that the bag contains something other than the correspondence, documents or articles referred to in paragraph 4 of this article, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

(c) Convention on Special Missions (article 28, paragraph 4):

4. The bag of the special mission shall not be opened or detained.

(d) 1975 Vienna Convention (articles 27, paragraph 3, and 57, paragraph 4):

Article 27

...

3. The bag of the mission shall not be opened or detained.

Article 57

...

4. The bag of the delegation shall not be opened or detained.

In addition, the provisions quoted under items (18) (a) and (19) below may also be relevant.

It was pointed out that the existing conventions did not adequately provide for protection of the diplomatic bag accompanied by a courier in the place where he was staying or on means of transport.

(15) STATUS OF THE DIPLOMATIC BAG NOT
ACCOMPANIED BY DIPLOMATIC COURIER(a) *General*

The provisions quoted and referred to under item (14) above are also relevant to the status of the diplomatic bag not accompanied by diplomatic courier.

(b) *The diplomatic bag entrusted to the captain
of a commercial aircraft or of a ship*

The existing conventions provide the following.

(a) 1961 Vienna Convention (article 27, paragraph 7):

7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

(b) 1963 Vienna Convention (article 35, paragraph 7):

7. A consular bag may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized

port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a consular courier. By arrangement with the appropriate local authorities, the consular post may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

(c) Convention on Special Missions (article 28, paragraph 8):

8. The bag of the special mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. The captain shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the special mission. By arrangement with the appropriate authorities, the special mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

(d) 1975 Vienna Convention (articles 27, paragraph 7, and 57, paragraph 8):

Article 27

...

7. The bag of the mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the mission. By arrangement with the appropriate authorities of the host State, the mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

Article 57

...

8. The bag of the delegation may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the delegation. By arrangement with the appropriate authorities of the host State, the delegation may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

(16) RESPECT FOR THE LAWS AND REGULATIONS
OF THE RECEIVING STATE

No provision is contained in the existing conventions.

(17) OBLIGATIONS OF THE RECEIVING STATE

(a) *General*

The existing conventions provide the following.

(a) 1961 Vienna Convention (article 27, paragraph 5):

5. The diplomatic courier... shall be protected by the receiving State in the performance of his functions.

(b) 1963 Vienna Convention (article 35, paragraph 5):

5. ... In the performance of his functions he [the consular courier] shall be protected by the receiving State.

(c) Convention on Special Missions (article 28, paragraph 6):

6. The courier of the special mission... shall be protected by the receiving State in the performance of his functions.

(d) 1975 Vienna Convention (articles 27, paragraph 5, and 57, paragraph 6):

Article 27

...

5. The courier of the mission... shall be protected by the host State in the performance of his functions.

Article 57

...

6. The courier of the delegation... shall be protected by the host State in the performance of his functions.

(b) *Obligations of the receiving State in the event of death or accident of the diplomatic courier precluding him from the performance of his functions*

No provision is contained in the existing conventions.

(18) OBLIGATIONS OF THE TRANSIT STATE

(a) *General*

The relevant conventions provide as follows:

(a) 1961 Vienna Convention (article 40, paragraph 3):

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit, the same inviolability and protection as the receiving State is bound to accord.

(b) 1963 Vienna Convention (article 54, paragraph 3):

3. Third States shall accord to official correspondence and to other official communications in transit, including messages in code or cipher, the same freedom and protection as the receiving State is bound to accord under the present Convention. They shall accord to consular couriers who have been granted a visa, if a visa was necessary, and to consular bags in transit, the same inviolability and protection as the receiving State is bound to accord under the present Convention.

(c) Convention on Special Missions (article 42, paragraphs 3 and 4):

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as the receiving State is bound to accord under the present Convention. Subject to the provisions of paragraph 4 of this article, they shall accord to the couriers and bags of the special mission in transit the same inviolability and protection as the receiving State is bound to accord under the present Convention.

4. The third State shall be bound to comply with its obligations in respect of the persons mentioned in paragraphs 1, 2 and 3 of this article only if it has been informed in advance, either in the visa application or by notification, of the transit of those persons as members of the special mission, members of their families or couriers, and has raised no objection to it.

(d) 1975 Vienna Convention (article 81, paragraph 4):

4. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as the host State is bound to accord under the present Convention. They shall accord to the couriers of the mission, of the delegation or of the observer delegation, who have been granted a passport visa if such visa was necessary, and to the bags of the mission, of the delegation or of the observer delegation in transit the same inviolability and protection as the host State is bound to accord under the present Convention.

The question was raised whether the status of the diplomatic courier, in particular his privileges and immunities, should be dealt with in respect of transit States also. It was pointed out that the existing conventions provided no obligation for a transit State to grant visas to diplomatic couriers but that once the couriers were admitted to the territory of the transit State, they should enjoy the necessary protection.

(b) *Obligation of the transit State in the event of death or accident of the diplomatic courier precluding him from the performance of his functions*

No provision is contained in the existing conventions.

(19) OBLIGATIONS OF THE THIRD STATE IN CASES OF *force majeure*

The existing conventions provide as follows.

(a) 1961 Vienna Convention (article 40, paragraph 4):

4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and diplomatic bags, whose presence in the territory of the third State is due to *force majeure*.

(b) 1963 Vienna Convention (article 54, paragraph 4):

4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and to consular bags, whose presence in the territory of the third State is due to *force majeure*.

(c) Convention on Special Missions (article 42, paragraph 5):

5. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to the official communications and the bags of the special mission, when the use of the territory of the third State is due to *force majeure*.

(d) 1975 Vienna Convention (article 18, paragraph 5):

5. The obligations of third States under paragraphs 1, 2, 3 and 4 of this article shall also apply to the persons mentioned respectively in those paragraphs and to the official communications and bags of the mission, of the delegation or of the observer delegation when they are present in the territory of the third State owing to *force majeure*.

Chapter VII

SECOND PART OF THE TOPIC "RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS"

145. The Commission divided its work on the topic "Relations between States and international organizations" into two parts, concentrating first on that part of the topic relating to the status, privileges and immunities of representatives of States to international organizations. The draft articles it had adopted at its twenty-third session, in 1971, on that part of the topic were referred by the General Assembly to a diplomatic conference. That conference met in Vienna in 1975 and adopted the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.⁶⁴⁹

146. At its twenty-eighth session, in 1976, the Commission reverted to the remaining second part of the topic. In its report of the work of that session, the Commission included the following paragraph:

The Commission also approved the recommendation of the [Planning] Group, which was submitted to it by the Enlarged Bureau, that at least three meetings should be set aside for a discussion of the second part of the topic "relations between States and international organizations". In considering the question of diplomatic law in its application to relations between States and international organizations, the Commission concentrated first on the part relating to the status, privileges and immunities of representatives of States to international organizations. The draft articles which it adopted on this part at its twenty-third session in 1971 were referred by the General Assembly to a diplomatic conference. This conference met in Vienna in 1975 and adopted the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. The Commission requested the Special Rapporteur on the topic, Mr. Abdullah El-Erian, to prepare a preliminary report to enable it to take the necessary decisions and to define its course of action on the second part of the topic of relations between States and international organizations, namely, the status, privileges and immunities of international organizations and their officials, experts and other persons engaged in their activities not being representatives of States.⁶⁵⁰

147. At the twenty-ninth session of the Commission, in 1977, the Special Rapporteur submitted a preliminary report on the second part of the topic of relations between States and international organizations.⁶⁵¹ The report consisted of five sections. Chapter I described the background of the preliminary study and defined its scope. Chapter II traced the evolution of international law relating to the legal status and immunities of international organizations.

Chapter III analysed recent developments in relations between States and international organizations that had occurred since the adoption by the Commission in 1971 of its draft articles on the first part of the topic of relations between States and international organizations and that had a bearing on the subject-matter of the report. Chapter IV dealt with a number of general questions of a preliminary character, including: place of custom in the law of international immunities, differences between inter-State diplomatic relations and relations between States and international organizations, legal capacity of international organizations, and scope of privileges and immunities and uniformity or adaptation of international immunities. Chapter V contained a series of conclusions and recommendations.

148. Furthermore, the Special Rapporteur indicated in his preliminary report his belief that,

Bearing in mind that many years have elapsed since the preparation of the replies by the United Nations and the specialized agencies to the questionnaire addressed to them by the Legal Counsel of the United Nations, ... it would be useful if the United Nations and the specialized agencies were requested to provide the Special Rapporteur with any additional information on the practice in the years following the preparation of their replies.⁶⁵²

He also stated, in the same passage, that "such information would be particularly helpful in the area of the category of experts on missions for, and of persons having official business with, the organization", and further pointed out that another area in which information was also needed was that relating to resident representatives and observers who might represent or be sent by one international organization to another international organization.

149. The Commission discussed the preliminary report at its 1452nd, 1453rd and 1454th meetings, held on 4, 5 and 6 July 1977. Among the points raised in the course of the discussion were, the need for an analysis of the practice of States and international organizations in the sphere of international immunities and its impact on the United Nations system, the need to study the internal law of States regulating international immunities, the possibility of extending the scope of the study to all international organizations, whether universal or regional, the need to take account of the particularities of diplomatic law in its application to relations between States and international organizations, and the need to reconcile the

⁶⁴⁹ *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207.

⁶⁵⁰ *Yearbook ... 1976*, vol. II (Part Two), p. 164, doc. A/31/10, para. 173.

⁶⁵¹ *Yearbook ... 1977*, vol. II (Part One), p. 139, doc. A/CN.4/304.

⁶⁵² *Ibid.*, para. 78. On the basis of those replies, the Secretariat of the United Nations issued in 1967 a study entitled "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities" (*Yearbook ... 1967*, vol. II, p. 154, doc. A/CN.4/L.118 and Add.1 and 2).

functional requirements of international organizations and the security interests of host States.

150. At its 1454th meeting, the Commission decided to authorize the Special Rapporteur to continue his study on the lines indicated in his preliminary report and to prepare a further report on the second part of the topic of relations between States and international organizations, having regard to the views expressed and the questions raised during the debate at the twenty-ninth session. The Commission also decided to authorize the Special Rapporteur to seek additional information, and expressed the hope that he would carry out his research in the customary manner, namely, by investigating the agreements and practices of international organizations, whether within or outside the United Nations system, as well as the legislation and practice of States.⁶⁵³

151. By paragraph 6 of its resolution 32/151 of 19 December 1977, the General Assembly endorsed "the conclusions reached by the International Law Commission regarding the second part of the topic of relations between States and international organizations".

152. By a letter dated 13 March 1978 addressed to the heads of the specialized agencies and IAEA, the Legal Counsel of the United Nations stated that:

To assist the Special Rapporteur and the Commission, the United Nations Secretariat at Headquarters has undertaken to examine its own files and to collect materials on the practice of the Organization regarding its status, privileges and immunities during the period from 1 January 1966 to the present. Furthermore, you will find enclosed a questionnaire, largely identical to the relevant one sent in 1965, which is aimed at eliciting information concerning the practice of the specialized agencies and IAEA additional to that submitted previously, namely, information on the practice relating to the status, privileges and immunities of the specialized agencies and IAEA, their officials, experts and other persons engaged in their activities not being representatives of States.

153. Furthermore, the Legal Counsel pointed out in that letter:

As in 1965, the questionnaire closely follows the structure of the Convention on the Privileges and Immunities of the Specialized Agencies. This format was chosen to make possible a uniform treatment of the material by all the specialized agencies, and to facilitate comparisons between their replies. It should be emphasized, however, that the additional information sought by the Special Rapporteur under his mandate from the Commission relates not only to the Specialized Agencies Convention—or, in the case of the IAEA, the Agreement on the Privileges and Immunities of the IAEA—but equally to the constituent treaties of the agencies, the agreements with host Governments regarding the headquarters of the agencies, and relevant experience of the agencies concerning the implementation in practice of these international instruments. Any relevant material derived from these sources should be analysed and described under the appropriate sections of the questionnaire.

The questionnaire attempts to indicate the principal problems which, so far as we know, have arisen in practice, but our information may not be complete and consequently the questions may not be exhaustive of the subject. If problems which are not covered by the questionnaire have arisen in your organization during the

period under consideration and you think they should be brought to the attention of the Special Rapporteur, you are requested to be good enough to describe them in your replies. Also, the questionnaire was designed for all the specialized agencies, and its terminology may not be completely adapted to your organization; we would be obliged, however, if you would be kind enough to apply the questions to the special position of your organization in the light of their purpose of eliciting all information which will be useful to the International Law Commission.

It is hoped that the replies will not be limited to short answers to the questions, but that, so far as useful and possible, you will furnish materials in relation to your organization—including resolutions, diplomatic correspondence, judicial decisions, legal opinions, agreements, etc.—showing in detail the positions taken both in intergovernmental organizations and by States, and the solutions, if any, which have been arrived at, so that the Special Rapporteur may be afforded a clear view of international practice on points which have given difficulty during the period.

154. The Special Rapporteur has been in touch with the Legal advisers of a number of specialized agencies and regional organizations. The Codification Division of the United Nations Office of Legal Affairs furnished the Special Rapporteur with a collection of data, including a complete set of the *United Nations Juridical Yearbook* (1962-1975). That work contains legislative texts and treaty provisions concerning the legal status of the United Nations and related intergovernmental organizations, thus offering an important source supplementing the relevant volumes for 1960 and 1961 of the United Nations Legislative Series.⁶⁵⁴ In addition, the *Juridical Yearbook* reproduces selected legal opinions that sometimes deal with questions that have arisen in practices relating to privileges and immunities.

155. At the current session of the Commission, the Special Rapporteur submitted a second report on the second part of the topic of relations between States and international organizations (A/CN.4/311 and Add.1⁶⁵⁵). The report consisted of five chapters. Chapter I defined the basis of the report. Chapter II contained a summary of the Commissions, discussion of the preliminary report of the Special Rapporteur, which related to the following issues: advisability of codifying the second part of the topic; scope of the topic; subject-matter of the envisaged study; theoretical basis of the immunities of international organizations; form to be given to the eventual codification; methodology and processing of data. Chapter III contained a summary of the Sixth Committee's discussion at the thirty-second session of the General Assembly of the work of the Commission at its twenty-ninth session on the second part of the topic of relations between States and international organizations. Chapter IV dealt with a number of general questions raised in the discussions in the Commission and the Sixth Committee, grouped under the following main headings: impact of institutional evolution and functional expansion in the sphere of international organizations; contribution of national law to the legislative sources of international immunities; case

⁶⁵³ *Yearbook ... 1977*, vol. II (Part Two), p. 127, doc. A/32/10, paras. 94 and 95.

⁶⁵⁴ *Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations*, vols. I and II (United Nations publications, Sales Nos. 60.V.2 and 61.V.3 respectively).

⁶⁵⁵ Reproduced in *Yearbook ... 1978*, vol. II (Part One).

for codification of the law of international immunities; place of regional organizations in the régime of international immunities. Chapter V contained a series of conclusions and recommendations.

With regard to the scope of the envisaged codification, the Special Rapporteur suggested that the Commission should adopt a very broad approach to its initial work on the second part of the topic; the scope of the study should be extended to include all international organizations, whether of a universal or of a regional character. The definitive decision to include regional organizations in the eventual codification could be taken only when the study was completed. The Special Rapporteur also included in chapter V the proposition that the same broad outlook should be adopted in relation to the subject-matter of the study. He referred to the suggestion made by some members of the Commission that a few problems should be selected for consideration at the first stage, such as those concerning the legal status and immunities of international organizations, and that the problems relating to international officials should be left until later. He thought that the decision on the priority issue should also be deferred pending the completion of the study. He recommended to the Commission that arrangements be made to ensure the association of the specialized agencies and IAEA, as well as Switzerland, in the preparation of any draft articles to be proposed by the Commission on the second part of the topic similar to those prepared in connexion with the first part. When the Commission prepared its provisional draft articles on representation of States in their relations with international organizations, it decided to submit them not only to governments of Member States but also to the secretariats of the United Nations, the specialized agencies and IAEA for their observations. Again, bearing in mind the position of Switzerland as the host State in relation to the United Nations Office at Geneva and to a number of specialized

agencies, as well as the wish expressed by the Swiss Government, the Commission deemed it useful to transmit the draft articles also to that Government for its observations.⁶⁵⁶

156. The Commission discussed the second report of the Special Rapporteur at its 1522nd, 1523rd and 1524th meetings, held on 20, 21 and 24 July 1978. Among the questions raised in the course of the discussion were: definition of the order of work on the topic and advisability of conducting the work in different stages, beginning with the legal status, privileges and immunities of international organizations; special position and regulatory functions of operational international organizations established by governments for the express purpose of engaging in operational—and sometimes even commercial—activities, and difficulty of applying to them the general rules of international immunities; relationship between the privileges and immunities of international organizations and their responsibilities; responsibility of States to ensure respect by their nationals of their obligations as international officials; need to study the case law of national courts in the sphere of international immunities; need to define the legal capacity of international organizations at the level of both internal and international law; need to study the proceedings of committees on host country relations, such as that functioning at the Headquarters of the United Nations in New York; need to analyse the relationship between the scope of the privileges and immunities of the organizations and their particular functions and objectives. At its 1524th meeting, held on 24 July 1978, the Commission approved the conclusions and recommendations set out in the second report of the Special Rapporteur.

⁶⁵⁶ *Yearbook ... 1970*, vol. II, p. 276, doc. A/8010/Rev.1, para. 24.

Chapter VIII

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. The law of the non-navigational uses of international watercourses

157. By resolution 3315 (XXIX) of 14 December 1974, the General Assembly recommended that the Commission should continue its study of the law of the non-navigational uses of international watercourses, taking into account, *inter alia*, comments received from Member States on the questions referred to in the annex to chapter V of the Commission's report on the work of its twenty-sixth session.⁶⁵⁷ At its twenty-eighth session, in 1976, the Commission had before it the replies received from 21 Member States, submitted pursuant to General Assembly resolution 3315 (XXIX).⁶⁵⁸ By resolution 31/97 of 15 December 1976, the General Assembly urged Member States that had not yet done so to submit to the Secretary-General their written comments on the subject of the law of the non-navigational uses of international watercourses. At the current session, the Commission had before it additional replies to its questionnaire submitted by four Member States pursuant to General Assembly resolution 31/97 (A/CN.4/314)⁶⁵⁹.

158. At its 1526th meeting, held on 26 July 1978, the Commission heard a statement by the Special Rapporteur on the topic, Mr. Stephen M. Schwebel. The Special Rapporteur spoke, *inter alia*, of recent activities within the United Nations that concerned the topic of the law of the non-navigational uses of international watercourses. He drew attention to the Mar del Plata Action Plan adopted by the United Nations Water Conference,⁶⁶⁰ and recalled that members of the Commission were aware of Economic and Social Council resolution 2121 (LXIII) of 4 August 1977, entitled "Report of the United Nations Water Conference", and of General Assembly resolution 32/158 of 19 December 1977, entitled "United Nations Water Conference", as well as of the views of the Committee on Natural Resources of ESCAP, which had been transmitted to the Chairman of the Commission at its twenty-ninth session. It was noted that, by its resolution 32/151 of 19 December 1977, the General Assembly had recommended that the Commission should continue its work on the law of the non-navigational uses of international watercourses. Reference was also made to the

activities of two groups of experts established under the auspices of UNEP.⁶⁶¹

159. The Special Rapporteur also informed the Commission that, in co-operation with the Office of Legal Affairs, the secretariats of certain United Nations bodies, programmes and regional economic commissions, as well as certain specialized agencies and other international organizations, had been requested to provide recent information and materials relevant to the topic. Finally, he drew attention to document A/CN.4/314, circulated during the current session, which contained four additional replies submitted by governments to the Commission's questionnaire on the topic,⁶⁶² and stressed the importance of receiving as many replies as possible as soon as possible.

160. At the same meeting, the Commission took note of the presentation made by the Special Rapporteur and expressed the hope that he could proceed in the near future with the preparation of a report on the topic. It decided to stress once again the invitation to governments of Member States that had not already done so to submit their replies to the Commission's questionnaire, in pursuance of General Assembly resolution 31/97 referred to above.

B. Review of the multilateral treaty-making process

161. By its resolution 32/48 of 8 December 1977, the General Assembly requested the Secretary-General to prepare a report on the techniques and procedures used in the elaboration of multilateral treaties, and invited governments and the Commission to submit their observations on that subject by 31 July 1979, for inclusion in the Secretary-General's report.⁶⁶³ Pursuant to that invitation, the Commission included in the agenda of its current session an item entitled "Review of the multilateral treaty-making process".

162. At its 1486th meeting, held on 25 May 1978, the Commission set up a working group, composed of Mr. Robert Q. Quentin-Baxter (Chairman), Mr. Juan José Calle y Calle, Mr. Frank X.J.C. Njenga, Mr. C. W. Pinto and Mr. Alexander Yankov, to consider the preliminary questions raised by resolution 32/48 and to make recommendations to it on action to be taken in response to the General Assembly's invitation.

⁶⁵⁷ *Yearbook ... 1974*, vol. II (Part One), p. 301, doc. A/9610/Rev.1.

⁶⁵⁸ *Yearbook ... 1976*, vol. II (Part One), pp. 147, doc. A/CN.4/294 and Add.1.

⁶⁵⁹ Reproduced in *Yearbook ... 1978*, vol. II (Part One).

⁶⁶⁰ *Report of the United Nations Water Conference* (United Nations publication, Sales No. E.77.II.A.12), chap. I.

⁶⁶¹ Intergovernmental working group of experts on natural resources shared by two or more States; Group of experts on environmental law.

⁶⁶² See para. 157 above.

⁶⁶³ See A/CN.4/310 (Note by the Secretariat), reproduced in *Yearbook ... 1978*, vol. II (Part One).

163. The Working Group held three meetings, on 7, 12 and 20 July 1978, in the course of which there were exchanges of views as to the way in which the Commission could best respond to the General Assembly's invitation. At its last meeting, the Group approved its report (A/CN.4/L.283). The Commission, at its 1526th meeting on 26 July 1978, approved the report of the Working Group and decided to include paragraphs 164 to 169 below in its report to the General Assembly on the work of its current session, as recommended by the Working Group.

164. The Commission considers that a review of the multilateral treaty-making process constitutes a very important question and that such an endeavour requires serious consideration and thought. In the light of that fact, and of the role the Commission plays, pursuant to its Statute, in the progressive development of international law and its codification, the Commission welcomes the opportunity to make a contribution to the study of the question.

165. In accordance with General Assembly resolution 32/48, the Secretary-General's report is to be a factual report on the techniques and procedures used in multilateral treaty-making, primarily within the United Nations. It would take account of other treaty-making practices to the extent needed for purposes of comparison. The report would describe the various technical and procedural United Nations patterns in treaty-making so as to facilitate the assessment of their merits by the General Assembly.

166. It had been recognized, during discussion in the Sixth Committee of the General Assembly, that the Commission's observations would necessarily be more in the nature of an appraisal. The Commission will wish to make a careful evaluation of its own performance and potential. In so doing, the Commission will be greatly helped by past reports of its Planning Group and by its members' extensive experience in other treaty-making forums.

167. It has to be stressed that the Commission's productive capacity depends primarily upon two factors: first, the work that the Commission can accomplish during a 12 week annual session and the work that its members, particularly the special rapporteurs, can accomplish at other times of the year; secondly, the analysis of materials, selection of documentation and preparation of studies by the Codification Division of the Office of Legal Affairs in the sphere of work of the Commission on the various topics on its agenda, all of which requires a reasonable increase in the manpower and financial resources of the Division. The Commission had hoped that this would be done earlier, in accordance with its recommendations of several years ago, and it recalled in that connexion that the General Assembly, by its resolution 32/151 of 19 December 1977, had already endorsed the Commission's recommendation for the strengthening of the Codification Division, in order to ensure the Division's year-round support of the work of the Commission both in research and in other essential services.

168. Moreover, as was recognized during the debate on this question in the Sixth Committee of the General Assembly, an assessment of the technical and procedural

aspects of treaty-making, as practised by the Commission, would have to be set in a wider context that took into account the subject-matter of the topics chosen for codification and progressive development. Indeed, a study of the process of selection of topics, and of the interplay between the work of the Commission and that of other treaty-making forums, should be one of the most interesting and constructive facets of the Commission's response to the General Assembly's invitation to furnish comments.

169. In the light of the foregoing considerations, the Commission approved the recommendations of the Working Group that the Group be reconstituted, taking into account as far as possible the need for continuity of membership, at the beginning of the Commission's thirty-first session, and that it be asked to present a final report to the Commission not later than 30 June 1979.

C. International liability for injurious consequences arising out of acts not prohibited by international law

170. As noted above,⁶⁶⁴ at its current session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, and to report to it thereon.

171. The Working Group consisted of Mr. Robert Q. Quentin-Baxter (Chairman), Mr. Roberto Ago, Mr. Jorge Castañeda and Mr. Frank X.J.C. Njenga. It held three meetings, on 6, 13 and 21 July 1978, and submitted a report to the Commission (A/CN.4/L.284 and Corr.I).

172. From the outset of its work on the topic of State responsibility, the Commission agreed that that topic should deal only with the consequences of internationally wrongful acts,⁶⁶⁵ and that "in defining the general rule concerning the principle of responsibility for internationally wrongful acts, it was necessary to adopt a formula which did not prejudice the existence of responsibility for lawful acts".⁶⁶⁶ That conclusion met with broad acceptance in the discussion of the Sixth Committee of the General Assembly at its twenty-fifth session, in 1970.⁶⁶⁷

173. In 1973, when the Commission started to work on the first set of draft articles on State responsibility, it referred to the matter in more definite terms:

... If it is thought desirable—and views to this effect have already been expressed in the past both in the International Law Commission and in the Sixth Committee of the General Assembly—the International Law Commission can undertake the study of the so-called responsibility for risk after its study on responsibility for wrongful acts has been completed, or it can do so simultaneously but separately.⁶⁶⁸

⁶⁶⁴ Para. 9.

⁶⁶⁵ See, for example, *Yearbook ... 1969*, vol. II, p. 233, doc. A/7610/Rev.1, para. 83.

⁶⁶⁶ *Yearbook ... 1970*, vol. II, pp. 307 and 308, doc. A/8010/Rev.1, para. 74.

⁶⁶⁷ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, doc. A/8147.

⁶⁶⁸ *Yearbook ... 1973*, vol. II, p. 169, doc. A/9010/Rev.1, para. 39.

174. At its twenty-eighth session, held in that year, the General Assembly again supported the position of the Commission and recommended that the Commission should undertake a study of the new topic "at an appropriate time". In each of the following two years, the Assembly repeated its recommendation that the Commission take up the topic "as soon as appropriate",⁶⁶⁹ and finally, in 1976, in resolution 31/97 of 15 December, it replaced that phrase by the words "at the earliest possible time".

175. Pursuant to those recommendations of the General Assembly, the Commission agreed, at its twenty-ninth session, in 1977, to place the topic "on the active programme of the Commission at the earliest possible time, having regard, in particular, to the progress made on the draft articles on State responsibility for internationally wrongful acts".⁶⁷⁰ The General Assembly, in its resolution 32/151 of 19 December 1977, endorsed the conclusion of the Commission and, in paragraph 7, "invited" the latter

at an appropriate time and in the light of progress made on the draft articles on State responsibility for internationally wrongful acts and on other topics in its current programme of work, to commence work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law...

176. In past years, the new topic has been described in varying terms; for example, "responsibility for risk arising out of the performance of certain lawful activities, such as spatial and nuclear activities",⁶⁷¹ "this other form of responsibility, which is in reality a safeguard against the risks of certain lawful activities",⁶⁷² and "a study of that other form of responsibility, which is the protection against the hazards associated with certain activities that are not prohibited by international law".⁶⁷³ In the Sixth Committee similar expressions have been used, although during one discussion some representatives said they believed that there might be "a third category of acts ... which, because of their dangerous nature, fell half way between lawful and unlawful acts".⁶⁷⁴ The simple distinction between lawful and unlawful acts has prevailed however, and by 1974 the title of the new topic had assumed its present wording.

177. The Commission considered and took note of the report of the Working Group at its 1527th meeting, on 27 July 1978, and on the basis of the recommendations contained in paragraph 26 of the report, decided to:

- (a) appoint a Special Rapporteur for the topic;

⁶⁶⁹ See resolution 3315 (XXIX) of 14 December 1974, sect. I, para. 4 (a), and resolution 3495 (XXX) of 15 December 1975, para. 4 (b).

⁶⁷⁰ *Yearbook ... 1977*, vol. II (Part Two), p. 129, doc. A/32/10, para. 108.

⁶⁷¹ *Yearbook ... 1969*, vol. II, p. 233, doc. A/7610/Rev.1, para. 83.

⁶⁷² *Yearbook ... 1970*, vol. II, p. 308, doc. A/8010/Rev.1, para. 74.

⁶⁷³ *Yearbook ... 1973*, vol. II, p. 169, doc. A/9010/Rev.1, para. 39.

⁶⁷⁴ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, doc. A/8147, para. 104.

(b) invite the Special Rapporteur for the topic to prepare a preliminary report at an early juncture for consideration by the Commission;

(c) request the Secretariat to make the necessary provision within the Codification Division of the Office of Legal Affairs to collect and survey materials on the topic on a continuing basis and as requested by the Commission or the Special Rapporteur appointed for the topic;

(d) include in this section of the Commission's report section II of the report of the Working Group.

178. At its 1525th meeting, held on 25 July 1978, the Commission appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur on the topic "International liability for injurious consequences arising out of acts not prohibited by international law".

ANNEX

Report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law.^a

...

II. GENERAL CONSIDERATION OF THE SCOPE AND NATURE OF THE TOPIC AND OF THE METHOD TO BE FOLLOWED IN THE STUDY OF THE TOPIC

9. The topic of international liability for injurious consequences arising out of acts not prohibited by international law has only recently gained prominence, and is not separately described in most standard works on international law. It therefore seems desirable briefly to consider the general nature of the obligations that States owe to each other, and to the international community, in relation to the use of territory, and then to indicate in a preliminary way the starting point for the present topic.

10. A revolution in technology, occurring mainly within the period since the United Nations was established, has extended dramatically man's power to control his environment, creating a corresponding need for the urgent development of legal norms. Because of its awareness of that need, the General Assembly has invited the Commission to take up the study of this new topic.

11. It is, of course, not the first time that such a task, depending so largely upon lessons to be learned from contemporary State practice, has been entrusted to the Commission. The question of the concept and régime of the continental shelf, taken up by the Commission more than a quarter of a century ago as part of its study of the law of the sea, also presented those features. There, however, the parallel between the two topics ends: the question of the continental shelf had one, bold outline; but the questions raised by the new topic are multiform.

12. It would not be appropriate in this report to try to survey the range of recent materials that are, or may be, relevant to the development of the new topic. They must include, for example, the measures of international co-operation undertaken in relation to the peaceful uses of atomic energy, and to the régime of outer space, the principles affirmed by the United Nations Conference on the Environment and transactions of a regional or local character in relation to shared resources, the work of the Third Law of the Sea Conference regarding maritime pollution, and international concern about the risks attendant upon the sea carriage of oil.

13. These subjects have at least three common characteristics. Each concerns the way in which States use, or manage the use of,

^a A/CN.4/L.284 and Corr 1.

their physical environment, either within their own territory or in areas not subject to the sovereignty of any State. Each concerns also the injurious consequences that such use or management may entail within the territory of other States, or in relation to the citizens and property of other States in areas beyond national jurisdiction. Finally, as the title of the new topic suggests, these injurious consequences, and the liability they generate, may arise out of acts not prohibited by international law.

14. The three characteristics are reflected succinctly in principle 21 of the United Nations Declaration on the Environment:^b

“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

15. It may be noted that obligations of the kind now being considered are different from those that a State owes in respect of aliens who have chosen to place themselves or their property within that State's territory. In the situations that fall within the present topic, there is no presumption of willingness to accept risks or harmful consequences because they are tolerated within the territory or control of the State in which those risks or harmful consequences arise. There is also no requirement to seek an effective remedy offered by municipal law—unless, indeed, there is an applicable régime, accepted by the States concerned, that does impose such a requirement.

16. On the other hand, the community of States, like national and local communities, does not attach a legal liability to inconveniences that are thought to be minor, and incidental to normal or reasonable uses of territory. If States have provided themselves with no other measuring rod, tacit acquiescence in an established situation must be the best evidence that the law takes no account of the degree of discomfort which that situation entails.

17. Until the impact of the modern technological revolution began to be felt, the causes and occasions of dispute were relatively few. Industrial processes seldom had the capacity to cause devastation beyond national frontiers. In general, the high seas and the air could still be regarded as self-purifying and self-replenishing. Most of the modern manifestations of insidious or irreversible damage did not occur, and any that did were not perceived.

18. In those times, the concomitant obligations that States owe to each other by virtue of the use they make of their physical environment did not often assume a practical form, except in relation to the flow of fresh water across or along international frontiers, and the use of salt water as a means of navigation. The right of innocent passage through the territorial sea is an early and clear example of an obligation owed, by virtue of sovereignty over maritime territory, to the international community at large.

19. Questions such as those that may occur among riparian States have for many years given rise to doctrinal discussion about the essential nature of the underlying legal norms. The evaluation of conflicting interests has usually been found to import a test of reasonableness—that is, a balance between the purposes to be served by a given use of territory and the unwelcome consequences that such a use may entail for other States and their nationals. Therefore the essential obligation owed by a State in such a context has tended to be conceived as one of moderation, or of care or due diligence, in relation either to its own activities or to private activities within its jurisdiction or control.

20. Nevertheless, no criterion of this kind can of itself provide a means of regulating liability for the dangers inherent in certain major fields of activity made possible by modern technology. It is a feature of these activities that, however stringent the standard of care observed, and however excellent the general safety record, an accident—if it does occur—will probably be large in scale and in the extent of its injurious consequences. Moreover, in some fields the ascertainment and measurement of the harm caused must depend upon the application of accepted scientific standards.

21. It has become the practice of States to establish conventional régimes to regulate liability for these dangers, on a subject-by-subject basis. The régimes differ very widely in their content, which tends to be governed by the needs of the particular situation, rather than by any doctrinaire view about the nature of the responsibility of States. In some cases a liability is accepted by States themselves; in others liability is placed solely on the operator, and remedies are made available within the ambit of municipal law. There are intermediate solutions, including some that place primary liability on the operator, but envisage a recourse to the State as guarantor.

22. The most constant feature of these régimes is the adoption of a rule of absolute liability—that is, a liability that arises from the very fact that injurious consequences have occurred, without reference to the quality of the action that led to the occurrence. This rule, which was in large measure inspired by the common law rule of absolute liability for dangerous things, is often accompanied by a limitation of the extent of liability. Depending on the subject concerned, the imposition of an absolute—but limited—liability may, or may not, be intended to exclude a further and more extensive liability, based on the duty of care or due diligence.

23. The new topic has meeting points with several other topics that are, or will soon be, under consideration by the Commission. The law of the non-navigational uses of international water-courses is of extreme interest, because it is sharply focused on one aspect of the obligations that States may owe each other in respect of their use and management of territory. The topic of the jurisdictional immunities of States and their property is also of potential interest, because the extent of sovereign immunities may be a factor in the choice of a régime of liability for the injurious consequences of certain kinds of acts not prohibited by international law.

24. Nevertheless, the most fundamental connexions of the new topic are with that of State responsibility. It may, indeed, be necessary to reconsider the present title of the new topic when work has made some progress. Certainly, the use of the term “liability” rather than “responsibility” in the present title should not obscure the need to explore the relationship between the liabilities established by conventional régimes and the substratum of obligations owed by States under customary law. On the other hand, the use of the term “liability” does indicate that the topic should be approached largely in terms of the primary rules contained in conventional régimes, and should not attempt to parallel the extensive consideration that the Commission is giving to secondary rules in the course of its study of State responsibility.

25. The Working Group believes that the variety and volume of State practice in this fast-growing field of law warrants—and indeed demands—the systematic study for which the General Assembly has called. The topic is suitable for codification and progressive development in accordance with the Commission's usual working methods. This would have the added advantage of associating the Legal Committee of the General Assembly more closely with an important sector of United Nations activity which is of particular legal interest.

26. Finally, it should be noted that the range of materials on which the Commission and its Special Rapporteur will need to rely—especially in regard to multilateral practice under the auspices

^b *Report of the United Nations Conference on the Human Environment* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I, p. 5.

of the United Nations and of other international organizations—will be extensive, and cannot be obtained quickly enough from secondary sources. It is therefore thought essential to the success of the project that provision be made within the Codification Division of the Office of Legal Affairs in the United Nations Secretariat to collect and survey such materials. An arrangement of this kind would seem to be in keeping with the general United Nations aim of co-ordinating activities related to the environment, and yet would preserve a necessary degree of detachment from areas directly concerned with the implementation of United Nations programmes.

D. Jurisdictional immunities of States and their property

179. As noted above,⁶⁷⁵ the Commission at its current session established a working group to consider the question of future work by the Commission on the topic "Jurisdictional immunities of States and their property" and to report thereon to the Commission. The Working Group was composed as follows: Mr. Sompong Sucharitkul (Chairman), Mr. Abdullah El-Erian, Mr. Laurel B. Francis and Mr. Willem Riphagen.

180. During the thirtieth session, the Working Group held three meetings and submitted to the Commission a report (A/CN.4/L.279/Rev.1) that dealt *inter alia* with general aspects of the topic and contained a number of recommendations.

181. In 1948, the Secretary-General had prepared for the first session of the Commission a memorandum entitled *Survey of International Law in Relation to the Work of Codification of the International Law Commission*.⁶⁷⁶ Included in that *Survey* was a separate section on "Jurisdiction over foreign States" in which it was stated that the subject covered "the entire field of jurisdictional immunities of States and their property, of their public vessels, of their sovereigns, and of their armed forces".⁶⁷⁷ It was noted that in 1928 the League of Nations Committee of Experts, notwithstanding the divergencies in detail, had been of the view that some aspects of the subject were ripe for codification and could be considered by an international conference convened for that purpose. It was further noted that, in reply to the questionnaire sent to governments by the Committee, 21 governments had expressed themselves in favour of the codification of this subject, while only three governments had answered in the negative.⁶⁷⁸ As to the contemporary suitability of codifying the topic, the 1948 *Survey* indicated the following:

There would appear to be little doubt that the question—in all its aspects—of jurisdictional immunities of foreign States is capable and in need of codification. It is a question which figures, more than any other aspect of international law, in the administration of justice before municipal courts. The increased economic activities of States in the foreign sphere and the assumption by the State in many countries of the responsibility for the management of the principal industries and of transport have added to

the urgency of a comprehensive regulation of the subject. While there exists a large measure of agreement on the general principle of immunity, the divergencies and uncertainties in its application are conspicuous not only as between various States but also in the internal jurisprudence of States.⁶⁷⁹

182. At its first session, in 1949, the Commission reviewed various topics of international law with a view to the selection of topics for codification, in accordance with article 18, paragraph 1, of its Statute, using as a basis for discussion the 1948 *Survey*. After due deliberation the Commission drew up a provisional list of 14 topics selected for codification, including one entitled "Jurisdictional immunities of States and their property".⁶⁸⁰

183. In its work on various topics, the Commission has touched upon certain aspects of the question of the jurisdictional immunities of States and their property. In its 1956 draft articles on the law of the sea,⁶⁸¹ the Commission referred to the immunities of State-owned ships and warships. The immunities of State property used in connexion with diplomatic missions were considered in the 1958 draft articles on diplomatic intercourse and immunities,⁶⁸² while those of such property used in connexion with consular posts were dealt with in the 1961 draft articles on consular relations.⁶⁸³ The 1967 draft articles on special missions⁶⁸⁴ also contained provisions on the immunity of State property, as did the 1971 draft articles on the representation of States in their relations with international organizations.⁶⁸⁵ International conventions have been elaborated on the basis of all the above-mentioned sets of draft articles.⁶⁸⁶

184. In 1970, when the Commission confirmed its intention of bringing its long-term programme up to date, taking into account the General Assembly's recommendations and the international community's current needs, it asked the Secretary-General to submit to it a new working paper as a basis for the selection of a list of topics that might be included in its long-term programme of

⁶⁷⁵ *Ibid.*, para. 52.

⁶⁸⁰ *Yearbook ... 1949*, p. 281, doc. A/925, para. 16.

⁶⁸¹ *Yearbook ... 1956*, vol. II, pp. 256 *et seq.*, doc. A/3159, chap. II, sect. II.

⁶⁸² *Yearbook ... 1958*, vol. II, pp. 89 *et seq.*, doc. A/3859, chap. III, sect. II.

⁶⁸³ *Yearbook ... 1961*, vol. II, pp. 92 *et seq.*, doc. A/4843, chap. II, sect. IV.

⁶⁸⁴ *Yearbook ... 1967*, vol. II, pp. 347 *et seq.*, doc. A/6709/Rev.1, chap. II, sect. D.

⁶⁸⁵ *Yearbook ... 1971*, vol. II (Part One), pp. 284 *et seq.*, doc. A/8410/Rev.1, chap. II, sect. D.

⁶⁸⁶ Convention on the Territorial Sea and the Contiguous Zone (1958) (United Nations, *Treaty Series*, vol. 516, p. 205); Convention on the High Seas (1958) (*ibid.*, vol. 450, p. 11); Vienna Convention on Diplomatic Relations (1961) (*ibid.*, vol. 500, p. 95); Vienna Convention on Consular Relations (1963) (*ibid.*, vol. 596, p. 261); Convention on Special Missions (1969) (General Assembly resolution 2530 (XXIV), annex); Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (1975) (*Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207).

⁶⁷⁵ Para. 10.

⁶⁷⁶ United Nations publication, Sales No. 1948.V.1(I).

⁶⁷⁷ *Ibid.*, para. 50.

⁶⁷⁸ *Ibid.*

work.⁶⁸⁷ In 1971, the Secretary-General submitted the requested working paper, entitled "Survey of international law",⁶⁸⁸ which included a section on "Jurisdictional immunities of foreign States and their organs, agencies and property". After indicating, in that Survey, various problems posed by its subject-matter, the Secretary-General added:

Differences of view exist on these questions, as indeed they do on the substantive matters referred to above. But it may be suggested that the differences are not in all cases large, although they can nevertheless cause friction and uncertainty; that, as was said in the 1948 Survey, it is doubtful whether considerations of any national interest of decisive importance stand in the way of a codified statement of the law on this topic, commanding general acceptance; and that its day-to-day importance makes it suitable for codification and progressive development.⁶⁸⁹

185. During the Commission's consideration of the item on the review of its long-term programme of work at its twenty-fifth session, in 1973, the 1971 Survey served as a basis for discussion. Among the topics repeatedly mentioned in the discussion was that of the jurisdictional immunities of foreign States and of their organs, agencies and property. The Commission decided that it would give further consideration to the various proposals or suggestions in the course of future sessions.⁶⁹⁰

186. In 1977, at its twenty-ninth session, the Commission considered possible additional topics for study following the implementation of the current programme of work, and included a section thereon in its report.⁶⁹¹ The topic "Jurisdictional immunities of States and their property" was recommended for selection in the near future for active consideration by the Commission, bearing in mind its day-to-day practical importance as well as its suitability for codification and progressive development.⁶⁹²

187. The General Assembly, having considered the report of the Commission on the work of its twenty-ninth session, adopted on 19 December 1977 resolution 32/151, paragraph 7 of which reads as follows:

[The General Assembly]

...

7. Invites the International Law Commission, at an appropriate time and in the light of progress made on the draft articles on State responsibility for internationally wrongful acts and on other topics in its current programme of work, to commence work on the topics of international liability for injurious consequences arising out of acts not prohibited by international law and jurisdictional immunities of States and their property.

188. The Commission considered the report of the Working Group at its 1524th meeting, on 24 July 1978, and on the basis of the recommendations contained in paragraph 32 of the report decided to:

(a) include in its current programme of work the topic "Jurisdictional immunities of States and their property";

(b) appoint a Special Rapporteur for that topic;

(c) invite the Special Rapporteur to prepare a preliminary report at an early juncture for consideration by the Commission;

(d) request the Secretary-General to address a circular letter to the governments of Member States inviting them to submit by 30 June 1979 relevant materials on the topic, including national legislation, decisions of national tribunals and diplomatic and official correspondence;

(e) request the Secretariat to prepare working papers and materials on the topic, as the need arose and as requested by the Commission or the Special Rapporteur for the topic.

189. On 27 July 1978, at its 1427th meeting, the Commission took note of the report of the Working Group and decided to include section III of that report in this section of the Commission's report.

190. At its 1525th meeting, held on 25 July 1978, the Commission appointed Mr. Sompong Sucharitkul Special Rapporteur on the topic "Jurisdictional immunities of States and their property".

ANNEX

Report of the Working Group on jurisdictional immunities of States and their property^a

...

III. GENERAL ASPECTS OF THE TOPIC

A. Nature of the topic and legal basis of jurisdictional immunities

11. The doctrine of State immunity is the result of an interplay of two fundamental principles of international law: the principle of territoriality and the principle of State personality, both being aspects of State sovereignty. Thus, State immunity is sometimes expressed in the maxim *par in parem imperium non habet*.

12. "Jurisdictional immunities of States and their property" is clearly a topic of public international law affecting the rights, interests and duties of States as well as of private persons, inasmuch as conflicts and disputes may arise from the intercourse and transactions between foreign States and private persons.

13. The topic is of interest to States broadly from two opposing standpoints: States as territorial sovereigns for the exercise of their sovereign authority over the entirety of their territorial units, and States as foreign sovereigns being impleaded or pursued in litigation or suits by individual or corporate plaintiffs before the judicial or administrative authorities of another State exercising territorial jurisdiction over cases involving foreign States.

14. It is therefore in the interest of States generally that the rules of international law governing State immunities should be made more easily ascertainable so as to give general guidance to States to enable them to adopt and maintain a consistent attitude in the exercise of their territorial sovereign authority as well as in their insistence on the sovereign right to be exempt from the exercise of a similar authority by another State. In reality, however, the views of States, as expressed by them or implied from their past

⁶⁸⁷ Yearbook ... 1970, vol. II, p. 309, doc. A/8010/Rev.1, para. 87.

⁶⁸⁸ Yearbook ... 1971, vol. II (Part Two), p. 1, doc. A/CN.4/245.

⁶⁸⁹ Ibid., p. 20, para. 75.

⁶⁹⁰ Yearbook ... 1973, vol. II, pp. 230 and 231, doc. A/9010/Rev.1, paras. 173 and 174.

⁶⁹¹ Yearbook ... 1977, vol. II (Part Two), pp. 129 and 130, doc. A/32/10, paras. 107-111.

⁶⁹² Ibid., p. 130, para. 110.

^a A/CN.4/L.279/Rev.1.

practice, have been far from uniform. Nor indeed have the views of different departments within the same government or territorial unit been necessarily harmonious.

B. Scope of the study

15. The topic concerns the immunities of foreign States from the jurisdiction of territorial authorities, be it a court of law, an administrative tribunal or any other judicial or administrative authority. The topic also covers the immunities accorded by territorial authorities to foreign States as well as to their property.

16. The application of State immunities to the property of foreign States extends mainly to two distinct domains, namely, immunities from jurisdiction and immunities from execution. The jurisdiction of a territorial State is sometimes founded on the physical presence of movable or immovable property to be seized or attached within its territorial confines. The exercise of territorial jurisdiction over such property may directly or indirectly implead a foreign sovereign State which owns, possesses or has effective control over the property in question. A mere statement by the foreign State that it has proprietary rights to, or interests in, the property under seizure or attachment order may or may not be decisive of the issue of immunity.

C. Sources of international law for the study of the topic

17. Evidence of rules of international law on State immunities appears to be eminently available primarily in the judicial and governmental practice of States, in the judicial decisions of national courts, in the opinions of legal advisers to governments, and partially in the rules embodied in national legislation as well as international conventions of universal or regional character within the limits of the subject-matter concerned.

18. Customary law in this connexion appears to have grown largely out of the judicial practice of States, since the question of extent of jurisdiction of a municipal court is invariably determined by the court itself. Additional difficulties have arisen owing to differences in the procedural rules prevailing in each State, but these difficulties are not insurmountable with the aid of comparative law of techniques. The practice of States, both judicial and governmental, will therefore have to be consulted as primary evidence of the existence of rules of international law, and also as indications of the direction in which international law is progressively developing.

19. At a later stage in the study of the topic, the views of governments may be sought as to the nature, scope and extent of the immunities States are prepared to accord to each other mutually, and the immunities they consider themselves entitled to claim from each other. At any rate, for the purposes of the present initial stage in the study, it would be helpful to request governments to provide basic information and materials relating to State practice in this sphere.

D. Title of the topic

20. For present purposes, the topic as it is now entitled can be usefully maintained, but further analysis should not foreclose the possibility of refining the title for the purposes of future work undertaken by the Commission on the topic, so as to conform more closely to the existing realities of State practice and taking into account earlier titular variations.^b

21. Suffice it to note at this initial stage that the implied dichotomy of States and of their property seems unreal, as in the ultimate analysis it is to States and in their name—and in their name only—that immunities are accorded. All references to the immunities of “their property” relate only to the coverage or the scope or

extent of application of the rules of State immunities. States are entitled to immunities in respect of activities of several bodies and in relation to things, including to some extent their property.

E. Content of State immunities

22. An examination should be made of the content or substance of State immunities in various forms and manifestations; for instance, immunities from civil jurisdiction, immunities from penal or criminal jurisdiction and immunities from provisional measures of protection by way of seizure and attachment. Exemptions from taxation and other fiscal impositions are also illustrations of State immunities.

23. The exercise of jurisdiction by the judicial authority of a State is essentially different from the exercise of enforcement measures by the competent authority of that State in execution or satisfaction of judgement. Immunities from execution form a different dimension of State immunities, requiring special attention and distinct treatment. Waiver of immunities from jurisdiction does not, as a general rule, extend to waiver of execution. In each case, a separate waiver is normally required if execution is to proceed against a foreign State or any of its property.

F. Beneficiaries of State immunities

24. State immunities are enjoyed by States themselves. State organs, instrumentalities, agencies and institutions that exercise the sovereign authority of the State are also entitled to State immunities. The expanding list of beneficiaries of State immunities and the ever-widening application of such immunities deserve thorough and careful examination. In particular, an inquiry should be made as to what constitutes a “foreign State” for the purpose of immunities. This inquiry will entail the study of the types of organs, agencies, instrumentalities and institutions which, forming part of the machinery of the State, participate in the enjoyment of State immunities. The beneficiaries of some State immunities certainly include the armed forces of States or, conversely, “foreign visiting forces” and all the men and equipment, such as members of the armed forces, men-of-war, military vehicles and military aircraft. The status of political subdivisions of States and the position of constituent members of a federal union also merit special treatment.

25. The benefits of the rules of State immunities also extend to other manifestations of State authority that have no legal personality or, more accurately, that take the form of things or property.

G. Extent of State immunities

26. The crucial question in any study of State immunities is the extent to which States are to be accorded jurisdictional immunities. The doctrine of State immunities was formulated in the nineteenth century,^c during which States confined their activities to functions

^c See e.g. the following cases: *The Schooner “Exchange” v. McFaddon and others* (1812) (W. Cranch, *Reports of Cases argued and adjudged in the Supreme Court of the United States*, New York, Banks Law Publishing, 1911, vol. VII, 3rd ed., p. 116 opinion of C. J. Marshall); *The “Prins Frederik”* (1820) (J. Dodson *Reports of Cases argued and determined in the High Court of the Admiralty*, London, Butterworth, 1811-1822, vol. II, p. 451, opinion of Sir William Scott (later Lord Stowell)); the “*Charkieh*” (1873) (United Kingdom, *The Law Reports, High Court of Admiralty and Ecclesiastical Courts*, London, Incorporated Council of Law Reporting for England and Wales, 1875, vol. IV, p. 97, opinion of J. Phillimore); *The “Parlement belge”* (1880), United Kingdom, *The Law Reports, Probate Division*, London, Incorporated Council of Law Reporting for England and Wales, 1880, vol. V, p. 203, opinion of L. J. Brett); *Spanish Government v. Casaux* (1849) (Daloz, *Jurisprudence générale. Recueil périodique*

^b See paras. 181 and 184 above.

traditionally recognized as properly within the spheres of State duties and responsibilities. Immunities were accorded to States on the grounds of their sovereign equality and political independence, irrespective of the nature of their activities. However, this doctrine, which has been styled "absolute" or "unqualified" immunity, has not been followed with consistency in the practice of States.

27. A glance at the more recent practice of States and contemporary legal opinions will clearly show that immunity has not been accorded in all cases, and that several limitations have been recognized, with the result that in several categories of cases immunity has been denied. Theories have been advanced advocating limitation of the domain of State immunities. These theories, which have sometimes been styled "restrictive", appear to be gaining further ground in State practice.

28. The current trends in the practice of States and in the opinion of jurists deserve further and closer examination to ascertain more clearly the direction in which State practice is developing. Neither State practice nor the *opinio doctorum* can now be said to have been fully orchestrated to the "restrictive" tune, since the bases for measuring the quantum of immunities to be accorded to foreign States are far from uniform or generally consistent.

29. The time has come for a careful study to be made in an effort to codify or progressively develop rules of international law on State immunities, in order to define or assess with greater precision the amount or quantum of State immunities or the extent to which immunities should be granted. A working distinction may eventually have to be drawn between activities of States performed in the exercise of sovereign authority which are covered by immunities, and other activities in which States, like individuals, are increasingly engaged, often in direct competition with the private sector. It is sometimes said that current practice seems to indicate that immunities are accorded only in respect of activities that are public in character, official in purpose or sovereign in nature. In other words, only *acta jure imperii*, or acts of sovereign authority, as distinct from *acta jure gestionis* or *jure negotii*, are covered by State immunities. This indication should also be further examined with the greatest care and scrutiny.

30. Finally, any examination of the extent of jurisdictional immunities should also cover related matters such as voluntary submission to local jurisdiction, waiver of immunities, counter-claims, service of writs, security for costs, and the question of execution of judgements against foreign States.

H. Relationship with other topics

31. Jurisdictional immunities are necessarily closely related to other categories of immunities in international law, such as diplomatic immunities, consular immunities, immunities of special missions, immunities of representatives of States in international organizations and international conferences^d and immunities of international organizations.^e

(Foot-note ^o continued.)

et critique de jurisprudence, de législation et de doctrine, 1849, Paris [undated], p. 5 (Cour de cassation); Société générale pour favoriser l'industrie nationale v. le Syndicat d'amortissement, le Gouvernement des Pays-Bas et le Gouvernement belge (1840) (*Pasicrisie belge. Recueil général de la jurisprudence des cours et tribunaux et du Conseil d'État belge*, Brussels, Bruylant, 1841, vol. II, pp. 33 *et seq.*, especially pp. 52 and 53 (Cour d'appel de Bruxelles)); Morellét v. Governo Danese (1882) (*Giurisprudenza Italiana*, Turin, Unione tipografico-editrice torinese, 1883, vol. I, pp. 125, 130 and 131 (Corte di Cassazione di Torino)); Guttieres v. Elmilik (1886) (*Il Foro Italiano*, Rome, Società editrice del Foro Italiano, 1886, vol. I, pp. 913 *et seq.*, especially pp. 920 and 922 (Corte di Cassazione di Firenze)).

^d See para. 183 above.

^e See *Yearbook...1977*, vol. II (Part One), p. 139, doc. A/CN.4/304.

E. Programme and methods of work of the Commission

191. At its 1475th meeting, held on 9 May 1978, the Commission decided to establish again a Planning Group of the Enlarged Bureau for the current session. The Group was composed of Mr. Milan Šahović (Chairman), Mr. Roberto Ago, Mr. Leonardo Díaz González, Mr. Abdullah El-Erian, Mr. Stephen M. Schwebel, Mr. Abdul Hakim Tabibi, Mr. Nikolai Ushakov and Sir Francis Vallat. It was entrusted with the task of considering the future programme and methods of work of the Commission and reporting thereon to the Enlarged Bureau of the Commission. The planning Group met on 22 June and on 18 and 24 July 1978. Members of the Commission other than members of the Group were invited to attend, and a number of them participated in the meetings.

192. On the recommendation of the Planning Group, the Enlarged Bureau recommended to the Commission, for inclusion in the Commission's report to the General Assembly on the work of the current session, paragraphs 193 to 201 below. At its 1528th meeting, held on 27 July 1978, the Commission considered the recommendations of the Enlarged Bureau and, on the basis of those recommendations, adopted the following paragraphs of this section for inclusion in the present report.

193. Having proceeded to an overall review of its programme and methods of work in 1977, the broad outlines and specific recommendations of which were endorsed by the General Assembly in its resolution 32/151 of 19 December 1977, the Commission at its current session concentrated its attention mainly on matters relating to the organization of its thirty-first session, to be held in 1979, as well as on some other issues of permanent concern for the effective fulfilment by the Commission of its tasks.

194. Bearing in mind the General objectives and priorities established by the Commission, with the approval of the General Assembly, at previous sessions, and the completion at the current session of work on the topic entitled "the most-favoured-nation clause" by the adoption of a final set of draft articles thereon, as requested by the General Assembly in resolution 32/151, as well as the progress achieved on other topics during the current session, the Commission should at its thirty-first session, in 1979, devote its attention primarily to consideration of the three topics of its current programme to which the General Assembly, has given priority, namely, State responsibility, succession of States in respect of matters other than treaties, and the question of treaties concluded between States and international organizations or between two or more international organizations.

195. Thus, on the basis of the reports that the Special Rapporteur on State responsibility intends to submit, the Commission should be able to make further progress at its next session in the preparation of draft articles on international responsibility for internationally wrongful acts, with a view to completing the first reading of the set of articles constituting part I of the draft as soon as possible, within the current term of office of the members of the Commission, as requested by the General Assembly in resolution 32/151. With regard to succession of States

in respect of matters other than treaties, the first reading of the draft articles on succession of States in respect of State property and State debts should be completed at the next session on the basis of the final report that the Special Rapporteur on the topic intends to submit. The Commission should also, at its 1979 session, make further substantial progress in the preparation of draft articles on treaties concluded between States and international organizations or between international organizations, so as to complete the first reading of the draft at an early date. In order to carry out the priority programme of work outlined above, the Commission intends to devote most of its time in 1979 to studying the three topics mentioned. As to the allocation of time at its thirty-first session for the topics listed above, the Commission will take the appropriate decisions at the beginning of that session, in the course of the adoption of the agenda.

196. Also at its thirty-first session, in response to the invitation extended to it by the General Assembly in resolution 32/48 of 8 December 1977, the Commission should formulate its observations on the question entitled "Review of the multilateral treaty-making process", following the procedure described in section B of this chapter. The remaining time could be devoted to the consideration of other topics on its current programme, notably the law of the non-navigational uses of international watercourses and the second part of the topic of relations between States and international organizations, these topics being the subject of study by the Special Rapporteurs concerned with a view to the submission of reports to serve as a basis for their consideration by the Commission.

197. The Commission may also have to consider questions posed by two new topics that the General Assembly, in paragraph 7 of resolution 32/151, invited it to study, namely, international liability for injurious consequences arising out of acts not prohibited by international law, and jurisdictional immunities of States and their property, if the Special Rapporteurs concerned, who were appointed at the current session, deem it necessary to have a first exchange of views in order to proceed with the study of their respective topics. It is possible that reports on one or both of these topics may be submitted to the next session of the Commission.

198. As in the past, the commission intends to keep constantly under review the possibility of improving its existing method of work and procedures in the light of the specific features presented by the individual topics under consideration,⁶⁹³ so as to carry out as efficiently as possible the tasks entrusted to it, in accordance with General Assembly resolution 32/151. It was with those considerations in mind that the Commission reconstituted the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and established working groups to study the future work of the Commission on the topics entitled "International liability for injurious consequences arising

out of acts not prohibited by international law" and "Jurisdictional immunities of States and their property", as well as to study the item "Review of the multilateral treaty-making process".

199. The Commission believes there is need for a better definition of its juridical status at the place of its permanent seat, including the immunities, privileges and facilities to which it and its members are entitled. In that connexion, the Commission requests the Secretary-General to study this matter and to take appropriate measures in consultation with the Swiss authorities.

200. The Commission wishes to place on record its appreciation to the General Assembly for having endorsed in resolution 32/151 of 19 December 1977 its recommendation "for the strengthening of the Codification Division of the Office of Legal Affairs", and to emphasize the current need to implement that provision. The Codification Division plays an essential, substantive role as a component part of the Commission's method of work. Its research and publications on subjects on the Commission's agenda are indispensable. Therefore the fact that the Division currently has at its disposal an excessively limited number of staff and other resources is highly detrimental to the timely and orderly accomplishment of the Commission's programme of work; that fact may also affect the work of United Nations bodies acting upon the Commission's recommendations. The codification process undertaken by the Commission requires, *inter alia*, preparation by the Codification Division of time-consuming research projects and studies on a variety of complex topics of international law. Such assistance cannot continue to be provided at the frequency and level required by an understaffed Division which must also, at an ever-increasing rate, serve one of the main committees of the General Assembly—the Sixth Committee—and very frequently a codification conference, as well as several *ad hoc* committees, and also meet their respective needs for both substantive and research assistance. In the light of those compelling considerations, the Commission decided to request that the Secretariat services concerned, in consultation with the Office of Legal Affairs, inform it at its next session on the steps taken pursuant to the General Assembly resolution to strengthen the Codification Division. The Commission particularly wishes to emphasize its view, expressed at the 1977 session, that there is "pressing need to increase the staff of the Codification Division of the Office of Legal Affairs so as to enable it to give to the Commission and its Special Rapporteurs all the assistance required by the increasing demands of its work, especially in the area of research projects and studies".⁶⁹⁴

201. Finally, the Commission would also like to express its appreciation to the General Assembly for having endorsed, by resolution 32/151, the recommendation it made in 1977 concerning the need to play due attention to the nature of the research projects and studies requested of the Codification Division in so far as control and limitation of documentation originating in the Secretariat was

⁶⁹³ The attention of the Commission was drawn to General Assembly resolution 32/71 of 9 December 1977, entitled "Pattern of Conferences".

⁶⁹⁴ *Yearbook ... 1977*, vol. II (Part Two), p. 132, doc. A/32/10, para. 122.

concerned.⁶⁹⁵ The Commission is confident that the General Assembly's decision on this matter will be implemented in a consistent manner.

F. Inclusion in the Yearbook of the Commission of the Survey on "force majeure" and "fortuitous event" as circumstances precluding wrongfulness

202. On the recommendation of its Enlarged Bureau, the Commission decided to include in its Yearbook the "Survey of State practice, international judicial decisions and doctrine on 'force majeure' and 'fortuitous event' as circumstances precluding wrongfulness" prepared by the Codification Division of the United Nations Office of Legal Affairs as part of the research on the subject undertaken at the request of the Commission and its Special Rapporteur on the topic of "State responsibility". The Commission took that decision in view of the scientific value of the document and its importance for the work of the Commission on the topic. In so doing, it also took into account General Assembly resolution 987 (X) of 3 December 1955 and related Commission decisions, as well as paragraph 10 of General Assembly resolution 32/151 of 19 December 1977. In order to allow time for translation of the provisional version circulated in 1977 as document ST/LEG/13, the Commission decided that the survey should be printed in volume II (Part One) of the *Yearbook* ... 1978 as a document of its current session (A/CN.4/315).

G. Co-operation with other bodies

203. The Commission wishes to reaffirm the great importance it attaches to co-operation with bodies engaged in the progressive development of international law and its codification at the regional level. In accordance with article 26 of its statute, the Commission has thus maintained co-operation with the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Inter-American Juridical Committee. During the current session, at its 1475th meeting, held on 9 May 1978, the Commission decided also to establish relations of co-operation with the newly created Arab Commission for International Law, in accordance with the same article of its Statute. As the aspirations of the States of the regions concerned in regard to the development of international law are also reflected in the respective agendas of those bodies, the Commission intends to pay due attention to topics on such agendas when reviewing, in the future, its own programme of work.

1. ARAB COMMISSION FOR INTERNATIONAL LAW

204. The Secretary-General of the United Nations received from the Secretary-General of the League of Arab States a message, transmitted by letter dated 26 October 1977 from the Permanent Observer of the League to the

United Nations, informing him that the Council of Ministers of the League of Arab States had established, in a resolution adopted on 8 September 1977, a "Commission for International Law on the Arab level", and had also decided that "the League of Arab States be represented in the meetings of the United Nations International Law Commission, in a similar capacity as regional organizations such as the Organization of American States and the Council of Europe are represented, in order to co-ordinate the work regarding the development and consolidation of the rules of international law on the Arab and international levels". The Secretary-General of the League accordingly requested the Secretary-General of the United Nations to take the necessary measures "to ensure the permanent presence of the League of Arab States as an observer in the meetings of the International Law Commission, commencing with the thirtieth session of the Commission". The Secretary-General transmitted the request to the Commission. It was pursuant to that request that the Commission, bearing in mind the statute of the newly established regional commission, took the decision to establish permanent relations of co-operation with the Arab Commission for International Law.

205. The Arab Commission for International Law was represented at the thirtieth session of the Commission by A. H. Alsayed, Under-Secretary-General for Legal Affairs of the League of Arab States, who addressed the Commission at its 1497th meeting, held on 9 June 1978.

206. Mr. Alsayed stated that the codification and progressive development of international law was a task of the utmost importance and that it was the firm conviction of all those who believed in and worked for a sound international order that the International Law Commission, through its work, contributed to the strengthening of the rule of law among nations, as an instrument for the maintenance of peace and security and the promotion of justice in international relations. Referring to the establishment of the Arab Commission for International Law, he said that long before its creation other organs of the League of Arab States had undertaken intensive work in the sphere of international law. In particular, a legal committee, set up under the Charter of the League, had prepared a number of conventions concluded under the auspices of the League and initiated the preparation of a number of legal studies and publications, including treaty and legislative series. Mr. Alsayed stated further that the legal bodies of the League had followed the work of the International Law Commission with great interest and appreciation and that the newly established Arab Commission would pay close attention to the important topics on the Commission's agenda under current consideration. He also expressed his appreciation of the valuable work of the Codification Division of the United Nations Office of Legal Affairs.

207. Mr. Alsayed invited the Chairman of the Commission to attend the session of the Arab Commission for International Law. The Commission requested its Chairman, Mr. José Sette Câmara, to attend the next session of the Arab Commission as an observer, or, if he were unable to do so, to appoint another member of the Commission for that purpose.

⁶⁹⁵ *Ibid.*, para. 123.

2. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

208. Mr. Laurel B. Francis attended the nineteenth session of the Asian-African Legal Consultative Committee, held at Doha (Qatar) in January 1978, as an observer for the Commission, and made a statement before the Committee.

209. The Asian-African Legal Consultative Committee was represented at the thirtieth session of the Commission by its Secretary-General, Mr. B. Sen, who addressed the Commission at its 1497th meeting, held on 9 June 1978.

210. Mr. Sen stated that the membership and the programme of activities of the Asian-African Legal Consultative Committee had expanded year by year and that its work had been gradually oriented towards providing assistance to the governments of member States as well as of Asian and African States in their growing role in the development of international law and international relations. In the past three years, the Committee's secretariat had also been performing certain advisory functions concerning legal problems faced by member governments. Mr. Sen reported that the Committee's seventeenth, eighteenth and nineteenth sessions, held in 1976, 1977 and 1978 respectively, had been attended not only by representatives of member States but also by an increasing number of observers from non-member States, totalling 35 at the Doha session, as well as by observers from various organs of the United Nations and the specialized agencies. He said that the priority topic at those sessions had been the law of the sea, on which the Committee had prepared extensive documentation and background material. The Committee had also considered the topics of succession of States in respect of treaties and of territorial asylum, in preparation for the plenipotentiary conferences held on those subjects. Mr. Sen stressed that a great deal of progress had been made during the past three sessions of the Committee in respect of international trade law. For example, the Committee had recommended the use of the UNCITRAL Arbitration Rules⁶⁹⁶ in *ad hoc* arbitrations, and had established a regional arbitration centre at Kuala Lumpur; the establishment of another centre, in Cairo, was being negotiated, and a third one was contemplated for the African region. The Committee had also adopted two model contracts for use in the international sale of certain types of commodities. Mr. Sen further noted that other matters under consideration by the Committee included certain aspects of the law on the environment and reciprocal assistance in the prosecution and prevention of economic offences. Lastly, he stated that during the past year official relations had been established between the Committee and the European Committee on Legal Co-operation, and that ties with the Inter-American Juridical Committee had been further strengthened.

211. The Commission, having a standing invitation to send an observer to the sessions of the Committee, requested its Chairman, Mr. José Sette Câmara, to attend

the next session of the Committee or, if he were unable to do so, to appoint another member of the Commission for that purpose.

3. EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

212. Mr. Willem Riphagen attended the twenty-eighth session of the European Committee on Legal Co-operation, held at Strasbourg (France) in December 1977.

213. The European Committee on Legal Co-operation was represented at the thirtieth session of the Commission by Mr. Hans-Peter Furrer, Director of Legal Affairs of the Council of Europe, who addressed the Commission at its 1516th meeting, held on 12 July 1978.

214. Mr. Furrer stated that, on the occasion of the twenty-fifth anniversary of the entry into force of the Convention for the Protection of Human Rights and Fundamental Freedoms [known as the European Convention of Human Rights], the Committee of Ministers of the Council of Europe had adopted, on 27 April 1978, a declaration on human rights stressing the importance of those rights, and the close connexion that existed between the protection of human rights within States and the strengthening of world peace and justice. He said that, based on such premises, the member States of the Council of Europe had decided to give priority to the work undertaken within the Council to expand the protection of human rights and actively to participate in their protection. Mr. Furrer then drew attention to two recent decisions of the European Court of Human Rights that would be of particular interest for the theory and practice of international law, namely, that of 18 January 1978, concerning the case of Northern Ireland, and that of 28 June 1978, concerning the case of König v. the Federal Republic of Germany. Mr. Furrer noted also that co-operation among member States in matters of criminal law had been the indispensable condition for the conclusion of the European Convention on the Suppression of Terrorism of 27 January 1977. Outside the spheres of human rights and criminal law, the European Committee had pursued three objectives, namely, the safeguarding and progressive development of relations among member States in accordance with international law, the approximation and harmonization of the legislation and legislative policies of those States, and the adaptation of their laws to the needs of a democratic society. Among the questions of international law under study or about to be studied by the Committee, Mr. Furrer mentioned in particular the question of privileges and immunities of international organizations and the peaceful settlement of disputes.

215. Mr. Furrer announced that the next session of the Committee would be held at Strasbourg from 27 November to 1 December 1978 and expressed the hope that the Commission would find it possible to be represented at that session. The Commission, having a standing invitation to send an observer to the sessions of the Committee requested its Chairman, Mr. José Sette Câmara, to attend that session of the European Committee on Legal Co-operation or, if he were unable to do so, to appoint another member of the Commission for that purpose.

⁶⁹⁶ Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/13/17), chap. V, sect. C.

4. INTER-AMERICAN JURIDICAL COMMITTEE

216. Mr. Abdullah El-Erian attended the session of the Inter-American Juridical Committee, held at Rio de Janeiro (Brazil) in January 1978, as an observer for the Commission, and made a statement before the Committee.

217. The Inter-American Juridical Committee was represented at the thirtieth session of the Commission by Mr. Ulpiano López Maldonado, who addressed the Commission at its 1517th meeting, held on 13 July 1978.

218. Mr. López Maldonado first informed the Commission of the items with which the Committee would be dealing at its forthcoming session, in July and August 1978. The priority items were the principle of self-determination of peoples and its sphere of application, legal aspects of co-operation in the sphere of transfers of technology, and revision of the inter-American conventions on industrial property. Other items, to which no priority was attached, included classification of international and commercial offences, nationalization and expropriation of foreign property, immunity of States from jurisdiction, settlement of international economic disputes relating to the law of the sea, territorial colonialism in the Americas, the function of law in social change, and measures to promote accession of non-autonomous territories to independence. Referring to the work carried out by the Committee during the past few years, Mr. López Maldonado said that the Committee was considering a draft inter-American convention on extradition and had prepared eight draft conventions on various topics of private international law, pursuant to the decision of the General Assembly of OAS to convene a second inter-American conference on private international law. In addition, the eighth General Assembly of OAS had recently requested the Committee to co-operate with the Permanent Council of OAS in the preparation of a series of draft conventions on aspects of international terrorism that were not covered by the 1971 Washington Convention. The Assembly had also called upon the Committee to prepare, in co-operation with the Inter-American Commission on Human Rights, a draft convention that would define torture as an international crime. Lastly, Mr. López Maldonado said that a course on international law was held annually, under the auspices of OAS and the Committee, and that one participant from each member country was awarded a fellowship.

219. The Commission, having a standing invitation to send an observer to the sessions of the Committee, requested its Chairman, Mr. José Sette Câmara, to attend the next session of the Inter-American Juridical Committee or, if he were unable to do so, to appoint another member of the Commission for that purpose.

H. Date and place of the thirty-first session

220. The Commission decided to hold its next session at the United Nations Office at Geneva from 14 May to 3 August 1979.

I. Representation at the thirty-third session of the General Assembly

221. The Commission decided that it should be represented at the thirty-third session of the General Assembly by its Chairman, Mr. José Sette Câmara.

J. Gilberto Amado Memorial Lecture

222. In accordance with a decision taken by the Commission at its twenty-third session,⁶⁹⁷ and thanks to another grant by the Brazilian Government, a fifth Gilberto Amado Memorial Lecture was given at the Palais des Nations on 7 June 1978.

223. The lecture, which was delivered by Mr. Taslim O. Elias, Judge of the International Court of Justice, was on "The International Court of Justice and the indication of provisional measures of protection". It was attended by members of the Commission and of its secretariat, other distinguished jurists, including some from permanent missions, delegations, the Secretariat of the Geneva Office of the United Nations, the secretariats of the specialized agencies at Geneva and the University of Geneva, as well as by participants in the International Law Seminar. The lecture was followed by a dinner. The Commission hopes that, as on the four previous occasions, the text of the lecture will be printed in English and French and so made accessible to the largest possible number of specialists in the sphere of international law.

224. The Commission is grateful to the Brazilian Government for this renewed gesture and hopes that its financial assistance will be maintained so as to make possible the continuance of the series of lectures, during the sessions of the Commission and of the International Law Seminar, as a tribute to the memory of the illustrious Brazilian jurist who for many years was a member of the Commission. The Commission asked Mr. Sette Câmara to convey its gratitude to the Brazilian Government.

K. International Law Seminar

225. Pursuant to General Assembly resolution 32/151 of 19 December 1977, the United Nations Office at Geneva organized, during the Commission's thirtieth session, the fourteenth session of the International Law Seminar for advanced students of that subject and for junior government officials who normally dealt with questions of international law in the course of their work.

226. Between 29 May and 16 June 1978, the Seminar held 11 meetings, devoted to lectures followed by discussions.

227. The following nine members of the Commission gave their services as lecturers: Mr. Ago (Progress of work on the question of State responsibility), Mr. Francis (Some implications of the concept of the economic zone in the law of the sea negotiations), Mr. Quentin-Baxter

⁶⁹⁷ See *Yearbook ... 1971*, vol. II (Part One), pp. 354 and 355, doc. A/8410/Rev.1, paras. 164-169.

(International liability for injurious consequences arising out of acts not prohibited by international law—Nature of the topic), Mr. Ushakov (The constitutional basis of USSR foreign policy and international law), Mr. Reuter (Is there a law of international organizations?), Mr. Riphagen (Treaties between States and international organizations, with particular reference to the European Communities), Mr. Šahović (Review of the multilateral treaty-making process), Mr. Schwebel (Non-navigational uses of international watercourses), and Mr. Sucharitkul (Jurisdictional immunities of States and their property). Mr. van Boven, Director of the Division of Human Rights of the United Nations Secretariat, spoke of "United Nations efforts in the field of human rights". Mr. Raton, Director of the Seminar, gave an introductory talk on the Commission and its work.

228. The 23 participants, of whom three were under the United Nations UNITAR Fellowship Programme in International Law, also attended the fifth Gilberto Amado Memorial Lecture and the meetings of the Commission. They had access to the facilities of the United Nations Library and an opportunity to attend a film show given by the United Nations Information Service. They were supplied with copies of the publication entitled *The Work of the International Law Commission*,⁶⁹⁸ which is essential for those following the work of the Seminar, together with the basic documents necessary for following the discussions of the Commission and the lectures of the

Seminar. Participants were also able to obtain, or to purchase at reduced cost, United Nations documents that were unavailable or difficult to find in their countries of origin.

229. As in the past, none of the cost of the Seminar fell on the United Nations, which was not asked to contribute to the travel or living expenses of participants. The Governments of Austria, Denmark, Finland, the Federal Republic of Germany, Kuwait, the Netherlands and Norway made fellowships available to participants from developing countries. Such fellowships, ranging in value from \$750 to more than \$5,500, were awarded to 14 candidates. With the award of fellowships, it is now possible to achieve an adequate geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise be prevented from attending solely by lack of funds. The situation is not entirely satisfactory, however, despite the renewed generosity of the above-mentioned governments and the new contribution of Austria. One selected candidate was unable to attend the current session for lack of funds and two candidates received fellowships covering only subsistence in Geneva. It is to be hoped, therefore, that other governments will also be able to award fellowships. It is the invariable practice of the organizers of the Seminar to inform donor governments of the beneficiaries' names, and the beneficiaries themselves are always informed of the source of their fellowships.

230. The Commission wishes to record its gratitude to Mr. Raton and his assistant, Miss M. K. Sandwell, for their effectiveness in organizing the Seminar.

⁶⁹⁸ United Nations publication, Sales No. E.72.I.17.

ANNEX

Comments of Member States, organs of the United Nations, specialized agencies and other intergovernmental organizations on the draft articles on the most-favoured-nation clause adopted by the International Law Commission at its twenty-eighth session *

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NOTE

For the text of the draft articles on the most-favoured-nation clause adopted by the Commission at its twenty-eighth session, see *Yearbook ... 1976*, vol. II (Part Two), pp. 11 *et seq.*, doc. A/31/10, chap. II, sect. C.

* The comments reproduced in this annex were originally circulated in documents A/CN.4/308 and Add.1 and Add. 1/Corr. 1 and Add.2, and A/CN.4/L.268.

For the text of instruments referred to several times in the present comments, see the following sources:

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|---|--|
| <p>Cartagena Agreement (Subregional integration agreement [Andean Pact])
(Bogotá, 26 May 1969)</p> <p>General Agreement on Tariffs and Trade
(Geneva, 30 October 1947)</p> <p>Final Act of the Conference on Security and Co-operation in Europe
(Helsinki, 1 August 1975)</p> <p>Charter of Economic Rights and Duties of States
(12 December 1974)</p> <p>Vienna Convention on the Law of Treaties ("Vienna Convention")
(Vienna, 23 May 1969)</p> <p>Declaration of Ministers ("Tokyo Declaration")
(Tokyo, 14 September 1973)</p> <p>Treaty establishing EEC ("Treaty of Rome")
(Rome, 25 March 1957)</p> <p>Treaty establishing a free-trade area and instituting LAFTA ("Montevideo Treaty")
(Montevideo, 18 February 1960)</p> | <p>Spanish text: <i>Grupo Andino - M.C.C. CARIFTA y otros documentos</i> (Foro Nacional sobre Venezuela y la Integración Latinoamericana), <i>Documentación Informativa</i>, vol. II, Caracas, 1971, p. 35.</p> <p>English text: American Association of International Law, <i>International Legal Materials</i>, Washington D.C., vol. VIII, No. 5, September 1969, p. 910.</p> <p>GATT, <i>Basic Instruments and Selected Documents</i>, vol. IV (Sales No. GATT/1969-1).</p> <p><i>Final Act of the Conference on Security and Economic Co-operation in Europe</i>, Helsinki, 1975, Lausanne, Imprimeries réunies.</p> <p>General Assembly resolution 3281 (XXIX).</p> <p><i>Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference</i> (United Nations publication, Sales No. E.70.V.5), p. 287.</p> <p>GATT, <i>Basic Instruments and Selected Documents, Twentieth Supplement</i> (Sales No. GATT/1974-1), p. 19.</p> <p>United Nations, <i>Treaty Series</i>, vol. 298, p. 11.</p> <p>United Nations, <i>Official Records of the Economic and Social Council, Thirtieth Session, Supplement No. 4</i>, annex II.</p> |
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A. Comments of Member States

Byelorussian Soviet Socialist Republic

[Original: Russian]
[20 January 1979]

1. The most-favoured-nation principle is extremely important for ensuring co-operation among States in their economic relations in general and in the development of international trade in particular.
2. The reciprocal granting of most-favoured-nation treatment is one of the ways of implementing the principle of the sovereign equality of States, which is generally recognized in international law. That principle is firmly embodied in the new Constitution of the Soviet State, as one of the principles on which the USSR founds its relations with other countries.
3. The Byelorussian SSR favours the general recognition and universal application of the most-favoured-nation principle in international economic relations.
4. The cases occurring in international practice where the granting of most-favoured-nation treatment to other States is made conditional upon fulfilment of completely unacceptable conditions cannot fail to have a negative effect on the development of international relations as a whole.
5. Measures taken under the auspices of the United Nations and other international organizations with a view to the ever wider application of most-favoured-nation treatment in international economic relations deserve support.
6. In the view of the Byelorussian SSR, the draft articles on the most-favoured-nation clause prepared by the Commission provide a fully satisfactory basis for drafting an international convention

on the matter. They clearly reflect the concept of most-favoured-nation treatment generally accepted in modern international law.

7. The Commission was fully justified in refusing to recognize exceptions to the most-favoured-nation clause other than those provided for in articles 21 to 23.
8. The Byelorussian SSR, as a member of the group of land-locked States, especially supports article 23, which takes into account the specific needs of States that have no coastline.
9. In the view of the Byelorussian SSR, the use in the draft articles of the expression "material reciprocity" to indicate the acceptable conditions for granting most-favoured-nation treatment is unwarranted, because the expression is extremely imprecise and is not part of the vocabulary generally used in international law. A broad interpretation of the expression "material reciprocity" might in fact render the content of the most-favoured-nation principle totally meaningless. The most-favoured-nation clause will promote trade only if it is applied without discrimination, that is, if one State grants another most-favoured-nation treatment without conditions or compensation of any kind. The Commission should take this comment into account in its further work on the draft articles.

Colombia

[Original: Spanish]
[6 March 1978]

1. In general, the draft articles systematize and codify the clause by virtue of which a granting State accords to a beneficiary State the right to enjoy most-favoured-nation treatment.

On a first reading, the Colombian Government is in agreement with the definition of the clause and of its constituent elements, but deems it appropriate to comment on the provisions of articles 7 and 21.

2. In article 7, relating to the source and scope of most-favoured-nation treatment, the Commission establishes "the most-favoured-nation clause in force between the granting State and the beneficiary State" as the basis of the right of the beneficiary State to obtain most-favoured-nation treatment. Here the expression "in force" does not logically determine the premises or the consequence of the rule; for instance, if a basic treaty regulating the content and scope of the most-favoured-nation clause already existed between a granting State and a beneficiary State, there would be no reason to make reference to the relationship between the granting State and a third State. That consideration, although abstract in principle, achieves a practical dimension in the intention of the States at the time when the most-favoured-nation treatment is granted under a clause: the creation of mutual rights and obligations for the parties concerned (the granting State and the beneficiary State), taking as the point of reference the content of obligations arising from earlier treaty relationships (between the granting State and the third State), a content that the parties have the power to broaden or to restrict. Although the basic treaty that gives rise to most-favoured-nation treatment between two States is the agreement they have concluded together, the intention expressed therein is to grant previously determined benefits, which the parties can agree to replace by others, no less favourable, but which are essentially based on the treaty in force between the granting State and the third State; it is in that sense that it is appropriate to speak of a clause in force.

3. Article 18 corroborates the foregoing argument by providing that enjoyment of rights under a most-favoured-nation clause "arises at the time when the relevant treatment is extended by the granting State to a third State". (This substantive provision applies in the case of treatment under a most-favoured-nation clause not made subject to the condition of reciprocity.) However, there is no express reference to the basic agreement as source of the right, the content of which is determined by the relevant treatment extended by the granting State to a third State.

4. In the light of the foregoing, the Colombian Government suggests the deletion of the expression "in force" in paragraph 1 of article 7 and its replacement by "agreed upon". As a possible variant, to make the draft more logical in structure, the final part of that paragraph (retaining the expression "in force") might read: "... most-favoured-nation clause in force between the granting State and the third State".

5. With regard to article 21, under which a beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a generalized system of preferences established by that granting State, the Colombian Government suggests that the word "developed" should be inserted before the words "beneficiary State". Such further definition would prevent the most-favoured-nation clause from being incorrectly applied in economic relations and giving rise to an imbalance in international trade, by providing certain countries with inequitable and non-reciprocal advantages.

6. A provision could be added to the article to the effect that the granting of most-favoured-nation treatment to a State within a generalized system of preferences should not prejudice the interests of other developing countries or imply discrimination against them.

Czechoslovakia

[Original: English]
[6 March 1978]

The draft articles on the most-favoured-nation clause established by the Commission at its twenty-eighth session form a

good basis for the international regulation of that institution. In principle, the proposed articles correspond to the needs of international economic relations. A convention would represent a most suitable form of codification. The draft articles touch upon certain very complex legal questions whose solution has yet to be clarified in more detail.

The Czechoslovak Socialist Republic submits the following remarks on the draft articles:

1. The proposed regulation follows from the distinction between the concept of the most-favoured-nation clause, which becomes effective only on the basis of contractual instruments, and the principle of non-discrimination, whose source is the principle of the sovereign equality of States and which is based on general principles of international law. The distinction between the content of the most-favoured-nation clause and the principle of non-discrimination is not, however, made sufficiently clear in the draft. The Commission's report states merely that States bound by the principle of non-discrimination have the right to grant more favourable treatment to another State and that no State may object to that provided the non-discriminatory treatment extended to it is comparable with that extended to other States.^a However, the example used to clarify this difficult distinction cannot be of general application. Even if article 47 of the Vienna Convention on Diplomatic Relations^b and article 72 of the Vienna Convention on Consular Relations^c use the term "discrimination", it is clear from the content that the object is to impose observance of obligations under the respective Conventions in respect of all States. As the Conventions designate the scope of these obligations, they concede that States may grant each other, on the basis of agreement or custom, treatment more favourable than that provided for by the Conventions. Both Conventions thus use the term "discrimination" in the sense of non-observance of their provisions. However, in spheres where minimum treatment is not provided for (for example, the commercial sphere), the existence of discrimination cannot be argued by analogy.

2. In article 1, and possibly in article 2, the sphere of application of the draft articles is limited only to the most-favoured-nation clauses contained in written agreements concluded between States. In that respect, the draft corresponds to the Vienna Convention on the Law of Treaties, although the Commission's report stresses that the draft articles are to be considered as an independent legal instrument. This definition of the subject-matter of the draft articles will substantially limit their application in practice. The most-favoured-nation clause is applied primarily in the commercial and political spheres, in which some States have delegated to international organizations of which they are members the right to conclude international agreements. That is true chiefly of EEC, which is one of the major participants in international trade. If the draft articles were adopted without change, they would not apply to most-favoured-nation clauses contained in treaties and agreements concluded by EEC with other States. The main object of the draft articles should thus be redefined, so that the articles could also apply to most-favoured-nation clauses contained in international treaties to which international organizations that conclude treaties containing the most-favoured-nation clause on behalf of their member States are parties, such treaties being effective on the territories of those States.

3. Articles 4 and 5 are of fundamental importance for the draft, and the scope of the most-favoured-nation clause should follow from them. It should be considered whether the two articles should not be linked and harmonized, to facilitate their interpretation. Certain difficulties of interpretation might arise from the fact

^a *Yearbook ... 1976*, vol. II (Part Two), pp. 7 and 8, doc. A/31/10, para. 40.

^b United Nations, *Treaty Series*, vol. 500, p. 122.

^c *Ibid.*, vol. 596, pp. 318 and 320.

that the term "treatment" is used in both articles, but in different senses. Article 4 deals only with the granting of most-favoured-nation treatment to other States and this wording is intended to specify clearly the subjects of rights and obligations under the most-favoured-nation clause, i.e. the contracting States. Article 5 deals with the treatment of the beneficiary State, persons or things, and delimits the scope of the most-favoured-nation clause.

The proposed wording of articles 4 and 5, however, does not tally with some of the conclusions set out in the commentary. Paragraph (13) of the commentary to article 4 rightly stresses that the most-favoured-nation clause may be variously worded, but that its purpose is the granting of treatment as defined in article 5. Taking into account the terms of article 2 (d), article 5 implies that any provision of an agreement expressing the will of the contracting States to grant a treatment that is not less favourable than that granted to any third State should also be considered as a most-favoured-nation clause.

Nevertheless, in its commentary to article 4, the Commission takes as an example of a case in which most-favoured-treatment is purportedly not involved the provisions of article XIII, paragraph 1, of the General Agreement on Tariffs and Trade. Those provisions, however, fulfil the conditions of article 5 of the draft articles, since they stipulate the obligation, for the contracting States, not to apply to another contracting State restrictions that are not applied to all third States. The reasons why article XIII of the General Agreement should not be considered as constituting a most-favoured-nation clause do not follow from the commentary. It might be thought that the Commission's conclusions were based merely on the title of the said article, which includes the words "non-discriminatory administration". However, that interpretation is not acceptable, because there exist a number of provisions of international treaties that indisputably constitute most-favoured-nation clauses and in which the term "non-discrimination" is used. In view of the indeterminate form of the most-favoured-nation clause, the intention of the parties should be decisive for its interpretation.

If prohibition of discrimination is accepted as following directly from the general principles of international law and therefore as valid irrespective of the content of the contractual provisions, the parties that expressly undertake to prohibit discrimination against third States generally have in mind any treatment less favourable than that granted to third States. If paragraph 1 of article XIII of the General Agreement does not constitute an acceptable example, that is also because, under article 1 of that Agreement, the concept of most-favoured-nation treatment is so broad that it covers all regulations on imports and exports. Thus article XIII aims only at correcting and defining the concept of the most-favoured-nation clause in the sphere of quantitative restrictions. That interpretation is also confirmed by the exceptions referred to in article XIV of the General Agreement.

Neither articles 4 and 5, in their present wording, nor the other proposed articles, indicate the distinction between the most-favoured-nation clause and non-discrimination referred to in the Commission's report.^d

4. Even if articles 6 to 12 may be regarded as overlapping to some extent and as merely emphasizing individual aspects of legal consequences that already follow directly from articles 4 and 5, the Czechoslovak Government, for its part, has no objection to their wording, because the adoption of these provisions will facilitate the interpretation of the draft articles. Neither has the Czechoslovak Government any suggestions to formulate at the present stage with regard to articles 13 to 20.

5. Articles 21 to 23 contain restrictions on the application of the most-favoured-nation clause. These restrictions have their purpose,

although the question may arise whether, in that case, the clause is still a most-favoured-nation clause in the sense of articles 4 and 5. According to article 26, the proposed regulation would also appear to apply to treaty provisions containing greater restrictions on the application of the clause than those mentioned in articles 21 to 23. It would be desirable, however, to make that interpretation quite clear.

It is possible to agree with the substance of articles 22 and 23. It is doubtful, however, whether the limitation provided for in paragraph 2 of those articles should be maintained. The beneficiary State mentioned in those paragraphs is in fact in a position similar to that of the third State to which benefits are granted. The most-favoured-nation clause should thus be limited only by virtue of treaty provisions, in accordance with article 26.

Account should be taken in the final wording of article 23 of the results of the Third United Nations Conference on the Law of the Sea, in particular of the provisions relating to the rights of land-locked countries to access to and from the sea and to freedom of transit.^e

^e See *Official Records of the Third United Nations Conference on the Law of the Sea, Sixth Session*, vol. VIII, *Informal composite negotiating text* (United Nations publication, Sales No. E.78.V.4), doc. A/CONF.62/WP.10, articles 124 *et seq.*

German Democratic Republic

[Original: German/Russian]
[30 September 1977]

1. The most-favoured-nation clause, which over the centuries has become an important element of international commercial relations, promotes co-operation based on equality and mutual advantage among all States. Its application is thus in the interests of world peace and international security. The draft articles are therefore of fundamental importance.
2. On the basis of the thorough preparatory work of the Special Rapporteur, Mr. E. Ustor, the Commission has succeeded in elaborating a well-balanced draft, which embodies the experience of many years in concluding most-favoured-nation clauses and takes due account of the most recent developments in this sphere. The draft is thus in full accord with the purpose and principles of the United Nations and of the Charter of Economic Rights and Duties of States.
3. In view of the important contribution of the most-favoured-nation clause to international economic relations and thus to the strengthening of international peace and security, the preamble to the future convention on the most-favoured-nation clause should include the following paragraph:

Considering the beneficial effects arising from the application of the most-favoured-nation clause for the development of international trade, the intensification of inter-State co-operation and hence the strengthening of international peace and security.

4. It should not be forgotten that the most-favoured-nation clause can have these beneficial effects only if the States entitled to the treatment conferred by the clause enjoy the greatest possible number of advantages. This means that agreed exclusions from the application of most-favoured-nation treatment must not be permitted to rob the most-favoured-nation clause of its value. Such exclusions must remain of an exceptional nature and must not vitiate the claim to most-favoured-nation treatment. The exceptions provided for by the Commission in articles 21, 22 and 23 fulfil this requirement. No other exceptions should be provided for. In particular, the right accorded under article 26 to agree to additional exceptions should be eliminated. In this connexion, the Commission should maintain its previous position with regard to advantages agreed upon among the States members of a

^d *Yearbook ... 1976*, vol. II (Part Two), p. 7, doc. A/31/10, para. 39.

customs union or economic community and should not formulate a specific exception for such advantages from the outset, regardless of a whole set of differing proposals or views. Such problems should be resolved, as in the past, by agreement between the States members of such a community and the States with which they have agreed upon a most-favoured-nation clause. Mutual interests are better served in this manner; this is also in conformity with article 12, paragraph 1, of the Charter of Economic Rights and Duties of States, which binds States participating in such co-operation to ensure that the policies of the groupings to which they belong 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.

5. The Government of the German Democratic Republic is in favour of making exceptions for advantages granted to developing countries in order to strengthen their economic independence. Article 21 is of great importance in this regard. The proposal made at the thirty-first session of the General Assembly that exceptions should also be made for mutual advantages granted in relations between developing countries deserves careful consideration, especially in the light of article 21 of the Charter of Economic Rights and Duties of States, under which developing countries that grant one another trade preferences are not obliged to extend such preferences to other countries under a most-favoured-nation clause.

6. The position previously adopted that the draft should not include an article on the settlement of disputes should also be maintained. Most-favoured-nation clauses appear in specific treaties and are thus an integral part of those treaties. Problems arising from the interpretation of such clauses should therefore be resolved under the procedures laid down in the treaties concerned for the settlement of disputes.

7. The application of most-favoured-nation treatment is also very important in connexion with the Final Act of the Conference on Security and Co-operation in Europe. This Final Act must be viewed in its totality. The 10 principles laid down in part 1 are extremely important for the interpretation and application of all its parts. By virtue of the first of these principles, participating States are to respect the right of all other participating States freely to choose and develop their political, social, economic and cultural systems as well as the right to determine their laws and regulations. A necessary consequence of the observance of this right is the creation of legal status for foreigners differing from that prevailing in a State with a different system. It should also be remembered, in applying most-favoured-nation treatment in commercial relations, that trade is a two-sided and not a one-sided affair. When a country grants a trading partner most-favoured-nation treatment, thus giving it equal legal status with other trading partners, that country increases its import potential and at the same time its opportunities for exporting to the trading partner's territory. Only in this way can mutually advantageous trade develop, with most-favoured-nation treatment contributing to its growth and to the expansion of economic relations between States. On the basis of this fundamental concept, we should concentrate our full attention on ensuring the widest possible application of most-favoured-nation treatment, without restrictions of any kind.

Guyana

[Original: English]
[8 March 1978]

General observations

The history of the most-favoured-nation (m.f.n.) clause reveals that its evolution to today's interpretation has been influenced largely by the myriad metalegal considerations which at different times determine the nature and content of trade relationships.

As such, the clause has evolved in response to the demands of changing times. Today's fast evolving trade relations should, of necessity, influence the nature and content of the m.f.n. clause, and an attempt to codify the clause must find its points of reference not only in *doctrine* and settled State practice but also in the decisions that have emanated from the various economic discussions convened to define new trading relations between and among developing countries and to redefine the trading relations between developing and developed countries. In short, a codification of the m.f.n. clause must retain a relevance for future trading relations, given the trends in the development of those relations. It could therefore prove beneficial for UNCTAD, the agency most closely involved in such discussions, to provide the Commission with insights into this dimension of its work.

Observations on selected articles

Article 5

In article 5 of the draft, the m.f.n. clause is stated in absolute terms and takes as its starting point the quantum of benefit enjoyed by the third State, the *tertium comparationis*. This starting point ignores the fact that there may be other considerations, e.g. a special relationship, which influence the granting of m.f.n. treatment in a certain area, making it more than an act of mere commerce, and that the potential beneficiary State should at least be in a position of *equivalence* with the third State before it can properly claim all the benefits enjoyed by that third State under an m.f.n. clause.

This observation is all the more pertinent since, while article 1 confines the application of the articles to treaties in written form, it is not altogether clear from article 3 that benefits enjoyed by a beneficiary State not under a written agreement cannot be used as the *tertium comparationis* for determining the quantum of benefits to be claimed by the potential beneficiary State in any negotiations. It seems that negotiations on economic relations could be simplified if some requirement of *equivalence* or *similarity* were tied to the scope of the m.f.n. clause. In addition, it would offer to countries at the lower end of an unequal economic relationship an invaluable asset in their negotiations with their more developed counterparts.

Article 16

The problems to which article 5 gives rise and the need for a solution also attend article 16, as at present cast.

This article, without so stating, has sought to assimilate the standard of national treatment to the standard of m.f.n. treatment. As such, it appears to have ignored the position of the granting State. The evolution of the m.f.n. clause appears to have been the sole determinant in the formulation of this article and, judging from the commentary to the article, the redefinition of the trading concepts and relationships that has been part of that evolution, and which has been so much the preoccupation of all countries for a number of years, has not played a part in the formulation of article 16. It would appear beneficial to the development of the new law of international economic relations if this article were to reflect that preoccupation of States.

Article 21

The article finds its proper place in a draft on the m.f.n. clause and gives recognition to the system of generalized, non-reciprocal, non-discriminatory preferences as an instrument for ensuring access by developing countries to the markets of developed countries for their goods. The article secures the position of a developed country vis-à-vis another developed country in the matter of granting preferences. Trading between and among developing countries is a recent phenomenon, and this expression of co-operation among developing countries can no doubt benefit from the inclusion of a similar provision in the text of article 21 to enable developing countries, if they so wish, to secure their positions vis-à-vis one another.

Customs unions and other similar forms of association

The draft makes no exception to the m.f.n. clause for customs unions and other similar forms of association, notwithstanding the frequency of their use in some form or other by several countries, but especially by developing countries, as an instrument of economic development. The Government of Guyana considers that the draft articles would benefit from the inclusion of this exception.

Hungary

[Original: English]
[20 February 1978]

1. The Government of the Hungarian People's Republic attaches great importance to the work of codification within the framework of the United Nations. The resultant treaties serve to promote the strengthening of peaceful relations and the development of co-operation among States. As part of that work, the draft on the most-favoured-nation clause elaborated by the Commission is another great contribution to widening the scope of the law of treaties.
2. The importance and topicality of this draft are underlined by the fact that an ever broader unconditional application of the most-favoured-nation principle, free from discrimination and based on mutual advantages, is bound to play a most significant role in the economic and commercial relations of States.
3. The Hungarian Government considers that the draft text on the most-favoured-nation clause, prepared by the Commission at its twenty-eighth session provides in general an appropriate basis, as regards both its concept and provisions, for the elaboration of an international treaty.
4. The Hungarian Government agrees, *inter alia*, with the draft's considering the unconditionality of the most-favoured-nation clauses to be the fundamental feature of most-favoured-nation treatment, that is, with the establishment of the presumption of its unconditional nature (article 8). Similarly appropriate and important is the provision of article 15, which, reaffirming a correct principle of codification, seeks the broadest possible application of most-favoured-nation treatment. The Hungarian Government likewise concurs in the position of the Commission that establishes a narrow limit to exceptions to the application of most-favoured-nation treatment. The making of exceptions is fully justified in respect of preferences granted to developing countries and of facilities accorded to frontier traffic between neighbouring countries and to land-locked countries. All three exceptions are intended to ensure that the legal regulation of most-favoured-nation treatment will produce a positive effect on the commercial and economic relations of States.
5. In the opinion of the Hungarian Government, however, the inclusion in the draft of the concept of material reciprocity raises certain problems, in so far as that text fails to take account of the fact that, under contemporary international law, material reciprocity is applicable only in certain non-commercial spheres. Its application under trade agreements, on the other hand, may give rise to discrimination. In view of this, the inclusion of material reciprocity in the draft raises uncertainty of interpretation of the different articles and might prejudice non-discrimination in the application of most-favoured-nation clauses in commercial relations. The Hungarian Government therefore believes that the best solution would be for the Commission, in keeping with the position it has expressed in its comments to the articles concerned, to provide a formulation of the most-favoured-nation principle that would state explicitly that the concept of material reciprocity is not linked to the principle of the most-favoured-nation treatment in cases of its application in commercial relations.

Luxembourg

[Original: French]
[20 September 1977]

The Government of Luxembourg wishes first of all to pay a tribute to the work accomplished by the Commission and its Special Rapporteur, which is characterized by the exceptionally abundant body of material on treaties, judicial practice and doctrine on the subject collected as a basis for a study in depth. Whatever the ultimate fate of the articles, this research in itself constitutes a useful and lasting contribution to the development of international law.

This expression of appreciation does not, however, prevent the Government of Luxembourg from making a number of comments relating both to the content of the proposed articles and to the question whether the draft articles might form a suitable basis for a treaty commitment on the part of States.

*Comments on the articles**Article 1*

Under this article, the scope of the articles would be restricted to most-favoured-nation clauses contained "in treaties between States". This provision greatly restricts the scope of the draft, since, following the establishment of regional economic groupings in various parts of the world, the clause is likely to be found more and more frequently in agreements concluded by unions or groups of States. This development should be taken into account and the scope of the articles should be defined accordingly.

Article 2

Only paragraphs (b), (c) and (d) appear to be necessary and useful in the régime established by the draft articles.

Paragraph (a), concerning the term "treaty", reproduces the concepts embodied in the Vienna Convention on the Law of Treaties.

Paragraph (e), concerning the term "material reciprocity", refers to a secondary and even atypical aspect of the clause, as will be seen from articles 8 to 10. This concept is therefore out of place in this introductory provision and it is proposed that it should be dealt with in connexion with articles 9 and 10.

Article 3

As the report itself indicates, some hesitation was expressed in the Commission itself with regard to this article, the scope of which is in fact difficult to comprehend. If the artificial restriction contained in article 1 could be removed, it would seem that article 3 could also be deleted without any difficulty.

Article 4

In the view of the Government of Luxembourg, this provision would be more suitably included among the definitions in article 2. As a separate article, it gives the impression of being completely tautological.

With regard to the substance of the article, due importance should be attached, in the structure of the draft articles, to the words "in an agreed sphere of relations". These words emphasize the fact that the clause can take effect only within a specific treaty relationship, and hence could not normally be transferred from one type of international treaty to another; for example, from the sphere of trade relations to relations concerning establishment or to systems of economic integration. A most-favoured-nation clause cannot be considered separately from the specific content within which it applies; accordingly, the Commission rightly drew attention, in paragraph (17) of its commentary, to the relationship between that provision and the *ejusdem generis* rule.

Article 5

The text prepared by the Commission demonstrates the difficulty of grasping the essence of most-favoured-nation treatment

by means of an abstract formula detached from the subject-matter of the clause. Questions arise concerning the scope of the formula—which recurs repeatedly in the remainder of the draft articles—in which reference is made to “persons” or “things” in a “determined relationship” with a given State. To what persons does it refer? While the situation may be clear enough in the case of physical persons, it is much less so in the case of economic enterprises, whether or not corporate bodies. Does the reference to “things” apply only to material objects or also to intangible goods such as the performance of services or commercial, industrial or intellectual property rights? Finally, what should be understood by the words “determined relationship” with a State, especially in the case of economic enterprises or intangible goods? The observations on this matter in paragraph (3) of the commentary shed little light on these questions, the solution to which should be incorporated in the text itself.

These questions give rise to serious doubt as to whether most-favoured-nation treatment can be defined without any reference to its subject-matter or to the treaty context in which it is stipulated. This question will be raised again in the conclusions.

Article 6

This provision, which merely states a legal truth of a very general nature, could easily be deleted.

Article 7

It may be questioned whether the argument underlying this article—based on a distinction between the right that “arises” from the clause (paragraph 1) and the way in which the treatment is “determined” (paragraph 2)—is entirely relevant. In fact the clause has the effect of creating a conditional obligation, the condition depending upon the favours that may subsequently be extended to a third State. It may therefore be going too far to say, as in paragraph (1) of the commentary, that the clause is the “exclusive” source of the beneficiary State’s rights.

Articles 8 and 9

At this point it is appropriate to raise again the question of “material reciprocity”, which the Government of Luxembourg suggested should be deleted from the definitions in article 2. Yet it may be asked whether it is advisable to introduce here the idea of “reciprocity”, which is ambiguous. In fact, as the Commission rightly indicated in paragraph (6) of the commentary to article 4, the clause as such should usually be regarded as reciprocal and not unilateral. On the other hand, what is involved here is less a question of reciprocity than one of “compensation” or material “equivalent”. On this subject, the Institute of International Law in its 1936 resolution (quoted in paragraph (17) of the commentary), chose a better adapted formula, which might well be substituted for the formula embodied in the draft articles.

Article 10

Article 10 is merely a truism, and the Government of Luxembourg recommends its deletion.

Articles 11 and 12

Article 11 sets forth the well-known *ejusdem generis* rule. A problem arises with regard to the relationship between this article and article 4. According to article 4, the clause applies only in “an agreed sphere of relations”. According to article 11, it entitles a State only to those rights that fall within the scope “of the subject-matter of the clause”. In the opinion of the Government of Luxembourg, these two conditions are cumulative, in that the criterion set forth in article 11 (the subject-matter of the clause) is a specification within the context of the treaty in which the clause is inserted (article 4). It would be desirable, in the interests of clarity, to draw attention at this point to the limitation set forth in article 4, since the *ejusdem generis* rule must apply in that respect as well.

Article 13

In the view of the Government of Luxembourg, this article duplicates articles 8 and 9 concerning the unconditionality of the clause.

Article 14

The wording of the article is difficult to understand. It seems that the intention is to present a simple idea, namely, that a State may not limit the scope of the clause, to the detriment of the beneficiary, as the result of an agreement concluded with a third State. This simple truth was stated more comprehensibly in the resolution adopted by the Institute of International Law in 1936, quoted in paragraph (2) of the commentary. It would be better to use that formulation.

Article 15

This provision does not in itself call for comment, but the Commission chose in this connexion to consider, in paragraphs (24) *et seq.* of the commentary, the question whether the most-favoured-nation clause did or did not attract benefits accorded within *customs unions and similar associations of States*. The commentary reflects a sharp divergence of opinion in the Commission, as a result of which no definite answer is given to the question whether economic integration treaties do or do not constitute an *ipso jure* derogation from commitments with regard to the most-favoured-nation clause. It is regrettable that one of the major problems raised by the clause could not be resolved.

To begin with, the Government of Luxembourg was surprised that the Commission, after referring repeatedly to the resolution adopted in 1936 by the Institute of International Law, should have made no reference in its report to the extensive work on the problem undertaken by the Institute in 1969, at its Edinburgh session, and to the resolution adopted at that time, in which it was stated that:

“States to which the clause is applied should not be able to invoke it in order to claim a treatment identical with that which States participating in an integrated regional system concede to one another.”^a

The Government of Luxembourg considers that this is the only decision that is in conformity with universal practice and that can accommodate the differences in quality and nature existing between economic integration systems and international trade. Whereas a large number of economic integration systems have been functioning since the nineteenth century, parallel with the most-favoured-nation clause mechanism, there is no known precedent of a State demanding and obtaining, by virtue of the clause, the advantages of a customs union or free-trade system of which it was not a member. The frequency of explicit exceptions in treaty practice (referred to in the Commission’s commentary), such as article XXIV of the General Agreement on Tariffs and Trade, show only that practice is unambiguous; the commentary was unable to cite any case of practice or of a judicial decision to the contrary that would extend to a non-member State, by virtue of the clause, the benefits of a system pertaining to a customs union or to a free-trade area.

The Government of Luxembourg therefore regrets that the objections presented in the Commission concerning a practice that has thus far been uncontested should have had the effect of weakening the certainty of a consistent international practice. If this problem is not resolved satisfactorily, there is a danger that the many States that have joined economic integration and free-trade systems will be obliged to formulate reservations, should the Commission’s draft be transformed into a treaty

^a *Annuaire de l’Institut de droit international, 1969, Basel, vol. 53, t. II, 1969, p. 379.*

without clear recognition of the derogation from the clause in favour of economic integration systems. That would be the only way to prevent the paralysis of customs union and free-trade systems by inadmissible claims, raised by virtue of the most-favoured-nation clause. Even States that have not yet joined such systems might feel the need to protect themselves by such reservations, so as not to jeopardize their future possibilities.

Articles 16 and 17

In these provisions, the Commission has attempted to deal with a problem that has always been very perplexing, since a clear distinction has not always been made, especially in conventions of establishment, between most-favoured-nation treatment and national treatment. The Government of Luxembourg considers that it is not appropriate to state in such general terms that the most-favoured-nation clause ensures the beneficiary State of national treatment in every case, once such treatment is promised to any third State. As the Commission itself says in paragraph (7) of its commentary to article 17, most-favoured-nation treatment and national treatment differ in character. By its very nature, the clause ensures only the most favourable treatment granted to *foreigners*, and not national treatment.

This is particularly true whenever national treatment is systematically generalized in relations between certain States, as may be the case in the context of political agreements or economic integration systems. As an example, the Government of Luxembourg would like to quote article 7 of the Treaty establishing EEC, which prohibits, within the sphere of application of the Treaty, "any discrimination on the grounds of nationality". This provision covers a very broad range of subjects, such as the status of wage-earning workers, economic establishment, provision of services, investment, regulations applying to foreigners, and so forth. Its objective is to eliminate systematically, in the entire area of economic activities and social relations, any difference in respect of nationality. It is difficult to see how benefits on such a large scale could be extended, through the action of a generic provision such as the one proposed, to every beneficiary of the most-favoured-nation clause.

Thus it seems that this provision too might give rise to reservations by States which would have a legitimate interest in protecting themselves against the incalculable consequences of an abstract formulation of this kind.

The Government of Luxembourg is of the opinion that, given the difference in nature between national treatment and most-favoured-nation treatment, it would be preferable not to confuse these two kinds of questions, and hence to delete articles 16 and 17.

Articles 18 and 19

These provisions invite no comment, except with regard to the concept of "material reciprocity", already discussed above.

The question arises, however, whether the termination or suspension of the treatment extended to the third State may be applied to the beneficiary State when it results from a breach of the law. May a State cite a breach committed by itself or by a third party in order to terminate an advantage conferred on the beneficiary State by virtue of the clause? This problem has still to be discussed.

Article 20

It appears to the Government of Luxembourg that this provision is contrary to a general principle of international law, according to which a State may not invoke its internal legislation in order to restrict the scope of an international obligation or to release itself from it. It should at least be stated in this provision that the national laws of the granting State may not be applied to the beneficiary State except when their observation has been expressly stipulated in relations with the third State. With the addition of such clarification, however, the provision would merely state the

obvious, so that the best solution would be to delete this article, which could have consequences that the Commission certainly did not intend.

Articles 21-23

The Government of Luxembourg approves the substance of these provisions, all of which are based on the same principle, namely, that the clause may not be used to extend the benefit of advantages accorded by the granting State in a context alien to the normal content of most-favoured-nation treatment, such as development assistance, frontier traffic and special facilities extended to land-locked States.

It merely wishes to observe that it seems hardly consistent to refuse to adopt the same approach in the case of the advantages granted *inter se* by States belonging to a customs union or a free-trade organization.

Conclusions

In the light of the foregoing, the Government of Luxembourg wonders whether the "most-favoured-nation clause" is an appropriate subject for the task of codification entrusted to the Commission.

1. An analysis of the draft articles shows that, with the exception of definitions and purely descriptive articles (1, 2, 3, 5, 6 and 7), and articles applying general rules of international law (14, 15, 24 and 25), the provisions of the draft are concerned exclusively with *rules of interpretation* or presumptions, intended to establish the meaning of the most-favoured-nation clause in default of stipulations to the contrary:

- Unconditional character of the clause (articles 8, 10 and 13)
- Limitation of the clause to its specific subject-matter (articles 4, 11 and 12)
- Obtaining national treatment (articles 16 and 17)
- Effect of the clause in time (articles 18 and 19)
- Effect of internal law on the clause (article 20)
- Implicit derogations from the clause (articles 21, 22 and 23)

These are typical subjects of an approach based on doctrine and judicial practice, which do not lend themselves to regulation by a treaty. The questions broached by the draft cannot, in fact, be resolved except under the conditions laid down in each individual most-favoured-nation clause at the stage of its practical application. It seems extremely hazardous to intervene in this process by means of pre-established provisions.

2. This difficulty is all the greater since the Commission has approached the problem at so general and abstract a level that no State could assess the real scope of the obligations it would assume by accepting such provisions as an international commitment. It is indeed impossible to say with certainty what the expressions "material reciprocity", "agreed sphere of relations", "determined relationships" of a State with certain "persons" and certain "things", "subject-matter of the clause", "relevant laws" etc. would mean. This comment shows that the most-favoured-nation clause is not a "thing in itself", that it is not a mechanism that could be regulated by purely juridical categories; in reality, the clause in each of its applications is closely linked to a well defined area of international relations such as customs duties, quantity control, international financial relations, the exercise of occupations and establishment, international labour relations, protection of persons and recognition of companies, navigation and legal protection. It is not possible to define the effects of the clause with sufficient legal accuracy outside these very specific contexts.

3. For these reasons, the Government of Luxembourg believes it would be inappropriate to continue work on these articles with the intention of preparing the text of a treaty. The most that could be expected to result would be a collection of aids to interpretation,

in the form of very flexible recommendations. It would also be necessary to eliminate in advance all approaches that would have the effect, not of clarifying the law, but of creating legal uncertainty, as in the case, in particular, of confusion between the most-favoured-nation clause and the national treatment régime, of refusal to recognize the limits of the clause with regard to economic integration, and of interference of internal law provisions in operation of the clause.

Netherlands

[Original: English]
[3 May 1978]

General observations

1. The consideration that the Commission has given to the most-favoured-nation clause results from the fact that it was urged to deal with that subject, as an aspect of the general law of treaties, from various quarters in the Sixth Committee at the twenty-first session of the General Assembly of the United Nations. Once it had included the subject in its programme of work, the General Assembly repeatedly recommended that it continue studying it. This it has done, although it announced as early as 1968 that it would deal with the subject independently, in other words, not as part of the general law of treaties. The articles drawn up by the Commission may largely be regarded as an attempt to codify present international law on the most-favoured-nation clause and its application. Only on one point—in articles 21 and 27, which concern exceptions to the general rules of application for the benefit of developing countries—is the element of “progressive development of international law” clearly predominant. The Commission explains this on the grounds that it has concentrated on the legal aspects of the m.f.n. clause; it was not called upon to deal with “questions of a technical economic nature”, which are being dealt with by other international organizations. It states, however, that it did wish to consider any modern developments that might affect the “codification or progressive development of rules pertaining to the operation of the clause”.^a

2. Other modern developments, on the other hand, have been but little reflected in the draft articles. This applies in particular to the new kinds of international co-operation between States in which those States can no longer exercise their powers—in particular for the regulation of trade relations with other States—independently, or even can no longer exercise them at all.

The Commission does not deny that certain kinds of international organizations can act not only on an equal footing with a State in international relations but *in the place of* the States that have formed them; however it places this outside the scope of its draft articles, which concern only most-favoured-nation clauses in treaties between States (article 1). Such clauses in international agreements to which at least one international organization is a party are expressly disregarded (article 3). In view of the nature of present international economic relations, the scope of the draft articles is accordingly extremely restricted. In this connexion reference is made to the commentary submitted by EEC and its proposed amendment to article 2.^b

In the commentary by EEC, the Netherlands Government refers in particular to the texts proposed for articles 10 *bis*,^c and 21,^d with regard to the application of the m.f.n. clause in relation to the promotion of trade between States with differing economic systems and the effect of the draft articles on preferences accorded to developing countries.

^a See *Yearbook ... 1976*, vol. II (Part Two), pp. 9-11, doc. A/31/10, paras. 45 *et seq.*, in particular paras. 47 and 48.

^b See sect. C, 6, para. 7, below.

^c *Ibid.*, para. 15.

^d *Ibid.*, para. 6.

Observations on the draft articles

Article 2

3. As stated above, the Netherlands Government considers it necessary to take into consideration the fact that international organizations to which certain States have transferred sovereign powers in the area covered by the m.f.n. clause act on an equal footing with States in international relations and must therefore be treated as States. Reference is made to the proposal, in the commentary by EEC, to extend the scope of the draft articles.^e

The Netherlands Government would further note that the term “equivalent treatment” is used in the definition of “material reciprocity”. According to the report, the intention is that the granting State must be prepared to grant treatment “of the same kind and of the same measure”^f to subjects of the favoured nation. The term “equivalent” is however normally interpreted as meaning “of the same value”. It is precisely when the legal systems of the two States involved differ substantially, and thus exclude treatment “of the same kind”, that the word “equivalent” would seem to be too broad. For the rest, reference is again made to article 10 *bis* proposed by EEC.^g

Article 3

4. This article is designed to avoid undesirable contradictory arguments such as could be based on the fact that article 1 restricts itself to m.f.n. clauses in treaties between States. The objections to this restriction have already been stated (see “General observations”), and need not be repeated.

The draft does not cover the case of an m.f.n. clause in an agreement between two international organizations, one of which undertakes to accord to the other treatment not less favourable than that extended to any other subject of international law (whether or not a State). A clause of this kind, as the Commission itself recognizes, is by no means inconceivable.^h There would therefore seem to be no good reason not to provide for the case in so many words.

Article 5

5. This article gives rise to the question whether the definition of “most-favoured-nation treatment” as “not less favourable than treatment extended by the granting State to a third State” is not too broad, or at least too vague. Particularly important here is the significance of the word “extended”, which also plays an important part in the other articles. The effect of the word is clearly indicated in the report, where it is made clear that it is not considered important whether “the treatment extended by the granting State to the third State... is based on a treaty, other agreement, unilateral, legislative, or other act, or mere practice”.ⁱ

Under article 18, the beneficiary State’s right to treatment as most-favoured-nation arises “at the time when the relevant treatment is extended by the granting State to a third State”. The Netherlands Government questions whether any actual treatment by which a State obliged to extend favoured treatment accords a preference to a third State is sufficient to give rise to entitlement on the part of the beneficiary State. Must not the requirement at least be fulfilled that such actual treatment is not in conflict with the internal law of the granting State? The answer to this must be in the affirmative. An argument for it can also be found in arti-

^e *Ibid.*, para. 7.

^f *Yearbook ... 1976*, vol. II (Part Two), pp. 28 and 29, doc. A/31/10, chap. II, sect. C, articles 8, 9 and 10, para. (41) of the commentary.

^g See sect. C, 6, para. 15, below.

^h *Yearbook ... 1976*, vol. II (Part Two), p. 13, doc. A/31/10, chap. II, sect. C, article 3, para. (3) of the commentary.

ⁱ *Ibid.*, pp. 20 and 21, article 7, para. (1) of the commentary.

cle 20 of the draft. Meanwhile it cannot be denied that there is sometimes a deliberate failure to apply the legislation of a State obliged to extend favoured treatment. If this should happen on occasion in relation to a third State, a beneficiary State should not be able to take advantage of it. The case could however be viewed differently if the disregard of the law took on the nature of "consistent practice"; this could be made explicit by amending article 5 to read "extended as a consistent practice by the granting State".

6. In its commentary,¹ the Commission rightly focuses attention on the fact that it will not infrequently be difficult to determine whether the relationships between persons and things and a third State are the same as those between persons and things and the beneficiary State, as specified in the m.f.n. clause. The Commission accordingly suggests that the words "the same relationship" could better be rendered by "the same type of" or "same kind of relationship", but has refrained from using this wording as it would overburden the text. The Netherlands, however, is of the opinion that this can hardly be regarded as overburdening; on the contrary, it would be a worthwhile addition, avoiding a literal, and thus restrictive, interpretation of the phrase "same relationship", which would not be compatible with the differences in the nationality laws of States—differences that are often difficult to define.²

Article 6

7. The Netherlands Government agrees to the text of this article, although it can be regarded as superfluous in the context of the complete draft in view of article 1.

Article 7

8. Apart from the reservations expressed in its comments on article 5, the Netherlands Government has no objections to the sense of this article; there are difficulties, however, with the wording. Paragraph 1 refers to "persons or things in a determined relationship with a third State", while what is meant is "in the same kind of relationship with a third State as the relationship determined by the conditions of the most-favoured-nation clause". The end of paragraph 2 manifests the same problem: "the determined relationship with the latter State" (grammatically, the third State) does not exist.

Article 10

9. Reference is made to article 10 *bis* proposed in the commentary by EEC.¹

Article 11 and 12

10. These articles are designed to set out the *ejusdem generis* rule. The Netherlands Government is in agreement with the sense of the articles, but would like to make two comments on the wording chosen by the Commission.

(a) Like articles 7 and 13, article 5 creates the impression that, whether the beneficiary State is entitled, by virtue of a stipulation in the clause or by virtue of the subject-matter of the clause, to claim for particular persons or things the treatment given to a third State, depends on whether the persons or things that have already benefited from that treatment are "in the same (kind of) relationship" to the third State. The comparison is therefore based on the definition in the m.f.n. clause. Article 11, paragraph 1, however, and especially article 12, paragraph 2 (b), because of the way they are formulated, appear to point to a comparison in the opposite direction. This point needs to be clarified. In particular, if the class of persons is specified precisely in the m.f.n.

clause, it makes a difference which approach is adopted; a specification of this kind is usually to be interpreted as a deliberate restriction. If the specification in the m.f.n. clause is taken as the basis for comparison, it is more likely that the clause will have less favourable results for the beneficiary State than if the relationship of the persons or things to the third State is taken as the basis.

(b) Article 12, paragraph 1, states in so many words—quite rightly—that a beneficiary State's entitlement arises only "if the granting State extends to a third State treatment which is in the field of the subject-matter of the m.f.n. clause". The same should of course also apply to cases in which the beneficiary State claims rights "in respect of persons and things".

Article 13

11. The Commission's commentary indicates that the actual granting of material reciprocity is to be regarded as a form of compensation, and that, if the parties to an m.f.n. clause have not made its effect dependent on material reciprocity, "it follows... that the granting State cannot withhold from the beneficiary State the treatment extended by it to a third State on the ground that the latter treatment was... extended... against... any... kind of compensation".^m It may be wondered whether this argument also obtains if the requirement of material reciprocity on the point in question is laid down in the legislation of the granting State. If a third State meets that requirement and its subjects thereby enjoy a particular privilege, surely the beneficiary State should not be able to invoke this without satisfying the requirement of material reciprocity.

Article 14

12. The sense of this article is that, under an m.f.n. clause falling under the terms of the Commission's draft, even exclusive preferences, irrespective whether granted before or after the date on which the clause came into effect by virtue of an agreement with a third State, must as a rule be accorded by the granting State to the beneficiary State. Under article 26, however, it would be possible to deviate from this rule by incorporating a general or specific exemption in the m.f.n. clause. Frequent use will presumably be made of this option. It must be assumed that the rule also applies if the exclusive treatment is accorded to all the States parties to a multilateral treaty: this is the case with the formation of a customs union and no doubt also with other agreements for economic co-operation or integration.

Article 15

13. Reference is made to the commentary on this article by EEC.ⁿ

Article 17

14. The Netherlands Government has no comments to make on this article. The question posed by the Commission in its report,^o whether it should go further into the problems connected with the coexistence of m.f.n. clauses and national treatment clauses, can be answered in the negative.

Article 18

15. Subject to the reservations expressed in the comments on article 5, this article seems to be acceptable.

Article 19

16. It seems to follow from paragraph 1 of this article that the beneficiary State no longer has any entitlement if the granting

¹ *Ibid.*, pp. 17 and 18, article 5, para. (3) of the commentary.

² *Ibid.*, pp. 34 and 35, articles 11 and 12, para. (22) of the commentary.

¹ See sect. C, 6, para. 15, below.

^m *Yearbook ... 1976*, vol. II (Part Two), p. 37, doc. A/31/10, chap. II, sect. C, article 13, para. (7) of the commentary.

ⁿ See sect. C, 6, para. 8, below.

^o See *Yearbook ... 1976*, vol. II (Part Two), p. 10, doc. A/31/10, para. 51.

State terminates the privileges granted to a third State on which the entitlement depends. No prior announcement of such termination is necessary. As a general rule this would seem to be acceptable. It may however be wondered why paragraph 2 makes the loss of rights contingent on a prior announcement—and that by the party with the greatest interest. The answer could be because paragraph 2 of article 19 is intended to correspond to paragraph 2 of article 18, for entitlement to most-favoured-nation treatment arises simply from the notification of “consent to accord material reciprocity”, and not from the actual according of material reciprocity. The right therefore lapses under paragraph 2 of article 19 in the same way as it arises. This paragraph could however lead to absurd consequences; the granting State, under the present text, would still be obliged to accord most-favoured-nation treatment to things and persons of the beneficiary State even if the latter no longer in fact accorded reciprocity but failed to provide formal notification of the “termination or suspension of the material reciprocity in question”. The end of paragraph 2 should therefore be worded differently, e.g. “at the time when material reciprocity is actually suspended or no longer accorded by the beneficiary State”.

Article 21

17. Reference is made to the relevant commentary by EEC.^p

Article 24

18. Should it be decided to treat certain international organizations on an equal footing with States, article 24 should obviously be extended to cover “any question with regard to a most-favoured-nation clause that may arise from the adherence of a State to an organization for the purposes of these articles put on a par with a State”. In the case of a succession of a State in such a way by an international organization, it is not however possible to fall back on fixed rules such as those formulated to cover the consequences of the succession of States with regard to treaties in general. Such cases would therefore have to be regulated separately in the present draft as regards any m.f.n. clauses entered into.

Article 25

19. This article, which as it were duplicates article 28 of the Vienna Convention on the Law of Treaties, is in fact superfluous in the context of the complete draft.

Article 26

20. This article lends all the draft articles an optional nature: on any point of material interest the parties to an agreement containing a most-favoured-nation clause could deviate from it. Even if the draft articles were included in a treaty ratified by a large number of States, their significance would probably be relatively minor; in the previous paragraphs it has been repeatedly indicated that frequent use will probably be made of the option of deviation.

Article 27

21. It goes without saying that acceptance of the draft articles, which, as expressly provided for in article 26, are of an optional nature, cannot stand in the way of the development of new rules of international law in the interests of developing countries or otherwise. An express provision of this kind can therefore have only pragmatic significance.

Final remarks

22. The Netherlands delegation to the thirty-first session of the General Assembly of the United Nations had already pointed out that the Commission had concentrated in its studies and discussions mainly on the most-favoured-nation clause as devel-

oped in the past and applied in practice.^q The development and practice of the clause are heavily influenced by the underlying idea that the m.f.n. treatment system is one of the most important means of promoting the development of world trade. The past history of the clause is accordingly strongly reflected in the draft articles; they will presumably make but little contribution to the development of “the modalities of the m.f.n. treatment system as a viable system of regulating international relations in the world of today”. If these modalities are to be developed, it would indeed seem to be necessary to carry out a “complete reconsideration of the m.f.n. treatment system”.

Regarded in this way, the draft articles would seem to have only limited significance, which is reduced to a minimum by articles 25 and 26. The Netherlands Government is accordingly of the opinion that the Commission should concentrate its further work on the matter above all on the ways of using the m.f.n. clause as a worthwhile instrument of law in present and future international society.

^q See *Official Records of the General Assembly, Thirty-first Session, Sixth Committee, 22nd meeting, para. 1, and ibid., Sessional Fascicle, Corrigendum.*

Sweden

[Original: English]
[16 January 1978]

1. In the opinion of the Swedish Government, the Commission is to be commended for its draft articles on the most-favoured-nation clause. The articles as well as the commentaries contained in the report of the Commission on the work of its twenty-eighth session are of a high quality and reflect the seriousness and thoroughness with which the Commission has performed its important work of codification. Except for a few points, the articles appear acceptable to the Swedish Government.

2. Since the most-favoured-nation clause is a type of treaty provision, it is clear that it should be studied in the general context of the law of treaties, as codified in the 1969 Vienna Convention on the Law of Treaties. It is natural that some of the draft articles should closely follow the pattern of the Vienna Convention, and it is clear that the Vienna Convention will in many respects also be of importance for the interpretation of the articles.

3. Moreover, it is important to remember that the articles have a residual character and become applicable only in so far as the parties have not agreed otherwise (article 26). When interpreting a most-favoured-nation clause, a primary concern must therefore be the determination of what has been agreed between the parties. The articles have the function of supplementing the agreement between the parties in regard to questions to which the agreement itself does not provide any answer. At the same time, however, it is to be expected that most-favoured-nation clauses will in most cases be adapted to the international standard laid down in a treaty or other international instrument.

4. While the Vienna Convention contains provisions on the settlement of disputes, there are no corresponding provisions in the draft articles. This does not mean, however, that the Commission considered such provisions to be superfluous. On the contrary, it appears from the report that the Commission decided to refer that question to the General Assembly and to Member States and, ultimately, to the body that may be entrusted with the task of finalizing the draft articles.^a The Swedish Government, for its part, considers it essential that provisions on settlement of disputes should be included in the final text.

^p See sect. C, 6, paras. 2-6, below.

^a *Yearbook ... 1976, vol. II (Part Two), p. 10, doc. A/31/10, para. 55.*

5. An important rule is laid down in article 15, which provides that

“The beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended under a bilateral or a multilateral agreement.”

This provision raises the important question of the relations between a most-favoured-nation clause and a customs union or a free-trade area. This question is dealt with at some length in the report,^b from which it appears that opinions in the Commission were divided on that point.

6. The Swedish Government, for its part, holds the view that an exception from the general rule in article 15 in respect of customs unions and free-trade areas should be included in the draft articles. Such an exception clause has been included in the General Agreement on Tariffs and Trade and in numerous bilateral treaties. It cannot be considered reasonable that a State which is not a member of a customs union or is not included in a free-trade area should be entitled, on the basis of a most-favoured-nation clause, to claim special benefits resulting from the customs union or free-trade agreement. A customs union or a free-trade agreement is a form of far-reaching co-operation that entails a number of rights as well as obligations for the States involved, and the rights cannot easily be separated from the obligations. The parties to a treaty containing a most-favoured-nation clause do not normally intend the clause to be applicable to benefits that either of them might subsequently grant to another State in connexion with the establishment of a customs union or a free-trade area. An exception for such cases should therefore normally be considered to be implicit in the most-favoured-nation clause, and this should be reflected in the draft articles. If there were no such exception, the existence of a most-favoured-nation clause might very well make it impossible for a State which is bound by that clause to become a member of a customs union or to establish a free-trade area together with other States. The Swedish Government, which takes a positive view on customs unions and free-trade areas as instruments of trade liberalization, would consider this to be an unfortunate result.

7. Another important provision is article 21, which deals with most-favoured-nation clauses in relation to generalized systems of preferences. This article provides that

“A beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a generalized system of preferences established by that granting State.”

In this regard it should be pointed out that, in the opinion of the Swedish Government, the generalized systems of preferences are of a temporary character. They should no longer be applied once developing countries have reached a stage of development that allows them to assume more of the obligations resulting from rules on international trade. While accepting the generalized systems of preferences as a temporary measure, the Swedish Government does not consider it desirable to grant those systems a special legal status by including a specific article on those preferences in the draft articles regarding the most-favoured-nation clause.

^b *Ibid.*, pp. 45-47, doc. A/31/10, chap. II, sect. C, article 15, paras. (24)-(39) of the commentary.

Ukrainian Soviet Socialist Republic

[Original: Russian]
[21 February 1978]

1. In present-day conditions, the codification of principles and norms conducive to the development of mutually beneficial eco-

nomical co-operation among States on a footing of equality is very timely and has great practical significance. The draft articles on the most-favoured-nation clause prepared by the Commission have a very important role to play in this connexion.

2. The favourable results which the application of most-favoured-nation treatment could produce have repeatedly been pointed out in international documents, including the Final Act of the Conference on Security and Co-operation in Europe and the Charter of Economic Rights and Duties of States adopted at the twenty-ninth session of the United Nations General Assembly. The Ukrainian SSR also considers that the application of the most-favoured-nation principle is an effective means of contributing to the development of international economic co-operation, for in granting each other most-favoured-nation treatment States give effect in one form to the generally recognized legal international principle of the sovereign equality of States, and this, naturally, leads to equality and non-discrimination between them, particularly in the sphere of international trade.

3. Unfortunately, there are still, in present-day international relations, instances in which the granting of most-favoured-nation treatment is made conditional by certain States on the fulfilment of completely unacceptable demands, including political demands. Such occurrences by no means contribute to the elimination of discrimination and the development of mutually beneficial trade and economic relations and of international relations as a whole.

4. The study by the Commission of the juridical nature of the most-favoured-nation clause and the legal consequences and conditions of its application in the various areas of inter-State relations will promote the wider application, in the practice of international relations, of most-favoured-nation treatment and the development of trade and economic co-operation among States with different social systems.

5. In the draft articles adopted by the Commission on first reading, at its twenty-eighth session, most-favoured-nation treatment is defined in article 5 as treatment accorded by the granting State to the beneficiary State or to persons or things in a determined relationship with that State not less favourable than “treatment extended by the granting State to a third State or to persons or things in the same relationship with a third State”. That definition is entirely acceptable, for it reflects the notion of most-favoured-nation treatment generally recognized in modern international law.

6. The Commission rightly refused to recognize the legality of any exceptions to the most-favoured-nation clause other than the provisions contained in articles 21-23 of the draft. Article 21, for example, provides for certain exceptions in favour of developing countries, and article 27 asserts that none of the articles shall be prejudicial to the establishment of new rules of international law in favour of developing countries.

7. Other exceptions that are entirely justified are those concerning the facilitation of frontier traffic between contiguous States (article 22), and the special provision on the application of the most-favoured-nation clause to land-locked States (article 23).

8. At the same time, there are passages in the draft articles that give rise to doubts concerning the appropriateness of their contents. This applies in particular to the term “material reciprocity” used to designate the conditions under which most-favoured-nation treatment is granted. As this term is extremely vague, it allows various interpretations, including a broad one. A broad interpretation could render the very principle of most-favoured-nation treatment meaningless.

9. With regard to the draft articles on the most-favoured-nation clause as a whole, they can serve as an entirely satisfactory basis for the preparation of an international convention on this question.

Union of Soviet Socialist Republics

[Original: Russian]
[14 December 1977]

1. The Soviet State has always defended the general recognition and universal application of the principle of most-favoured-nation treatment in international economic relations. This position is based on considerations of principle and general policy as well as on purely practical considerations.
2. The mutual granting by States of most-favoured-nation treatment is one way of implementing the generally recognized international legal principle of the sovereign equality of States. The Soviet Union is unfailingly guided by this principle in its foreign policy and takes all steps to promote its implementation in international relations.]
3. The 1977 Constitution of the USSR lays down that the sovereign equality of States is one of the principles on which the Soviet Union bases its relationships with other countries.
4. The application of the principle of most-favoured-nation treatment also creates maximum opportunity for developing peaceful economic co-operation among States. This principle is reflected in all treaties and agreements of the Soviet Union in economic and related areas. The USSR is prepared, on the basis of reciprocity, to extend most-favoured-nation treatment to all States without exception.
5. Unfortunately, instances still occur in international practice of individual States seeking to make the extension to other States of most-favoured-nation treatment conditional on the fulfilment of completely unacceptable demands, for example in political matters. Such attempts at discrimination cannot fail to have a negative effect on relations between the States concerned as well as on the development of international relations in general, not only in trade and economic matters.
6. The ever more general application in international economic relations of most-favoured-nation treatment is an important objective that greatly promotes the development of co-operation in trade and economic matters among States with different social systems. The measures being taken through the United Nations and other international organizations to achieve this objective are deserving of support. That also certainly applies to the Commission's work on the codification of general principles of international law determining the legal nature, conditions and consequences of the application of treaty provisions on most-favoured-nation treatment.
7. The draft articles on the most-favoured-nation clause prepared by the Commission at its twenty-eighth session are, on the whole, an entirely satisfactory basis for the drafting of an international convention on the subject. One of the merits of the draft articles is that they clearly reflect the concept of most-favoured-nation treatment as generally accepted in contemporary international law. As article 5 provides:

“Most-favoured-nation treatment means treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with a third State.”
8. The Commission rightly refused to recognize the legality of any exceptions to the most-favoured-nation clause other than those covered by draft articles 21-23. These concern certain exceptions in favour of developing countries (article 21), land-locked States (article 23) and the promotion of frontier traffic between contiguous States (article 22).
9. Nevertheless, there is serious doubt regarding the value of introducing the term “material reciprocity” in the draft to designate the conditions under which most-favoured-nation treatment is

granted. This term is not generally used in international law and is extremely vague. A broad interpretation could render meaningless the very principle of most-favoured-nation treatment. In the trade treaty relations of the Soviet Union and a large number of States co-operating with it, most-favoured-nation treatment is applied only unconditionally and without compensation. The Commission should take this into account in its future work on the draft articles.

United States of America

[Original: English]
[13 February 1978]

1. The United States Government generally and warmly supports the Commission's draft articles and favours their adoption. It wishes to compliment the Commission on the scholarship and judgement which the draft articles reflect.
2. There is only one article of the draft articles which, in the view of the United States, presents a material problem, namely, article 21:

“A beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a generalized system of preferences established by that granting State.”
3. The effect of article 21 is to except from all future most-favoured-nation clauses generalized preferences to developing countries, whether or not such preferences come within an exception or waiver, such as the current waiver from the most-favoured-nation provisions of the General Agreement on Tariffs and Trade. Article 21 would deny to a non-beneficiary of generalized preferences any basis for questioning, on most-favoured-nation grounds, the effect of the extension of preferential tariff treatment to a developing third State. This article thus embodies a major departure from existing rules.
4. The GATT waiver that currently excepts generalized preferences from the most-favoured-nation clause was drafted deliberately to afford some measure of protection of third States beneficiaries of that clause. It contains a notification and consultation requirement and provides that any contracting party which considers “any benefit accruing to it under the General Agreement... impaired... may bring the matter before the Contracting Parties” for review and recommendation.^a Article 21 of the Commission's draft does not provide such protection. In the view of the United States, the Commission's draft is deficient in not providing for some such mechanism for determination of the applicability of generalized preferences in a given case.
5. The legal basis for differential and more favourable treatment benefiting developing countries (including trade preferences) is under negotiation in the multilateral trade negotiations. For this reason, as well as the deficiency adverted to above, the United States at this juncture wishes to reserve its position on article 21, particularly in order to determine whether changes in that article should flow from the results of the multilateral trade negotiations. At the same time, the United States is open to appropriate possibilities of future agreement on modifications of most-favoured-nation principles for the benefit of developing countries. It notes that article 27 of the Commission's draft has been prepared with such possibilities in view.

^a GATT, *Basic Instruments and Selected Documents, Eighteenth Supplement* (Sales No. GATT/1972-1), p. 26.

3. Comments of organs of the United Nations

Economic Commission for Europe

[Original: English]
[17 January 1978]

1. There has been no special discussion of the theory of the m.f.n. clause or of the "effective reciprocity" concept recently in ECE or in any of its subsidiary bodies. During annual sessions of ECE and/or its Committee on the Development of Trade, representatives of ECE member governments have of course continued to make reference to instances and circumstances when application of m.f.n. treatment has taken place or would seem desirable. Such mainly economic considerations, however, would not seem to have affected the different views on the legal character of the clause and the legal conditions governing its application held by different ECE member governments, as described earlier by the ECE secretariat.

2. The Commission's attention is drawn to a recent study presented to the Committee on the Development of Trade (TRADE/R.351) that might be of interest to the Special Rapporteur. A copy of the study is attached herewith.^a The study contains an analysis of the main provisions of long-term treaties concluded since 1974 by ECE member governments having different economic and social systems. Paragraphs 13 to 16 refer directly to the clause and its application as well as to the exceptions that are sometimes identified in such treaties. Paragraph 30 deals with financing and credit facilities where most favourable conditions are generally accorded; in paragraph 47, reference is made to the inclusion, in some treaties of non-discriminatory conditions for the transfer of assets resulting from industrial co-operation contracts.

3. Finally, paragraph 9 relates to the objectives of the treaties concerned and, in particular, to the Final Act of the Conference on Security and Co-operation in Europe. At the twenty-sixth session of the ECE Committee on the Development of Trade, held from 28 November to 2 December 1977, many delegations referred to the provision in the Final Act whereby the participating States recognized, *inter alia*, the beneficial effects that could result from the application of most-favoured-nation treatment.

^a The study is not reproduced in its entirety. Only those paragraphs of document TRADE/R.351 to which ECE makes express reference are appended to the present comments.

APPENDIX

Excerpts from documents TRADE/R.351 "Practical measures to remove obstacles to intraregional trade and to promote and diversify trade. Long-term agreements on economic co-operation and trade"

Original: French.

B. ANALYSIS OF THE CONTENT OF THE AGREEMENTS

I. Objectives of the agreements

(a) Trade agreements

9. It is apparent that a change has occurred in long-term trade agreements, which were originally limited to relatively general provisions relating to the trade policy objectives to be attained and to payments. Now, however, questions concerning the economic relations between contracting States figure more prominently in the agreements. The gradual liberalization of trade has made it possible to go beyond the rigour of the earlier agreements and has opened up broader possibilities for discussions, thus promoting the conclusion of agreements which simply establish objectives to be attained in terms of value¹ or provide that the two contracting parties shall endeavour to ensure the harmonious development of their trade on a basis of equality and mutual benefit within the context of their reciprocal legislation. Trade agreements often contain a provision emphasizing the need to diversify the structure of trade in both directions by increasing exports of traditional as well as new products. In this

respect, the provisions vary considerably. In some cases, the agreements emphasize the need to promote reciprocal trade in industrial products, particularly machinery and equipment of different kinds. More frequently, the agreements indicate the desire of the Eastern European country to increase the proportion of machinery and equipment in its total exports to its Western European partner. In some cases, the agreement expresses the intention to develop reciprocal trade in consumer goods. In addition, the most recent agreements often refer to the provisions of the Final Act of the Conference on Security and Co-operation in Europe concluded at Helsinki.

...

II. Reciprocal treatment and general principles

(a) Provisions common to trade agreements and industrial co-operation agreements

13. In most recent agreements and, in particular, in trade agreements, the contracting parties agree to accord each other most-favoured-nation treatment.^{1(b)} It is sometimes stipulated, however, that such treatment shall not be applied to (a) advantages and privileges which are already, or may be, accorded to neighbouring countries, (b) privileges deriving from a customs union or from regional agreements, and, more rarely, (c) advantages which are or may be accorded to developing countries.

14. When the principle of the most favoured nation has not yet been mutually accepted by the governments concerned, the latter often commit themselves through clauses, worded differently but more or less similar in content, which provide for the reciprocal granting of "as favourable treatment as possible" or "the most advantageous facilities possible" within the limits of the laws and regulations of the two States.

15. Contracting States which have shipping interests sometimes insist on the granting of most-favoured-nation treatment to the vessels, crews, passengers and cargoes of each of the parties in their domestic ports and territorial waters.

16. Contracting parties which are parties to the General Agreement on Tariffs and Trade generally refer to their participation in this Agreement by incorporating a clause stipulating that in their mutual economic relations the two contracting States shall be guided by the principles and provisions of GATT—a step which amounts to recognition of the principle of most-favoured-nation treatment in particular.

...

IV. Financing

...

(b) Credit facilities

30. In trade agreements and, in particular, co-operation agreements, the contracting parties generally undertake to accord the most favourable financing and credit facilities possible, within the context of the legislation in force in the two States.

...

VIII. Miscellaneous questions

Entry into force, duration and renewal of agreements

...

(e) Special provisions

...

47. In another new type of provision, the parties to a very recent co-operation agreement⁴ note the benefit of applying certain "general principles" to co-operation projects in which they may participate; they call for the observance of these principles and their definition of them reflects continuing fears of being in difficulties when the co-operation projects are carried out. As defined in the agreement, these principles include, *inter alia*, the right: (i) freely to transfer abroad, without discrimination or charges and under the conditions stipulated in the contract, the net profits, the proceeds from holding of the invested capital, the entitlements resulting from the distribution of assets after winding up, and all other entitlements to which the participants can lay claim;⁴ (ii) to include in co-operation contracts provisions which will facilitate the recruitment and use of the local personnel necessary for proper performance of the obligations embodied in the co-operation projects; (iii) to obtain the equipment needed for the operations in question on the local market or abroad, in accordance with the rules of competition; (iv) to contact and work with the managing and technical personnel of the participants of the other party and, if necessary, with the

suppliers and the users of the goods and services produced as a result of the co-operation activities; or again (v) the right, for the members of joint ventures, to share in the profits and to take part in the management of the company in proportion to their holdings of the invested capital, to examine the accounts in accordance with the company's regulations and, through the conclusion of suitable arrangements, to ensure that the management is fully empowered to conduct the affairs of the company in conformity with the laws and regulations applicable.

...

¹ By stipulating, for example, that the volume of exchanges between the two countries should be multiplied twofold during the five-year period under consideration.

^{1 bis} It should be noted that in certain cases most-favoured-nation treatment is accorded under old agreements, sometimes concluded before the Second World War; a number of these agreements have remained in force.

...

⁴ Agreement concluded on 21 November 1976 between Romania and the United States of America.

⁶ It should be noted that in recent years these matters have frequently formed the subject of new agreements on double taxation.

Economic Commission for Western Asia

[Original: English]
[19 December 1977]

... You will perhaps note that, apart from the concluding paragraph, our observations are mainly confined to the impact of the proposed draft articles on ECWA's member countries.

...

I. With reference to specific draft articles, the following may have particular importance for ECWA countries:

"Article 6

"Nothing in the present articles shall imply that a State is entitled to be accorded most-favoured-nation treatment by another otherwise than on the ground of a legal obligation."

Here the Commission noted that it was widely held that only treaties with m.f.n. clauses were the foundation of m.f.n. treatment.

Since few of the ECWA countries are signatories of the General Agreement on Tariffs and Trade, m.f.n. treatment for their exports could normally be assured only by bilateral or multilateral treaties which include m.f.n. clauses.

"Article 15

"The beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended under a bilateral or a multilateral agreement."

In the discussion of the draft articles in the Sixth Committee of the General Assembly,^a it was pointed out that article 15 could be interpreted as the obligation to extend to third countries the advantages enjoyed by members of a customs union, if m.f.n. clauses were contained in treaties with the third countries. An automatic extension of m.f.n. treatment, when defined as the same treatment accorded among the members of a customs union, defeats the purpose of regional integration, since integration implies a "special relationship".

This aspect of the legal status of m.f.n. treatment might well affect ECWA countries which are now or may in the future be

^a See *Official Records of the General Assembly, Thirty-first session, Annexes, agenda item 106, doc. A/31/370, sect. B.*

participating in regional integration efforts. If an ECWA country should conclude a trade agreement with any country outside the customs union, it might be legally obliged to extend treatment on imports from that country equal to the treatment granted to other members of the customs union. A possible way to avoid this would be to make the m.f.n. clause conditional, including a phrase which states that it does not refer to the intra-customs-union treatment. This measure was included in all three of the EEC agreements with Jordan, Lebanon and Syria, in which these ECWA countries committed themselves to granting m.f.n. treatment to imports from EEC. If this article were to remain unchanged, ECWA countries should recognize its implications and make m.f.n. clauses conditional.

"Article 21

"A beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a generalized system of preferences established by that granting State."

This article might help to ensure the implementation of the various GSPs, in that developed countries which have implemented GSP schemes are under no legal obligation to extend such preferential treatment to imports from other developed countries. However, the fact that GSP was specifically mentioned in a draft article may have broader implications. As was brought out in the discussions both in the Commission and in the Sixth Committee of the General Assembly, the GSP has not been entirely satisfactory to developing countries. Developing countries are striving for improvements in the GSP and for more special and preferential treatment in the broad spectrum of international trade relations. It may therefore be advisable to change this article, either to be more general (no specific mention of GSP) or to be expanded to include other forms of preferential treatment for developing countries. In particular, the article neglects to mention preferences which are granted among developing countries (i.e. a beneficiary country is not entitled under an m.f.n. clause to any treatment granted by a granting developing State to a developing third State in the context of preferential trade agreements).

II. With reference to the general scope and content of the draft articles, we would make the following observation. The Commission has elaborated a legal framework for the m.f.n. clause as the norm of international trade relations, where only certain specific exceptions are permitted (e.g. GSP, existence of conditional clauses). Although article 27:

"The present articles are without prejudice to the establishment of new rules of international law in favour of developing countries."

leaves the possibility open for future changes in the legal obligations of the m.f.n., it may well be the case that the articles are already out of date. Recent developments in international relations would appear to have substantially modified the meaning and relevance of the m.f.n. clause, a few examples being: the formation of EEC, the call for the New International Economic Order [United Nations General Assembly resolution 3201 (S-VI)], the Charter of the Economic Rights and Duties of States, numerous special preference arrangements extended by EEC, and so on. Thus the draft articles may not reflect today's reality. This idea was in fact brought out in the ECWA Seminar on the multilateral trade negotiations, when it was noted that it was very difficult now to know what value m.f.n. treatment had, or indeed how it was defined, with so many different types of preferential treatment prevailing in the international trading system. If m.f.n. treatment is valid only for trade among certain developed countries, it surely cannot be considered as the norm in international trade relations. This opinion was also voiced during the discussion of the draft articles by the Sixth Committee of the General Assembly.

United Nations Conference on Trade and Development^a

[Original: English]
[9 June 1978]

1. The question of most-favoured-nation treatment, and its relationship to the preferential treatment of developing countries, has been of major concern to UNCTAD since its inception. General Principle Eight of recommendation A.I.1, adopted at the first session of the Conference, provided *inter alia* that international trade should be conducted to mutual advantage on the basis of most-favoured-nation treatment. However, developed countries should grant concessions to all developing countries and extend to developing countries all concessions they granted 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 among themselves.^b

2. While most-favoured-nation treatment aims at equality of treatment, paradoxically it is preferences that constitute a means of enabling developing countries to come closer to real equality of treatment. In fact, the m.f.n. principle does not take account of the inequalities in economic structure and levels of development in the world; to treat equally countries that are economically unequal constitutes equality of treatment only from a formal point of view, but amounts actually to inequality of treatment. Consequently, preferential reductions on imports from developing countries bring those countries closer to achieving equality of treatment with producers in national or multinational markets, take into account the fact that they are at a lower level of development, and correct a situation where they have in actual fact disadvantages in comparison with imports from developed countries.

3. The breakthrough for the introduction of generalized preferences in the tariff area for products originating in developing countries was achieved by UNCTAD resolution 21 (II), adopted at the second session of UNCTAD. In that resolution the Conference *inter alia* laid down the objectives of the generalized, non-reciprocal, non-discriminatory system of preferences in favour of developing countries, namely: (a) to increase their export earnings; (b) to promote their industrialization; (c) to accelerate their rates of economic growth.^c

4. Decision 75 (S-IV), adopted by the Trade and Development Board at its fourth special session, defined *inter alia* the legal status of the GSP. It was recognized in that connexion that no country intended to invoke its rights to most-favoured-nation treatment with a view to obtaining, in whole or in part, the preferential treatment granted to developing countries in accordance with UNCTAD resolution 21 (II), and that the contracting parties to the General Agreement on Tariffs and Trade intended to seek the required waiver or waivers as soon as possible.

5. The decision also embodied the statement made by the preference-giving countries that the legal status of the tariff preferences to be accorded to the beneficiary countries by each preference-giving country individually would be governed by the following considerations:

1. The tariff preferences would be temporary in nature;

2. Their grant would not constitute a binding commitment and, in particular, would in no way prevent: (a) their subsequent withdrawal in whole or in part; or (b) the subsequent reduction of tariffs on a most-favoured-nation basis, whether unilaterally or following international tariff negotiations;

3. Their grant would be conditional upon the necessary waiver or waivers in respect of existing international obligations, in particular in the General Agreement on Tariffs and Trade.

6. The decision also provided that developing countries that were to share their existing tariff advantages in some developed countries as the result of the introduction of the GSP would expect the new access in other developed countries to provide export opportunities at least to compensate them.^d

7. Mainly on the basis of UNCTAD resolution 21 (II) and decision 75 (S-IV) of the Trade and Development Board, a large number of developed countries have introduced schemes of generalized preferences. Such schemes are at present applied by the following developed market economy countries: Australia, Austria, Canada, the EEC countries (Belgium, Denmark, France, Federal Republic of Germany, Ireland, Italy, Luxembourg, Netherlands, United Kingdom), Finland, Japan, New Zealand, Norway, Sweden, Switzerland and the United States of America.

8. Moreover, the following socialist countries of Eastern Europe grant preferential treatment to developing countries: Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Poland and the USSR.

9. A number of the schemes of generalized preferences have undergone important changes since their entry into force. There have been continuous efforts in UNCTAD towards an improvement of the existing schemes. In this connexion, special mention should be made of resolution 96 (IV), adopted at the fourth session of UNCTAD, which provides *inter alia* that the generalized system of non-reciprocal, non-discriminatory preferences should be improved in favour of developing countries, taking into account the relevant interests of those developing countries enjoying special advantages, as well as the need to find ways and means of protecting their interests. With regard to the duration of the GSP, the resolution provided that it should continue beyond the initial period of 10 years originally envisaged, bearing in mind, in particular, the need for long-term export planning in developing countries.^e

10. The developing countries are interested in strengthening the legal status of the GSP. Accordingly, the Manila Declaration and Programme of Action, adopted by the developing countries in February 1976,^f proposed that 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.

11. An important step towards the improved legal status of the GSP was the adoption of the Charter of Economic Rights and Duties of States, article 18 of which stipulates:

"Developed countries should extend, improve and enlarge the system of generalized non-reciprocal and non-discriminatory tariff preferences to the developing countries consistent with the relevant agreed conclusions and relevant decisions as adopted

^a Statement made by the representative of the UNCTAD secretariat at the 1497th meeting of the Commission, held on 9 June 1978.

^b *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.

^c *Ibid.*, *Second Session*, vol. I [and Corr.1 and 3 and Add.1 and 2], *Report and Annexes* (United Nations publication, Sales No. E.68.II.D.14), p. 38.

^d See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 15 (A/8015/Rev.1)*, pp. 261 *et seq.*, Part Three, annex I.

^e *Proceedings of the United Nations Conference on Trade and Development, Fourth Session*, vol. I [and Corr.1], *Report and Annexes* (United Nations publication, Sales No. E.76.II.D.10), p. 10.

^f *Ibid.*, p. 109.

on this subject, in the framework of the competent international organizations. Developed countries should also give serious consideration to the adoption of other differential measures, in areas where this is feasible and appropriate and in ways which will provide special and more favourable treatment, in order to meet the trade and development needs of the developing countries. In the conduct of international economic relations the developed countries should endeavour to avoid measures having a negative effect on the development of the national economies of the developing countries, as promoted by generalized tariff preferences and other generally agreed differential measures in their favour."

As may be seen from this provision, the Charter of Economic Rights and Duties of States pronounces itself in favour of preferential treatment for developing countries not only in the area of tariffs but also in other areas where this is feasible.

12. Such areas are indicated *inter alia* in UNCTAD resolution 96 (IV), which has already been mentioned, and which deals with a set of interrelated and mutually supporting measures for the expansion and diversification of exports of industrial products of developing countries, as well as in UNCTAD resolution 91 (IV), on the multilateral trade negotiations.⁹ Resolution 96 (IV) requests developed countries to give consideration to the view of developing countries that developed countries should apply the principle of differential and more favourable treatment in favour of developing countries to non-tariff barriers also. Resolution 91 (IV) urges the practical and expeditious application in the multilateral trade negotiations of differential measures that would provide special and more favourable treatment for developing countries in accordance with the provisions of the Tokyo Declaration and, *inter alia*, underlines that there is widespread recognition that subsidies and countervailing duties are areas where special and differentiated treatment for developing countries is both feasible and appropriate. The same resolution stresses the need to ensure that the least developed among developing countries receive special treatment in the context of any general or specific measures taken in favour of developing countries during the negotiations.

13. I have referred to the preferential tariff treatment in favour of developing countries under the GSP and to the specific situation of those developing countries that enjoy special advantages, as well as to the need to ensure that the least developed countries receive special treatment, as outlined for instance in UNCTAD resolution 91 (IV). I have also referred to preferential treatment in favour of developing countries in other areas than tariffs. The preferential treatment so far discussed relates to preferential measures taken by developed countries in favour of developing countries.

⁹ *Ibid.*, p. 14.

14. Last but not least, I have to underline the great importance of preferential treatment which developing countries accord or intend to accord each other. In connexion with the establishment of a New International Economic Order, collective self-reliance and growing co-operation among developing countries are of capital importance. Preferential trade arrangements among developing countries, including those of a limited scope, can play a key role, to an ever increasing extent, in the measures of economic co-operation among developing countries. In line therewith, resolution 1 (I) of the UNCTAD Committee on Economic Co-operation among Developing Countries has called upon the Secretary-General of UNCTAD, in establishing the work programme on economic co-operation among developing countries, to give special priority to the initiation of studies relating to a global scheme of trade preferences among developing countries and the intensification of ongoing work and activities relating to the strengthening of subregional, regional and interregional economic co-operation and integration among developing countries.^h

15. I have discussed the objectives and forms of preferential treatment for developing countries as they have developed in the recent past, and particularly in this Second United Nations Development Decade. This issue of preferential treatment is still under consideration by governments in UNCTAD, as well as in the context of the multilateral trade negotiations conducted in the framework of GATT. It raises a number of complex questions, the resolution of which is not foreseeable at present. However, I wish to point out that draft article 21 is limited to tariff preferences under the GSP, while developing countries are seeking preferential treatment or special differentiated treatment in all areas of trade relations with developed countries. Moreover, they consider that preferential treatment granted in trade among themselves should not be extended to developed countries. In addition, I wish to stress the importance of draft article 27, which I understand is intended to leave open the way for the elaboration of new rules to the benefit of developing countries as regards their preferential treatment.

16. There is no doubt that the work of the Commission can substantively contribute to the maintenance and further development of this preferential treatment in the future, particularly in the third Development Decade and thereafter. To this end, however, it would be necessary that the preferential treatment described should be adequately covered by the draft articles under consideration. It is in this spirit that I wish the Commission all success in its further work.

^h *Official Records of the Trade and Development Board, Seventeenth Session, Supplement No. 2 (TD/B/652), annex I, p. 15.*

C. Comments of specialized agencies and other intergovernmental organizations *

1. United Nations Educational, Scientific and Cultural Organization

[Original: French]
[12 January 1978]

I have the honour to inform you that UNESCO has no comments to make and no information to submit on this subject.

* Two other intergovernmental organizations, the Customs Co-operation Council and the Central Office for International Railway Transport, indicated that they had no comments to make on the draft articles. Nevertheless, they drew attention,

However, for your information I should like to point out that in at least one agreement it is provided that UNESCO shall benefit from a clause which might be called a "most-favoured-organization clause". I refer to annex B of the Agreement between the

respectively, to the International Convention on the Simplification and Harmonization of Customs Procedures, signed at Kyoto on 18 May 1973 ("Kyoto Convention"), particularly in connexion with draft articles 22 and 23, and to the following decisions relating to trade agreements and international railway tariffs: judgment of the Prague district trade court of 21 May 1935; judgment of the Rome appeals court of 16 April 1940; judgment of the Italian High Court of Appeals of 19 April 1945.

Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory, dated 2 July 1954,^a called the Headquarters Agreement. In that text it is provided that the officials who will benefit from the provisions of article 19, paragraph 2, i.e. those who will have diplomatic status, are those expressly enumerated in the annex and "officials in grades corresponding to the grades of officials of any other intergovernmental institution to whom the Government of the French Republic may grant diplomatic privileges and immunities by a headquarters Agreement". This is certainly a most-favoured-organization clause as regards persons entitled to diplomatic privileges and immunities.

2. International Atomic Energy Agency

[Original: English]
[14 November 1977]

It should be noted that the provisional draft articles are concerned with most-favoured-nation clauses in treaties between States. Apart from certain safeguard agreements, IAEA does not become a party to bilateral or multilateral treaties between States. In the circumstances, it does not seem that IAEA could contribute any useful information or observations relevant to the draft articles.

In addition, I would mention that the Statute of IAEA,^b which provides for agreements between IAEA and member States (articles IX, XI and XII), requires that, in effect, such agreements must be in accordance with the principle of sovereign equality of States and must avoid discrimination. Most-favoured-nation clauses have never been used or considered by IAEA as a means for promoting these two principles.

3. General Agreement on Tariffs and Trade

[Original: English]
[30 December 1977]

1. The GATT secretariat has studied the draft articles with interest. Our over-all impression is that they would contribute substantially to the understanding of the most-favoured-nation clause and would help reduce uncertainty and conflicts in its application. We should like to commend the Special Rapporteur for having succeeded in condensing a wealth of jurisprudence, practice and doctrine on the most-favoured-nation clause into a few clear rules.

2. We have noted the decision of the Commission not to enter into questions of a technical and economic nature belonging to fields entrusted to other international organizations and to concentrate on the legal character of the most-favoured-nation clause and the legal conditions of its application. We agree that the application of the most-favoured-nation clause with respect to some of the issues that arise in the field of international trade would seem to require the reconciliation of diverging interests through negotiations in specialized international organizations, and therefore do not lend themselves easily to codification at this stage.

3. We have noted further that the proposed articles would apply only to future treaties embodying a most-favoured-nation clause and that States would remain free to agree on different provisions. The proposed articles would therefore not alter the existing GATT law and would preserve the freedom of the contracting parties to GATT to negotiate any changes in this law. The present draft of the Commission does not refer to customs unions, free-trade areas

and similar groupings. We assume that in its further work the Commission will take into account the developments that have taken place in this area.

4. We have also noted that, although some members of the Commission considered the subject of preferences for developing countries not yet suitable for codification, the Commission judged that a progressive development of the law in this field would be desirable, given the importance of the concept of preferences in trade relations between developed and developing countries. Some members of the Commission thought that the proposed article 21 on generalized systems of preferences should be extended or supplemented by additional provisions safeguarding the interests of developing countries.

5. Against this background, it may be stated that the Tokyo Declaration, which launched the multilateral trade negotiations in GATT, recognizes the importance of maintaining and improving the GSP and of special and more favourable treatment for developing countries both in the tariff and non-tariff fields. The responsibility for supervising and guiding these negotiations rests with the Trade Negotiations Committee, which at present is composed of representatives of 98 countries. The Committee has established a number of groups and subgroups to deal with the various areas of the negotiations. One of the groups, which has come to be known as Group "Framework", is to consider improvements in the legal framework for the conduct of world trade. Among the five items on the provisional agenda of this group are:

"The legal framework for differential and more favourable treatment for developing countries in relation to GATT provisions, in particular, the most-favoured-nation clause", and

"For the purpose of future trade negotiations: application of the principle of reciprocity in trade relations between developed and developing countries and fuller participation by the developing countries in an improved framework of rights and obligations under the GATT that takes into account their development needs."

6. Various tentative suggestions and ideas for improvements in the existing provisions of the General Agreement have been put forward in the Group "Framework". Some of the proposals which may have relevance for the work of the Commission relate to the incorporation of a general enabling clause in the text of the General Agreement to provide a legal basis for differential treatment to developing countries, a legal basis for the GSP, increased security for the concessions granted under the GSP, differential treatment to developing countries in areas other than tariffs, and a legal basis for the exchange of preferential concessions among developing countries. Also in other groups constituted by the Trade Negotiations Committee proposals have been made for the extension of special and differential treatment to developing countries which may involve deviations from the existing GATT rules, including the most-favoured-nation clause.

7. The Commission might wish to bear in mind these activities in GATT, and the timetable for the multilateral trade negotiations, in any further work it proposes to undertake. In this context, the Commission may wish to take into consideration that the potential impact of the proposed article 21 and any supplementary provisions would be limited because they would not modify or improve the legal situation regarding preferences in the General Agreement, to which 83 governments, accounting for more than four fifths of world trade, have subscribed. Moreover, the proposed articles could exempt preferential treatment for developing countries only from most-favoured-nation clauses, while, as the discussion in the Group "Framework" has revealed, developing countries seek exemptions also from other clauses providing for non-discrimination. It may also be mentioned that, if the proposed articles are to be in harmony with the Vienna Convention on the Law of Treaties and therefore to apply only to relations among States, they can probably not cover the preferences granted to

^a United Nations, *Treaty Series*, vol. 357, p. 3.

^b *Ibid.*, vol. 276, p. 3.

territories enjoying GSP beneficiary status, of which there are over 40. The situation regarding preferences for developing countries is rapidly evolving and therefore no generally accepted meaning for several of the terms used in draft article 21 has as yet emerged. According to our experience, the difficulties arising in the interpretation of these terms can at this stage best be overcome in an institutional framework for continuous consultation and negotiation.

8. We should like to add that the views expressed in this letter are those of the GATT secretariat and not necessarily those of the contracting parties to GATT which, we understand, have had the opportunity of making their comments individually.

4. Board of the Cartagena Agreement

[Original: Spanish]
[3 January 1978]

1. The Board believes that the draft prepared by the Commission, like all the work performed by the Commission, has great merit.
2. Nevertheless, it feels bound to express its concern over the unrestricted scope of article 15 of the draft, which reads:

“The beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended under a bilateral or a multilateral agreement.”

3. It is readily apparent that such a broad provision as the one cited would have serious consequences for the expansion of integration schemes among developing countries. The small and weaker countries frequently regard integration as the most suitable instrument for achieving the global development demanded by their economies and peoples. Thus the Latin American Republics in general, and the member countries of the Cartagena Agreement in particular, are making considerable efforts to take appropriate and effective measures so as to be able to achieve full integration of their economies.

4. The process of integration in which the member countries of the Cartagena Agreement are engaged implies a number of essential steps: first, establishment of a framework in which to carry out commercial negotiations to ensure preferential treatment for subregional commerce; secondly, establishment of institutional machinery through which to find solutions to non-commercial problems hampering the expansion of flows of goods and services within the subregion; thirdly, institution of a joint industrialization process in the subregion in order to achieve a greater degree of expansion, specialization and diversification of industrial production, maximum use of the resources available in the area, efficient use of the factors of production, development of economies of scale, and equitable distribution of benefits; fourthly, harmonization of economic policies and co-ordination of development plans, with emphasis on the agricultural sector; fifthly, institution of a special régime which, by benefiting Bolivia and Ecuador, will help gradually to bridge the development gaps currently existing in the subregion; finally, establishment of a forum for the preparation of future phases of integration and the definition of joint positions vis-à-vis the rest of the world.

5. In the light of these facts, and since it would be illogical to permit a State that was not a party to a specific bilateral or multilateral agreement to enjoy the advantages deriving from the agreement without accepting the responsibilities imposed by it, resolution 222 (VII), adopted by the Conference of the Contracting Parties to the Montevideo Treaty at its seventh session,^c establishes that the tariff reductions provided for in the subregional agree-

ment shall neither be extended to contracting parties which do not participate in the subregional agreement nor create special obligations for them.

6. On the basis of this legal principle, article 113 of the Cartagena Agreement stipulates that the advantages provided for in the Agreement shall neither be extended to non-participating countries nor create obligations for them.

7. Similarly, in its capacity as the functional body of the Cartagena Agreement, the Board considers that the advantages provided for in an integration agreement cannot be invoked by States benefiting from the most-favoured-nation clause, as might be understood from the text of article 15. It further considers that, if the present text is retained, the work of codification facing the Commission might be made more difficult, since States might regard such a principle as conflicting with the very aims of integration.

8. The Board would therefore be most grateful if the Commission would take up the proposal of some of its members by making exceptions from the general rule in the case of customs unions, free-trade areas and other similar associations of States, as is provided for in the General Agreement on Tariffs and Trade.

5. Caribbean Community Secretariat

[Original: English]
[29 December 1977]

The Secretariat has not had much practical experience in this subject, but a representative of the Legal Division has made a study of the documents referred to and is of the opinion that three articles could be of particular interest to member States of the Caribbean Community, namely, articles 15, 21 and 27.

Article 15 was found to be important, for it raises the case of customs unions and similar associations of States vis-à-vis most-favoured-nation treatment. The article does not make the case of customs union an exception to most-favoured-nation treatment. The view here is that the most-favoured-nation clause should not attract benefits granted within customs unions and similar associations of developing States.

Article 21 deals with the most-favoured-nation clause in relation to treatment under a generalized system of preferences. The article states:

“A beneficiary State is not entitled under a most-favoured nation clause to any treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a generalized system of preferences established by that granting State.”

The view here would support some of the representatives who would want article 21 expanded to except from the operation of the most-favoured-nation clause any preferences or favours which developing countries grant to one another.

Article 27 is of importance to the Caribbean Community because of its concern for developing countries, leaving the door open for future development within the international community.

6. European Economic Community

[Original: French]
[24 January 1978]

...

The comments of EEC [bear] on the aspects of the draft articles that fall within its exclusive competence (commercial aspects).

In this context, EEC reserves the right to make such other comments or drafting suggestions as may appear necessary as the work of the Commission in this area advances.

^c For Spanish text, see ALALC, *Síntesis mensual*, Montevideo, fourth year, No. 31, January 1968, p. 24. For English text, see American Association of International Law, *International Legal Materials*, Washington D. C., vol. VII, No. 4, July 1968, p. 851.

1. The purpose of the present comments on the Commission's draft articles on the most-favoured-nation clause is to draw the attention of the Commission once again to those particular aspects of EEC's use of the most-favoured-nation clause that derive from the special nature of the regional integration process in which the Community is engaged.^d The Community's misgivings about the clause are shared by numerous States and groups of States, both industrialized and developing, which are also engaged in more or less advanced processes of regional integration and could face problems similar to those faced by the Community as a result of the Commission's draft articles. These misgivings arise partly from the nature of the Community, its very existence and its powers to represent its members, and partly from its relations with countries having different socio-economic systems.

I. ASPECTS OF REGIONAL INTEGRATION

A. EEC and how it functions

2. The Community is a customs union which, as such, desires to promote the expansion of trade. Article 110 of the Treaty establishing EEC (Treaty of Rome) is explicit in this regard:

"By establishing a customs union between themselves the Member States intend to contribute, in conformity with the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international exchanges and the lowering of customs barriers.

"The common commercial policy shall take into account the favourable incidence which the abolition of customs duties as between member States may have on the increase of the competitive strength of the enterprises in those States."

But it is also much more. One of its aims is to promote "closer relations between its member States" (article 2 of the Treaty). Article 3 of the Treaty therefore provides not only for the elimination of customs duties and quantitative restrictions, the establishment of a common customs tariff, the abolition between member States of obstacles to the free movement of persons, services and capital and the approximation of their respective internal laws, but also the establishment of a whole series of common policies, including a common commercial policy towards third countries, common policies in the spheres of agriculture and transport, and common institutions to promote advanced economic integration. While these goals which the member States of the Community have set themselves entail the exercise of rights by the States towards one another, they entail above all the assumption of heavy commitments.

In that connexion, the relations between EEC and GATT illustrate the manner in which the Community's existence has been accepted at the international level.

EEC, whose six original member States were in one way or the other bound by the General Agreement on Tariffs and Trade (through the Protocol of Provisional Application or the Protocol of Accession) even before 1958, has also, since its inception, considered itself bound by the General Agreement. In the words of the first paragraph of the Treaty,

"The rights and obligations resulting from conventions concluded prior to the entry into force of this Treaty between one or more member States, on the one hand, and one or more

third countries, on the other hand, shall not be affected by the provisions of this Treaty."

Neither the Community nor its member States have considered it necessary to apply to the General Agreement the provisions of the second paragraph of the same article, which obliges member States to "take all appropriate steps" to eliminate any incompatibility between those previous conventions and the Treaty. The Community and its member States considered that the General Agreement was not incompatible with the obligations deriving from the Treaty, and, under article XXIV, paragraph 7 (a), of the General Agreement, the Community submitted the customs union that it constituted for consideration by GATT. During that consideration, the Community was represented as such by a single spokesman.

Similarly, it should be noted that the Court of Justice of the European Communities stated in its ruling of 12 December 1972 in the combined cases 21 to 24-72 that

It is clear that at the time when they concluded the Treaty establishing the European Economic Community the member States were bound by the obligations of the General Agreement.

By concluding a treaty between them they could not withdraw from their obligations to third countries.

On the contrary, their desire to observe the undertakings of the General Agreement follows as much from the very provisions of the EEC Treaty as from the declarations made by member States on the presentation of the Treaty to the contracting parties of the General Agreement in accordance with the obligation under article XXIV thereof.^e

The Community has moreover taken part (and is still taking part) in various important multilateral negotiations in the framework of the General Agreement (sixth and seventh "Multilateral trade negotiations" conferences in the framework of GATT).

3. At the same time, member States have transferred to the Community the exercise of their powers in connexion with trade policy. As a result, questions relating to the application of the most-favoured-nation clause in trade matters now fall exclusively with the competence of EEC, and it is for the Community, and no longer for its member States, to accord and receive most-favoured-nation treatment vis-à-vis, among others, all the contracting parties of GATT. To that extent, the powers that EEC exercises in this specific area are those that are normally exercised by States.

In the exercise of its exclusive powers in trade policy, the Community has thus concluded, and continues to conclude, both preferential and non-preferential trade agreements with numerous States or groups of States. EEC preferential agreements take various forms: agreements on free-trade areas, particularly with the EFTA countries; customs union agreements with countries like Greece or Turkey; agreements with developing countries on the basis of article 238 of the Treaty of Rome.^f EEC policy

^e *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit* (Reference for a preliminary ruling by the College van Beroep voor het Bedrijfsleven), judgment of 12 December 1972, Court of Justice of the European Communities, *Reports of Cases before the Court, 1972-part II*, Luxembourg p. 1226.

^f

"Article 238

"The Community may conclude with a third country, a union of States or an international organization agreements creating an association embodying reciprocal rights and obligation, joint actions and special procedures.

"Such agreements shall be concluded by the Council acting by means of a unanimous vote and after consulting the Assembly.

"Where such agreements involve amendments to this Treaty, such amendments shall be subject to prior adoption in accordance with the procedure laid down in article 236."

^d The Community has already had occasion to give its comments on the Commission's draft articles, in October 1975 and October 1976, in the Sixth Committee of the United Nations Assembly. [See *Official Records of the General Assembly, Thirtieth Session, Sixth Committee, 1544th meeting, paras. 37-45; ibid., Thirty-first Session, Sixth Committee, 16th meeting, paras. 1-19; and ibid., Sessional Fascicle, Corrigendum.*]

with regard to countries having a State monopoly of trade is to grant them most-favoured-nation treatment on an individual basis.

In the Community's treaty relationships, the agreements it has concluded with developing countries are of particular importance. Those agreements often accord both most-favoured-nation treatment and preferential treatment.

In that connexion, EEC shares the concern expressed by the Commission with regard to the specific interests of developing countries in their relations with industrialized countries. It most commonly grants preferential treatment in agreements based on article 238 of the Treaty of Rome.

The standard practice of EEC in this area is as follows:

(a) It does not grant most-favoured-nation treatment in such agreements, but rather more favourable treatment. The partner States grant EEC the benefit of the clause in exchange for the preferences it accords them, which represent substantially greater advantages for those countries than those deriving from the granting of the clause;

(b) The preferential arrangement granted by EEC is based on the following principles:

— The products of partner States benefit from progressive tariff reductions on the Community's markets (with regard to most items);

— The treatment accorded may not be more advantageous than that which member States grant among themselves;

(c) Partner States grant EEC most-favoured-nation status as a minimum. This advantage to the Community is limited by the recognition of the right of participating States to conclude co-operation agreements or to form customs unions or free-trade areas with third countries. Under the agreement, the Community will not invoke the clause in connexion with agreements concluded by partner States among themselves.

4. An example of this legal format combining the application of the clause with special preferences is provided by the convention signed on 28 February 1975 by 46 African, Caribbean and Pacific States (known as the "ACP States"), the Community and its member States, known as the "Lomé Convention".⁹ Under the terms of this Convention, EEC agrees, *inter alia*, that products originating in the ACP States may be imported into the Community free of customs duties and charges having equivalent effect, but the treatment thus accorded may not be more favourable than that applied by the member States of the Community among themselves (article 2 of the Convention). In the case of products subject to controls under the agricultural policy, the Community agrees to grant, on an individual basis, a generally more favourable treatment than that accorded to third States.

The ACP States are not required to make the same concessions to EEC. They must accord it treatment no less favourable than most-favoured-nation treatment (article 7, paragraph 2 (a)); the Community does not undertake to treat them in the same way, because it is giving them more favourable treatment. Article 7, paragraph 2 (b), provides that

"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"

This means that the Community agrees not to invoke the clause in connexion with relations among the ACP States or between them and other developing countries.

5. In addition, a large number of countries as well as EEC grant *generalized preferences* to developing countries on an individual basis. The Community, within the framework of UNCTAD, announced in 1971 and subsequently put into practice its own system of tariff concessions for manufactured and semi-manufactured products originating in a large group of developing countries (members of the Group of 77). Although this system is not legally binding upon the Community and is theoretically temporary in nature, it answers a concern that had become manifest since the Second World War in the United Nations, and particularly in UNCTAD. It implies a limitation of the effects of the clause, as the contracting parties of the General Agreement on Tariffs and Trade admitted when, on the basis of the agreement reached at the second session of UNCTAD, they adopted a general waiver of the clause under the terms of article XXV of the General Agreement, which authorizes developed member countries to adopt generalized non-discriminatory and preferential tariffs with respect to products originating in developing countries (decision of 25 June 1971).¹⁰ It should be added that article XXXVII of the General Agreement already provided that

"The developed contracting parties shall...

"(a) accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less developed contracting parties..."

6. In order to take into account not only the granting by the industrialized countries of generalized preferences to developing countries, but also the special links resulting from preferential agreements concluded or to be concluded by industrialized States, and in particular the Community, with developing countries, the Community suggests that *draft article 21* of the Commission should be amended to read as follows:

"A beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a developed granting State to a developing third State on a non-reciprocal basis under a preferential régime established by that granting State."

B. Consequences of EEC's powers

7. In view of the requirements of regional integration as encountered by the Community, the Community would like to point out once again to the Commission that, in their over-all conception, the draft articles are directed exclusively at States and appear to ignore integrated groups of States or groups in the process of integration.

The existence and functioning of the Community are only one example among many of the growing tendency throughout the world to establish regionally integrated areas, while the internationalization of economies has been accelerated by many factors besides the most-favoured-nation clause. As they now stand, the draft articles do not seem to take this trend fully into account. Accordingly, the adoption of the approach used in the draft article could lead States engaged in such integration processes to limit substantially their use of the clause for fear of compromising the future of their international commitments. The fact should not be underestimated that, while the trend towards regional integration affects the application of the clause, that trend goes hand in hand with a transposition of the application of the clause from the State to the regional level, as the Community's experience vis-à-vis third countries shows.

In the light of these considerations, and of the fact that, in the sphere of trade, the Community has exclusive powers similar to those exercised by States, it is suggested that *draft article 2* should be supplemented by the following definition:

⁹ For text, see *Official Journal of the European Communities*, Luxembourg, 30 January 1976, vol. 19, No. L.25.

¹⁰ GATT, *Basic Instruments and Selected Documents, Eighteenth Supplement* (Sales No. GATT/1972-1), p. 24.

"The expression *State* shall also include any entity exercising powers in spheres which fall within the field of application of these articles by virtue of a transfer of power made in favour of that entity by the sovereign States of which it is composed."

C. Consequences of EEC's status as a customs union

8. In addition to these general observations, which apply not only to the Community but also to all States engaged in regional integration processes, certain causes for concern should be mentioned that relate more specifically to EEC.

In this connexion, the Community wishes to repeat the reservations already expressed by the spokesman of EEC at meetings of the Sixth Committee on 21 October 1975 and 13 October 1976 concerning *draft article 15*.⁴ In the words of the draft article;

"The beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended under a bilateral or a multilateral agreement."

The adoption of such an article could be interpreted as meaning that, under the most-favoured-nation clause, the advantages which the States members of a customs union grant among themselves by virtue of that union should be extended to third countries; in other words, the States members of the Community should grant third States the same treatment that they grant to each other.

The Community also has reservations with regard to *draft article 16*, according to which

"The beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended as national treatment."

This draft would imply the extension to third countries of the mutual non-discriminatory commitments granted to each other by States members of a customs union.

9. First of all, the proposed wording does not take into account the fact that the States members of the Community have relinquished to it all powers in the sphere of trade policy and, as individual countries, no longer have the necessary means of fulfilling bilateral commitments in these areas. They no longer have individual customs tariffs. They cannot, therefore, grant customs or trade advantages not provided for by the common system.

The Community and its member States have always assumed, for their part, the existence of a customary rule in international law that the founders of customs unions or free-trade areas may exclude concessions made in connexion with such unions and areas from the application of the clause to third countries.

The third paragraph of article 234 of the Treaty of Rome may indeed be interpreted as providing for just such an exception. In stating that, "in the application" of conventions concluded prior to the conclusion of the Treaty, member States shall "take due account of the fact that the advantages granted under this Treaty by each member State form an integral part of the establishment of the Community and are therefore inseparably linked with the creation of common institutions, the conferring of competences upon such institutions", that article obliges member States to make use of the exception concerning customs unions, for the Treaty of Rome has other aims and other means at its disposal than those of a mere customs union. To draw any other conclusion from that provision would lead to the absurd result that, under the clause, third States might become members of the Community. This conflicts with the third paragraph of article 234 of the Treaty, which implies that accession is a negotiated process in which member States gaining the advantages of integration simultaneously accept the concomitant responsibilities. These responsi-

⁴ See foot-note *d* above.

bilities extend to spheres which, by their nature, go beyond the obligations generally undertaken within a customs union; they include, to mention only one type of commitment, a Community legal system in which Community law is pre-eminent and directly applicable within member States under the supervision of the Court of Justice of the European Communities.

10. In this context, therefore, the Special Rapporteur's argument appears inadequate. It seeks to show that there is no customary rule under international law that would implicitly exclude customs unions from the effects of the clause and that, in consequence, the draft could not embody an exception relating to customs unions. Even were his argument conclusive, it would not address itself to the fact that there is also no international custom by which a beneficiary State could have *obtained* all the advantages granted by members of a customs union among themselves. Not only is there no such custom—there is not even a single example of it.

The question also arises whether the existence of a custom relating to an implicit exception to the clause, as constituted by a customs union, should be considered exclusively in that light. If such a view were to be adopted exclusive of any other, the result, since customs unions are most frequently express exceptions to the clause, would be that it would become impossible ever to codify the exception to the clause constituted by customs unions, precisely at a time when international practice in this area is changing radically.

The customs union exception is regarded in the doctrine and in State practice as an automatic exception to the normal application of the most-favoured-nation clause. With regard to the doctrine, reference may be made to the conclusion reached by the Economic Committee of the League of Nations that "customs unions constitute exceptions, recognized by tradition, to the principle of most-favoured-nation treatment",⁵ and to the resolutions adopted by the Institute of International Law in 1936⁶ and 1969.⁷ Paragraph 7 of the 1936 resolution provides:

"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;

"to the treatment resulting from a customs union which has been or may hereafter be concluded;

"..."

The 1969 resolution points out in paragraph 2 (*b*) that

"States to which the clause is applied should not be able to invoke it in order to claim a treatment identical with that which States participating in an integrated regional system concede to one another."

In practice, States desiring to establish a customs union or similar economic system have often invoked the exception under discussion. The most striking modern example is to be found in article XXIV of the General Agreement on Tariffs and Trade, which recognizes the exception as well as the clause itself. This recognition has confirmed the status of the exception as a customary rule, so that in practice the exception largely replaces the clause. Many customs union agreements have thus been concluded in derogation of the most-favoured-nation clause. Examples that

⁵ League of Nations, *Recommendations of the Economic Committee concerning commercial policy* (C.138, M.53.1929.II), pp. 4-14.

⁶ *Annuaire de l'Institut de droit international*, 1936, Paris, vol. 39, t. II, 1936, p. 289. The text is reproduced in *Yearbook ... 1969*, vol. II, pp. 180 and 181, doc. A/CN.4/213, annex II.

⁷ *Annuaire de l'Institut de droit international*, 1969, Basel, vol. 53, t. II, 1969, p. 361.

may be cited are the Customs Union of West African Countries, CARICOM, the Arab Common Market and the Andean Group.

As for free-trade areas, the exception they constitute to the most-favoured-nation clause is a worldwide phenomenon common to many regional groupings (CACM, EFTA, LAFTA and the Australia-New Zealand Free Trade Area).

Indeed, if such an exception did not exist, it would have to be created, for otherwise States would never be able to decide to establish such systems. In the absence of the exception, all the advantages of systems of economic integration would have to be shared with all the third States to which member States were linked by treaties containing the most-favoured-nation clause. It is for these reasons that the customary rule has been established and that international law would have to accept it, even if the rule and current practice did not already exist. This remark applies equally to both industrialized and developing countries.

11. It is therefore the Community's view that the draft articles should take account of its concern over the consequences of regional integration, as expressed above, and in particular that the exception concerning customs unions and free-trade areas should be clearly reflected in the draft.

Consequently, it is suggested that draft articles 15 and 16 should be supplemented by an article 16 *bis* which would read as follows:

"Notwithstanding articles 15 and 16, the present articles shall not affect rights and obligations which are established within entities in the sense of article 2, in particular economic unions, customs unions or free-trade areas, and which confer benefits or impose responsibilities on the members of such entities."

The title of this article 16 *bis* might be:

"Effects of the clause on rights and obligations established within economic and other unions"

II. RELATIONS BETWEEN COUNTRIES WITH DIFFERENT SOCIO-ECONOMIC SYSTEMS: QUESTION OF RECIPROCITY

12. Relations between countries with different socio-economic systems are governed by certain rules, for the special circumstances prevailing in the economies of countries in which the State enjoys a monopoly of trade render most-favoured-nation treatment without real effect unless the conditions under which it is accorded are specified.

This simply means that it is necessary to recognize the existing differences in trade conditions that result from differences in economic systems.

Real reciprocity in advantages should be measured in terms of practical and comparable results, e.g. increase in the volume and composition of trade between countries with different economic systems, to the satisfaction of the trading partners.

Thus the Final Act of the Conference on Security and Co-operation in Europe, in the preamble to the chapter entitled "Co-operation in the field of economics, of science and technology and of the environment", stresses the principle of reciprocity:

"Recognizing that such co-operation... can be developed, on the basis of equality and mutual satisfaction of the partners, and of reciprocity permitting, as a whole, an equitable distribution of advantages and obligations of comparable scale, with respect for bilateral and multilateral agreements".

In section 1 of that chapter, dealing with commercial exchanges, it is stated that

"trade represents an essential sector of their co-operation, and ... the provisions contained in the above preamble apply in particular to this sector". This means that the principle of reci-

procity as expressed in the preamble to the chapter referred to should apply to trade between countries with market economies and countries in which the State holds a monopoly of trade.

In the same section, it is also stated that the participating States

"are resolved to promote, on the basis of the modalities of their economic co-operation, the expansion of their mutual trade in goods and services, and to ensure conditions favourable to such development",

i.e. on the basis of reciprocity.

It is only in this context that the signatories of the Final Act recognize the possible benefits resulting "for the development of trade from the application of most-favoured-nation treatment".

13. The States members of the Community have applied most-favoured-nation treatment in their relations with countries in which the State holds a monopoly of trade through bilateral trade agreements concluded with those countries. Those agreements have generally excepted customs unions and free-trade areas from the application of most-favoured-nation treatment—an exception recognized by many authorities. They have normally granted most-favoured-nation treatment unconditionally. The application of the treatment has moreover been sharply defined; it applies primarily to various import duties, charges and taxes, and to the customs formalities to which goods are subject.

Since 1 January 1975, the States members of the Community have no longer had authority to undertake trade negotiations with countries having a State monopoly of trade. This means that they may no longer provide for clauses relating to trade, including the most-favoured-nation clause, in their agreements with those countries.

14. In this context, EEC is concerned to ensure real reciprocity in trade between parties. In view of the expiry at the end of 1974 of the trade agreements between its member States and countries with a State monopoly of trade, it has therefore informed those countries that it is ready to negotiate with them on the mutual granting, under certain conditions, of most-favoured-nation treatment with regard to tariffs.

Following the accession to the General Agreement on Tariffs and Trade of certain Eastern European countries, EEC has also been bound to those countries by legal ties (protocols of accession in the framework of the General Agreement), and therefore grants them most-favoured-nation treatment. However, the particular character of the economic systems of those countries has made it necessary to create special protocols of accession. The *de facto* differences between the economies of the Western and Eastern countries are therefore reflected in these protocols of accession, the content of which varies according to the countries concerned.

The Community also accords most-favoured-nation treatment on an individual basis to other countries having a State monopoly of trade. It has thus unilaterally extended to them all the reductions in its common customs tariff.

Moreover, the Council of the European Communities reaffirmed, in a statement made on 12 November 1974, that

"The European Economic Community notes that, in the sphere of tariffs, most-favoured-nation treatment has hitherto been applied in various ways in relations between EEC countries and countries in which the State enjoys a monopoly of trade. The European Economic Community notes also that it has always, in the practical implementation of its common customs tariff, granted most-favoured-nation treatment in the matter of tariffs to countries with a State monopoly of trade, taking account of the traditional exceptions. It does not intend to modify this tariff treatment under present conditions, particularly given the prospect of new negotiations with those countries. It is aware of the need not to compromise the development of

trade on either side. It expects that countries with a State monopoly of trade will demonstrate the same concern.

15. It is clear from the aforementioned developments that the Community, in its relations with countries having a State monopoly of trade, has always regarded the clause as one means among others of ensuring that trade is conducted on the basis of reciprocity.

In the light of these considerations, which show in its true context the Community's application of the clause in its relations with countries having a State monopoly of trade, EEC would wish to see the draft take fuller account of the concern and of the practice of the Community and its member States regarding countries with different socio-economic systems. In this connexion, it hopes that the provisions concerning commercial exchanges contained in the Final Act of the Conference on Security and Co-operation in Europe will be taken into account.

EEC therefore proposes that the draft articles should be supplemented by an article to be placed immediately after article 10, the title and text of which would be as follows:

"Effect of a most-favoured-nation clause under special conditions of reciprocity on exchanges of goods and services between countries with different socio-economic systems"

"Nothing in these articles shall be construed as obliging the conceding State to grant most-favoured-nation treatment to the beneficiary State in respect of exchanges of goods and services between countries with different socio-economic systems unless the beneficiary State accords to the conceding State a status permitting, on the basis of equality and mutual satisfaction of the partners, as a whole, an equitable distribution of advantages and obligations of comparable scale, in accordance with bilateral and multilateral agreements."

III. CONCLUSION

16. The creation and development of EEC, which have obviated the need to apply the most-favoured-nation clause in relations between its member States, have led the Community as such to make extensive use of the clause in relation to third countries and at the same time to adapt its use according to circumstances. This new use of the clause is a consequence of the distinctive international character of the Community; it also reflects the growing trend in favour of the establishment of regional integration groups, including groups of developing countries, and the expansion of trade between countries with different socio-economic systems.

To ensure that this practice in respect of the most-favoured-nation clause is fully and clearly reflected in the draft articles that the Commission is drawing up, the Community considers that the Commission should take account of the additions it proposes to articles 2, 10, 15, 16 and 21, as follows:

(a) Clarification of *draft article 21*, aimed at taking into account the preferential agreements concluded or to be concluded by industrialized States, and particularly the Community, with developing countries. So clarified, the article would read as follows:

"A beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a developed granting State to a developing third State on a non-reciprocal basis under a preferential régime established by that granting State."

(b) Assimilation of the Community to a State within the meaning of the draft articles in relation to the spheres covered by the draft articles in which the Community has powers exclusive of those of its member States (most-favoured-nation clause in the commercial sphere). *Draft article 2* would thus be supplemented by the following text:

"The expression *State* shall also include any entity exercising powers in spheres which fall within the field of application of these articles by virtue of a transfer of power made in favour of that entity by the sovereign States of which it is composed."

(c) Exception concerning economic unions, customs unions and free-trade areas; *articles 15 and 16* would thus be supplemented by an *article 16 bis*, reading as follows:

"Effects of the clause on rights and obligations established within economic and other unions"

"Notwithstanding articles 15 and 16, the present articles shall not affect rights and obligations which are established within entities in the sense of article 2, in particular economic unions, customs unions or free-trade areas, and which confer benefits or impose responsibilities on the members of such entities."

(d) A further definition, contained in an *article 11 bis*, reading as follows:

"Effect of a most-favoured-nation clause under special conditions of reciprocity on exchanges of goods and services between countries with different socio-economic systems"

"Nothing in these articles shall be construed as obliging the conceding State to grant most-favoured-nation treatment to the beneficiary State with regard to exchanges of goods and services between countries with different socio-economic systems unless the beneficiary State accords the conceding State a status permitting, on the basis of equality and mutual satisfaction of the partners, as a whole, an equitable distribution of advantages and obligations of comparable scale, in accordance with bilateral and multilateral agreements."

7. European Free Trade Association

[Original: English]
[9 February 1978]

In view of the importance of regional economic integration, free-trade areas and customs unions are generally accepted exceptions to the most-favoured-nation treatment of trade. It is therefore necessary, in our view, that the draft articles be supplemented by a provision which explicitly recognizes such exceptions, as does article XXIV of the General Agreement on Tariffs and Trade.

The proposals made in this respect by the member of the Commission, the late Eduard Hambro,^m constitute an appropriate text for insertion in a draft convention.

These comments from EFTA as an organization do not prejudice any comments which individual EFTA countries may wish to send you.

8. Latin American Free Trade Association

[Original: Spanish]
[9 January 1978]

Please find enclosed a brief report, together with a study made in June 1973 in connexion with the LAFTA Action Plan, for the period 1970-1980, and entitled "The most-favoured-nation clause in the LAFTA system",ⁿ as well as a copy of resolution 354 (XV) of the Conference of Contracting Parties.^o

^m See *Yearbook ... 1976*, vol. II (Part One), p. 135, doc. A/CN.4/L.242.

ⁿ The study (doc. ALALC/SEC/PA/2) is not reproduced in full. Only the section "Summary and conclusions" is reproduced in appendix I to the present comments.

^o Reproduced as appendix II.

As it was unfortunately not possible to consult all the documents referred to in your note dated 28 July 1977, the information submitted is general in nature, but it does give an indication of the experience acquired by LAFTA in respect of the matter under discussion. The Secretariat would be pleased to provide you with any additional information or background material that might prove useful to you in your study of the annexes to this note.

1. Article 18 of the Montevideo Treaty contains the most-favoured-nation clause in the following form:

“Any advantage, benefit, franchise, immunity or privilege applied by a Contracting Party in respect of a product originating in or intended for consignment to any other country shall be immediately and unconditionally extended to the similar product originating in or intended for consignment to the territory of the other Contracting Parties.”

This text is a slight variant of the version of the most-favoured-nation clause in the General Agreement on Tariffs and Trade.

Article 19 of the Treaty, however, specifically states that most-favoured-nation treatment will not be applicable to the advantages, benefits, franchises, immunities and privileges already granted or that may be granted by virtue of agreements among contracting parties or between contracting parties and third countries with a view to facilitating border trade. Also, article 32 (a) authorizes the contracting parties to grant to member countries of LAFTA which are at a relatively less advanced stage of economic development advantages not extended to the other contracting parties.

2. During the early years of the Treaty's application, it was realized that article 18 of the Treaty was playing an extremely important role in ensuring that concessions granted under the liberalization programme automatically became multilateral in nature.

However, the practice and theory that subsequently emerged restricted the scope of article 18, on the one hand by making a distinction between the concept of multilateral instruments and the automatic extension of advantages and concessions through the most-favoured-nation clause, and on the other hand by incorporating in the legal structure of the Association mechanisms such as complementarity agreements—as provided for in resolution 99 (IV) of the Conference of Contracting Parties^p—and sub-regional agreements, whereby the extension of concessions is conditional on the prior recognition of reciprocity through a negotiated participation in agreements already concluded.

3. In June 1973, in the framework of the first stage of the LAFTA Action Plan for the period 1970-1980, the Secretariat submitted to the contracting parties a study entitled “The most-favoured-nation clause in the LAFTA system”.^q The study dealt with the principle of non-discrimination in international relations, in particular with the manner in which the most-favoured-nation clause operated in multilateral trade agreements on co-operation and integration, and with the most-favoured-nation clause in the Montevideo Treaty.

There is no need to repeat the concepts and arguments contained in that study. It is enough to outline the basic elements of the central thesis.

(a) The multilateral nature of the liberalization programme of the Montevideo Treaty is based on the multilateral nature of the instruments used in its application and not on the unconditional most-favoured-nation treatment provided for in article 18, mentioned above.

(b) Article 18 applies to all advantages granted by contracting parties to each other or to third countries outside the mechanisms established and regulated by the Association's organs.

^p For Spanish text, see ALALC, *Sintesis mensual*, Montevideo, first year, No. 3, September 1965, p. 64.

^q See appendix I.

(c) The contracting parties, by following the appropriate procedures, may establish and regulate mechanisms based on reciprocity without contravening the provisions of article 18 of the Treaty.

An analysis of the “Summary and conclusions” of this study suggests that it would be preferable, from a political point of view, for the contracting parties to channel their activities through mechanisms based on reciprocity, the actual operation of which would not necessarily require the participation of all members of the Association in every case.

4. After this study was carried out, the collective negotiations provided for in articles 3 and 4 of the Caracas Protocol^r took place. As is well known, those negotiations did not produce any definitive results, but various drafts were considered that were designed to broaden the scope of the so-called “partial mechanisms”, that is to say, those mechanisms in which not all member countries participate and access to which is conditional on the prior recognition of reciprocity.

Member States have in practice concluded agreements of this type; in resolution 354 (XV),^s the Conference of Contracting Parties provisionally authorized Uruguay to grant Argentina and Brazil concessions not extended to other contracting parties, so that bilateral economic co-operation agreements that included the granting of trade advantages could enter into effect.^t

Paraguay and Uruguay requested permission to grant similar concessions to Chile at the seventeenth regular session of the Conference (November 1977),^u but those requests were not approved and the whole question is still one of the central issues facing the contracting parties of LAFTA.

5. In conclusion, the experience of LAFTA with respect to the application of the most-favoured-nation clause has led, from the theoretical point of view, to an important conceptual distinction between the automatic extension of advantages through the application of the clause and the consequences of the use of negotiating instruments of a multilateral nature. From the practical and political point of view, the unrestricted application of article 18 of the Montevideo Treaty along traditional and orthodox lines would have represented an insurmountable obstacle to the incorporation in the Association's legal structure of mechanisms that over the past 10 years have constituted a dynamic element in negotiations among the contracting parties, such as complementarity agreements and subregional agreements.

APPENDIX I

The most-favoured-nation clause in the LAFTA system ^v

SUMMARY AND CONCLUSIONS

1. Bilateral economic relations and the operation of multilateral systems of co-operation in trade have been based mainly on the *unconditional* application of the most-favoured-nation clause since the United States abandoned, in 1923, the system of the conditional clause that it had used and imposed in its trade relations with other countries in the nineteenth century.

^r For Spanish text, see ALALC, *Instrumentos Jurídicos Básicos*, Montevideo, 1975, 2nd ed. rev., p. 39. For English text, see Inter-American Institute of International Legal Studies, *Instruments of Economic Integration in Latin America and in the Caribbean*, Dobbs Ferry, N. Y., Oceana Publications, 1975, vol. I, p. 26.

^s See appendix II.

^t It should be emphasized that, under article 32 (a) of the Montevideo Treaty, Uruguay was already entitled to receive concessions not extended to other contracting parties.

^u Under the provision referred to, Paraguay and Uruguay were already authorized to receive advantages not extended to other contracting parties, but not to grant such advantages, whereas Chile, which was not designated a relatively less developed country, was not authorized to receive such advantages.

^v Doc. ALALC/SEC/PA/2.

2. The unrestricted application of this clause has been tempered by exceptions resulting from the desire of States to limit its scope and to mitigate its effects, by reason either of special circumstances or of changes occurring in international economic and political conditions. Mention must be made in that connexion of *border trade* and of *trade between adjacent countries*, as well as of the doubtless most important exceptions established by the General Agreement on Tariffs and Trade, namely, customs unions and free-trade areas. Two main reasons account for the fact that the clause has not been fully applied. On the one hand, States have adopted trade policies that have frequently involved the adoption of measures nullifying or distorting the effects of the clause. On the other hand, even though the most-favoured-nation clause is an integral part of multi-lateral co-operation agreements, those agreements are further governed by other essential principles, in particular that of reciprocity, which significantly attenuate the effect of the application of the said clause.

3. In economic integration systems, the scope of application of the unconditional most-favoured-nation clause depends on the degree of independence which participating States maintain in conducting relations with third States or even among themselves in matters not covered by specific integration programmes. In effect, every process of this type is based on two fundamental assumptions: reasonable reciprocity with regard to the benefits derived from the system and strong solidarity in exchanges with third countries. It is essential, in the interest of preserving the internal solidarity of the system, at least until there are common or sufficiently harmonized instruments for regulating foreign trade or until a joint trade policy is established with regard to third parties, to ensure that every advantage or benefit which a participating country grants to a third country should be extended automatically and unconditionally to the other member States.

4. However, within the system itself the situation is different. The absolute unconditionality of the clause could jeopardize the reception of advantages based on genuine reciprocity. Furthermore, if, as happens in LAFTA, the programme of trade liberalization is based on periodic negotiations or adjustments, the rate of acceleration of the process will have to be determined by the country with the most limited negotiating capacity, both because no compensatory measures exist and because the gratuitous extension of the advantages granted by the parties most ready to grant them would not be justified.

5. The Montevideo Treaty, according to the literal interpretation of its original text, contains the most-favoured-nation clause in an *unconditional* and absolute form, no distinction being made between relations among countries of the area and relations with third countries, except, naturally, the discriminatory measures arising from the liberalization programme. The sole exceptions to the application of the clause are those established, according to this interpretation, in chapter VIII of the Treaty, which authorizes the granting to countries at a relatively less advanced stage of economic development of concessions not extended to other countries, and in article 19, which expressly provides that most-favoured-nation treatment shall not apply to measures taken to facilitate border trade.

In effect, the Treaty establishes a pattern of integration based on the *general* application of the measures. Its main mechanisms envisage uniform progress in all countries, at least in respect of tariff liberalization. Such a scheme determines that the system shall advance at a rate determined by the contracting parties whose development prospects are least good.

6. However, since 1960 the strategy followed by the contracting parties to achieve the objectives of economic integration has undergone important changes.

Owing to the difficulties encountered in ensuring that all the countries move forward at the same rate, there has been a tendency to take piecemeal action. The basic general commitments of the Treaty have of course been preserved, but some contracting parties (not all of them) have used parallel mechanisms which they have sought to integrate in the system in order to maintain the same general direction, and which they have tried to regulate, and to harmonize with the objectives pursued, by the adoption of over-all institutional procedures.

This development has had direct consequences on the criterion used in interpreting the clause. Various situations arising during the first phase of the Treaty's application called into question the legal validity and relevance of this criterion which, it was noted, conflicted in practice with another basic principle of the Treaty, that of *reciprocity*, which was considered by some countries to be the keystone of the system. A new approach gradually developed and gave rise to a series of positions of a basically political nature concerning, first, complementarity agreements and, next, subregional agreements. It also led to the emergence of a school of thought that substantially changed the original interpretation of article 18 of the Treaty. According to that school, the principle laid down in article 18 governs only those privileges and advantages that are granted by a contracting party either to third countries or to other member nations in all cases not governed by the liberalization programme. That programme operates in conformity with its own rules, of which the main

one establishes that negotiations shall be based on equitable and reasonable reciprocity.

7. In 1964, by virtue of resolution 99 (IV) of the Conference of Contracting Parties,¹⁰ which established new regulations for complementarity agreements, a more flexible arrangement was adopted for applying article 18 of the Treaty, since it was decided that only countries that granted each other equivalent advantages might benefit from the advantages provided for in such agreements. This was an implicit recognition of the supremacy of the principle of reciprocity over the principle of the most-favoured-nation clause.

Later, in 1966, when work to set up the subregional Andean Group began, the same basic principle was adopted, as a programme of this kind could not be drawn up unless its members were freed from the requirement to extend to the other contracting parties of LAFTA the benefits they granted each other on a reciprocal basis. This point of view was accepted, and was confirmed in law in resolution 202 (CM-II/VI-E),¹¹ adopted by the Foreign Ministers of LAFTA in September 1967 at Asunción, Paraguay.

It may even be said that the decision to grant a special régime to Uruguay was based on a similar approach. That eminently political decision was indeed motivated less by the consideration of economic indicators, which it would have been difficult to adduce in order to justify the designation of that country as relatively less developed economically, than by the desire to enable a country in difficult economic circumstances to benefit, within reasonable limits, from a treatment of reciprocity.

8. This tendency to segment activities seems to be one of the determining elements of the future of the system, and seems destined to prevail in the negotiations of 1974. For this to be possible, the legal commitments and contractual obligations entered into under the Montevideo Treaty, and those that may be assumed in the future, must not be so rigid as to prevent the adoption of varying rates of activity to match the differing abilities of countries to realize the objectives of integration. This means, that while the essential elements of collective action must be preserved, the system should have the necessary flexibility to match the inherent dynamism of the process. This approach is particularly applicable to the most-favoured-nation clause.

This analysis shows that the clause should not be considered as a barrier to advances which the contracting parties wish to achieve by common agreement. Basically, the clause should not impede the maintenance of a system of partial integration in the complementarity agreements and in the subregional agreements. Not should it hinder a regulation of article 11 of the Treaty based on the granting of limited concessions, or the establishment of safeguard mechanisms providing for discriminatory corrective measures, and so forth.

9. One of the main objectives of the LAFTA integration process is to promote the industrial development of the region as a whole and of each member State in particular. The contracting parties recognize that one of the best means of achieving that goal is to ensure complementarity in manufacturing; that, however, may not be compatible with the unconditional application, *within* the area, of the most-favoured-nation clause. Over-all complementarity is very difficult to achieve, that is, by means of agreements covering the totality or a large number of manufacturing activities. The only viable approach, therefore, because it is more pragmatic, is a sectoral approach. However, even if the over-all sphere of action is thus divided up, the obstacles remain enormous. It is not at all easy to conclude industrial agreements between two countries in a specific sphere, and even less easy to conclude such agreements covering a series of products in a particular sector involving a larger number of countries. It must be remembered, moreover, that the 11 members of LAFTA are at very different levels of development and degrees of industrial diversification. The Andean Group, which formerly comprised only five countries with fairly homogeneous characteristics and with a broad range of undeveloped subregional activities, waited for nearly three years before adopting its first sectoral integration agreements, and is making slow progress in the preparation and negotiation of other agreements. In that connexion, the entry of Venezuela will certainly create new difficulties.

It is therefore illusory to think that, even at the sectoral level, an industrial complementarity can be achieved whereby the 11 countries of LAFTA would become parties to each of the agreements. Worldwide experience offers sufficient examples of this type of difficulty, as has been shown in the relevant chapter of the present study.

10. With the emergence of the Andean Group as a means, for a number of countries, of concerting their development efforts, the economic and political outlook for LAFTA, and by extension for Latin America, is rapidly changing.

¹⁰ See foot-note *p* above.

¹¹ For Spanish text, see ALALC, *Sintesis mensual*, Montevideo, third year, No. 28, October 1967, p. 507.

Before the Montevideo Treaty, and because of the geographic remoteness of Mexico and its slender ties with South America, the predominant geo-economic centres of the region were undoubtedly Argentina and Brazil. With the participation of Mexico in LAFTA and the new impetus that LAFTA has given to regional economic co-operation in the last 10 years, the three aforementioned countries have become the pivots of Latin American integration. Hence the practice, in LAFTA terminology, of designating those three countries as "the big three". Now, with the Andean Group, a fourth important economic unit on the subcontinent is in gestation—rapidly at the political level, but much more slowly in terms of immediate economic results. Proof of the reality of this phenomenon lies in the action of Argentina and Mexico aimed at establishing institutional ties with the Andean system as such, and at opening the way to the negotiation of specific agreements on industrial complementarity, and even in more general areas of integration.

It is very probable that the next stage of the Latin American integration process will focus on the relations between those four units. The preliminary negotiations that have recently taken place between the governments of Argentina and Mexico and the Andean subregion certainly appear to have been oriented in that direction. Moreover, with Venezuela becoming a party to the Cartagena Agreement, relations of this type will probably be strengthened and multiplied, since, judging by the principal indicators, the aforementioned economic units, with the entry of Venezuela upon the scene, acquire more or less equal importance.

11. It may be seen from the foregoing that the success of the Andean integration programmes and the greater or lesser speed with which they are carried out, especially in the industrial sector, will to a large extent determine the future features of LAFTA. In any case, it may be expected that the stage that is beginning will be characterized by collective and joint action by the Andean Group in the framework of the Association, so that the system of individual negotiations with the countries of the Group now appears to be definitely a thing of the past, at least as regards the major aspects of economic co-operation.

Despite the efforts to institutionalize the relations of the Andean Group with other LAFTA countries, which were initially successful, as evidenced by the establishment of mixed commissions, it does not seem probable, even were it legally and economically possible, to expand the subregional agreement to incorporate fully some of the so-called big countries of LAFTA. The differences in productive structures and other such factors seem to indicate that the best way to achieve closer relations would be to conclude special co-operation agreements, or even partial or sectoral integration agreements. Clearly, the economic goal of the preliminary negotiations held thus far has been industrial complementarity in its various aspects. This goal coincides with the main concern of LAFTA, where attempts have already been made, even through selective negotiations, to ensure that the liberalization programme does not facilitate the importation of products likely to compete with national products. Every effort has therefore been made to identify those products whose importation is not likely to affect the interests of national industry in each country.

12. Consequently, while in the Andean Group joint organization of industrial development of member countries is the basis of the system, for which the most appropriate machinery is joint planned sectoral integration, the most feasible way of establishing effective ties between the manufacturing activities of the four large economic units of the region seems to be to seek combinations of complementary products at the sectoral level. Subsequently, to ensure more deep-rooted integration, it might also be expected that some of the arrangements in this sphere would be based on co-participation of capital and on joint management in the case of certain manufacturing activities.

As sectoral integration progresses in the Andean subregion, the outlook for negotiations at the regional level will gradually become clearer. It will not be easy to conclude agreements between the Andean Group and the other LAFTA countries if the sectoral development goals involved, the range of products covered by the agreements in question and, most important, the characteristics and conditions of the distribution of industries among individual countries, have not been previously established by subregional agreement. Once these requirements are fulfilled, or even sooner, when studies on current and future subregional demand for the goods under consideration are sufficiently advanced, it will be possible to determine whether the Andean market offers reasonable prospects for achieving sufficient economies of scale, to establish in which cases it would be appropriate to endeavour to achieve complementarity with other countries in respect of inputs, and to decide whether it is necessary to choose other options within the broader framework of LAFTA.

Although this new factor represented by Andean integration is important, it is not so important, after all, as to eliminate all alternative forms of integration. In fact, Argentina, Brazil and Mexico have made considerable progress in establishing mutually advantageous relations in the manufacturing sphere. Thus they have signed many complementarity agreements, differing in kind and scale, but constituting a first positive step towards industrial integration. If the subregional group does not in the coming years achieve the expected unity

and strength, negotiations may well focus on the three other units, whose activity may continue to be a determining factor in the speed, scope and intensity of the integration process of LAFTA.

13. If it is agreed that there are good reasons for believing that the developments outlined above are likely to take place at the next stage of the process, an examination of the legal basis of the system in the light of the Association's experience impels the conclusion that the most-favoured-nation clause must be applied more flexibly among the member countries of the area. It is difficult to achieve the joint elaboration and approval of sectoral integration or complementarity agreements. The interests involved in such agreements are extremely important, both from the national point of view of each of the participating countries and from the point of view of the private or public enterprises operating in specific industrial sectors in each territory. The complexity of the economic factors that condition manufacturing production in each sector, political changes, lack of dynamism on the part of companies with regard to risks to be taken on foreign markets, etc., seriously impede efforts to establish effective bilateral and multilateral industrial ties. As a result, negotiations become laborious and slow, and they are not carried out, in practice, on a broad multilateral base. Thus, if negotiations relating to a specific sector between two of the economic units considered are to be brought to a successful conclusion, the application of the relevant formula should not depend on the wish of a third party to participate in the agreement, nor on its political will to accept it. Action will be multilateral only in cases where it is necessary to determine whether the norms in force on the subject have been observed, and whether the terms of the agreement are compatible with the over-all objectives of the system, as is now the case in complementarity agreements. However, the will and the ability to negotiate should not have to be determined by compulsory formalities that might constitute delaying procedures wholly irrelevant to the actual negotiations between the parties concerned. Under existing arrangements, company managers have repeatedly criticized resolution 99 (IV) for its excessively rigid regulations, which were imposed in order to ensure, as far as possible, that countries that had not expressly stated their interest in such negotiations should be able to take part in them; but that difficulty would be far greater if governments undertook negotiations with a view to concluding more far-reaching agreements.

14. In arrangements such as those outlined above, the basic principle of industrial integration or complementarity agreements should be that of reciprocity; article 18 of the Treaty should be set aside and replaced by a more or less broad system of multilateral control to ensure that each agreement is compatible with the general principles and objectives of the integration process.

These conceptual bases are in line with those of resolution 99 (IV). However, the arrangements would have to be completed by recognizing the right of the parties negotiating and participating in an agreement to close the negotiations and the agreement itself, thereby ensuring that the agreement should not be open to participation by other member countries of LAFTA unless negotiations, accepted rather than imposed by standard provisions, are previously conducted and provide for equivalent compensation.

15. It could be claimed, perhaps rightly, that such procedures might weaken the basic multilateral nature of the system and therefore be detrimental to joint, united action by member countries. However, experience would seem to indicate that the opposite is true.

When the countries described as having inadequate markets in resolution 71 (III) of the Conference of Contracting Parties, dated 21 November 1963, embarked on a laborious search for mechanisms to strengthen their opportunities to participate on an equal footing in the integrated development of the region, they decided that the most expeditious means for so doing would be that they, like the relatively less developed countries, should be permitted to conclude "closed" complementarity agreements among themselves. At the fourth session of the Conference of Contracting Parties (Bogotá, 1964), a large part of the discussion on the reform of the procedures governing complementarity agreements turned on that point. It may indeed be affirmed that it was the failure to agree on such an authorization that led, shortly after, to the subregional Andean movement. Had a resolution been adopted of the kind advocated at the time by the countries with inadequate markets, the member countries of the Andean Group would probably not have considered that it was of vital urgency to adopt immediately a formula of subregional integration.

16. As has been stated, this interpretation of the operation of the most-favoured-nation clause of the Montevideo Treaty would run counter to the probable geo-economic evolution of LAFTA, based on four major economic units encompassing nine of the 11 member countries—the three large countries and the six members of the Andean Group. As a result, the two remaining contracting parties—Paraguay and Uruguay—are in a very special situation, and they might view their position as being weakened to the extent that the clause was applied more flexibly or the predominance of the principle of reciprocity accentuated. Objectively speaking, smaller countries are better protected the more rigid the contractual system binding the other members. Unconditional and absolute

most-favoured-nation treatment enables them, in respect of mutual benefits, to use their veto power to force through solutions favourable to them.

However, both Paraguay and Uruguay currently enjoy a preferential régime that enables them to secure from the other contracting parties advantages that are not extended to the others; and these advantages are accorded not only in respect of products covered by integration or sectoral complementarity agreements, but also in respect of any product or group of products. The aim, then, would be to consolidate and, as far as possible, improve that special régime, having regard to the particular situation of each country. In both cases, the first step would have to be to decide to make such régimes permanent, by eliminating the transitory elements that currently characterize them. In addition, in order to strengthen those countries' negotiating power, which in itself is limited, it would have to be accepted that they in turn might concede only limited advantages in return for those that they received. This possibility has already been raised in LAFTA in a general manner, and recently, at the initiative of Paraguay, it was the object of a positive recommendation by the Advisory Commission on entrepreneurial matters.

17. Another aspect that could also be looked into is whether that concept of the applicability of the most-favoured-nation clause would apply only to LAFTA or also to Latin America as a whole. Since a frequently stated objective is to co-ordinate the various regional integration mechanisms (the establishment of the LAFTA-CACM Co-ordinating Committee and the document issued at the recent ECLA meeting testify to that position), it might be desirable to provide for the possibility of the conclusion of agreements to which Latin American countries that are not members of LAFTA might wish to be parties. This would anticipate specific proposals—such as that made some time ago by Mexico to the effect that concessions be granted to Central American countries—as well as the concern expressed in various documents and commentaries regarding the options available for collaboration in the subcontinent.

Mention should be made in this connexion of the ideas expressed in a document submitted to the eleventh Latin American Congress of industrialists, held in Buenos Aires in May 1973, by the Mexican Confederation of Chambers of Industry. The author, Mr. Eligio de Mateo, an engineer and well-known industrialist with vast experience of regional integration, agrees with the views outlined above and stresses the possibility of the regionalization of the Latin American area. In his view, the creation and strengthening of the Andean Group has simplified LAFTA, which already includes three economic units (Argentina, Brazil and Mexico) and is in process of encompassing a fourth. However when he mentions a meso-American subregion that would include the Central American countries, he foresees the possibility of countries that do not currently belong to LAFTA being included in the future regionalization.

Although any attempt to define various subregions in the area has the disadvantage of being based on a subjective interpretation of history and of its extension into the future, and although it is impossible to predict the future course of political and economic events, it is a fact that the present economic situation would seem to indicate that it is more than possible that the above-mentioned four economic units will have a polarizing effect on the integration process in the coming years. It would therefore seem advisable to devise instruments conducive to—or better still, that would facilitate or encourage—negotiations aimed at linking together these centres around which integration efforts will revolve.

18. Nevertheless, faced with such a broad range of possibilities, it will surely be necessary, in each case, to set limits for the action of individual countries and for collective action, to ensure that the former does not jeopardize the internal solidarity of the system and that the latter does not lead to excessive fragmentation of the process. It will thus be necessary, first, to maintain the most-favoured-nation clause as an element capable of preventing the system from breaking up owing to purely bilateral actions outside the scope of activities planned on a multilateral basis, and, secondly, clearly to define the rules governing partial actions by the contracting parties; these will have to be embodied in orderly mechanisms established and governed on a multilateral basis and supervised by the competent organs of the Association.

As stated at the outset, it is advisable that the application of the most-favoured-nation clause should be *unconditional* with respect to third parties *outside* the LAFTA area or the Latin American area, depending upon the decision taken. It appears inconceivable that, in a particular negotiation, a country belonging to the system should extend to a nation or group outside the area benefits not enjoyed by its partners in the regional mechanism. Such action would seriously affect internal solidarity and would rule out any possibility of co-ordinating national foreign trade policies, the need for which is becoming increasingly urgent in the light of the current international economic situation. The unconditional nature of the clause *vis-à-vis* outsiders is as important an element in respect of the area's external policy as would be a common external tariff.

19. Consequently the following ways for the future application of the most-favoured-nation clause in LAFTA might be considered:

(a) It would apply *unconditionally* and absolutely *vis-à-vis* third countries or groups of countries. Any exemption from duty or favour granted to a member country of LAFTA or a country institutionally linked to LAFTA—even if not a full member—would be extended automatically, without the need for negotiating any compensation, to the other countries of the Association. The wording of this principle would be similar to, if not exactly the same as, that of the present article 18 of the Montevideo Treaty.

(b) The guiding principle in relations between the contracting parties (and possibly between countries institutionally linked to the Association) would be that of reciprocity of benefits. As a general rule, the relatively less developed countries would not be required to provide strict compensation, and they would enjoy special advantages in the programmes of trade expansion and industrial development. In addition, the clause would be unconditional for those countries: they would automatically and gratuitously receive any concessions mutually agreed upon by the other contracting parties. The most-favoured-nation clause would thus be conditional within the area. For a country to be able to enjoy the advantages granted to one another in a negotiation by other contracting parties (whether in an import-substitution programme, in various types of complementarity agreements or in other possible action), it would have to grant benefits equivalent to those it received.

(c) There would be various ways of implementing this aspect of the clause, some of which are already regulated, while others could be regulated; for instance:

- (i) Frontier traffic;
- (ii) Frontier trade between adjacent areas, following delimitation of those areas and with the authorization of the organs of the Association;
- (iii) Complementarity in the various forms authorized (resolution 99 (IV) of the Conference of Contracting Parties would have to be revised for this purpose);
- (iv) Subregional agreements authorized by the organs of the Association;
- (v) Sectoral or intersectoral complementarity agreements or conventions between subregional groups and other LAFTA countries.

(d) Provision would be made, in the relevant legal texts, for organs of the Association to be endowed with the capacity and powers necessary to handle other cases that might be submitted by contracting parties. Special and immediate attention might thus be given to cases relating to relations with non-member Latin American countries, bearing in mind the regional common market and, possibly, ties with other third countries.

(e) The Andean Group—and any other subregional group—would participate in the respective programmes as a single economic unit, acting as such in the negotiations; however, it could agree that any compensation it secured should benefit only one or some of its members.

(f) Negotiations would be free, that is to say, they would not be determined or affected by the right of other members to participate in a specific phase of the negotiations, as is currently the case with complementarity agreements. Nevertheless, the outcome of the negotiations would be subject, at the implementation stage, to certain requirements relating to collective discipline, in order to maintain the cohesion of the system and to ensure that the principles and general objectives of the process were adhered to. There should be no veto in respect of the declaration of compatibility and that declaration should not be impeded by the will of a single economic unit.

20. A sufficiently broad basis of interpretation exists for the contracting parties to be able to carry out the measures following from the practical provisions of the Treaty without any need to amend or replace that instrument. However, if the outcome of negotiations indicates a need for revision of the Treaty, it might be advisable, in order to avoid problems of interpretation, to review the text of article 18 and, in general, all aspects of the principle of non-discrimination.

Appendix II

LAFTA resolution 354 (XV)^y

AUTHORIZATION FOR URUGUAY TO GRANT SELECTIVE ADVANTAGES TO ARGENTINA AND BRAZIL

The Conference of Contracting Parties, at its fifteenth regular session,
Mindful of the Protocol establishing the Council of Ministers for Foreign Affairs of the Latin American Free Trade Association,

^y Adopted on 16 December 1975 at the fifteenth regular session of the Conference of Contracting Parties.

Considering the need to deal with the situation in Uruguay through urgent, provisional and exceptional measures,

Resolves that:

First. Uruguay shall be authorized provisionally to grant selective concessions to Argentina and Brazil.

Second. Article 4 of resolution 204 (CM-II/VI-E) shall apply with respect to the concessions granted under the preceding article. The same rule shall govern selective concessions granted by Argentina and Brazil to Uruguay.

Third. The authorization referred to in the previous articles shall remain, in force until the Council of Ministers for Foreign Affairs, at its first meeting takes a decision on the subject of this resolution, whatever the result of that decision may be.

9. League of Arab States

[Original: Arabic]
[24 June 1978]

The League of Arab States has the honour to point out that it considers, in principle, that articles 15 to 17, relating to the irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement, the right to national treatment under a most-favoured-nation clause, and most-favoured-nation treatment and national or other treatment with respect to the same subject-matter, respectively, are not consistent with the policy applied to treatment among Arab States, whether on a bilateral or a multilateral basis. Privileges granted by an Arab State to another Arab State may not be applicable to non-Arab parties, since relations among Arab countries are governed by special considerations.

The Secretariat of the League will transmit its views on other articles after ascertaining the views of member States.

10. World Tourism Organization

[Original: French]
[26 October 1977]

The situation with regard to the World Tourism Organization and its experience with this clause in the area of tourism is as follows:

I. BILATERAL AND MULTILATERAL AGREEMENTS ON TOURISM

For the moment, no convention has been concluded under the auspices of WTO. However, there exist a large number of bilateral agreements concerning the promotion and development of tourism, although none of them contains a most-favoured-nation clause. There are also multilateral agreements on the subject, but relations between the States parties are based strictly on the principle of reciprocity.

II. TREATMENT FAVOURABLE TO THE ORGANIZATION

It is a fact that the most-favoured-nation clause does not apply to intergovernmental organizations. However, since this clause is designed to do away with certain types of discrimination among subjects of international law and since, moreover, the Special Rapporteur has taken up in his report the question of favourable treatment accorded to intergovernmental organizations, the following provisions of the Convention between Spain and WTO on the legal status of that organization in Spain² (Headquarters Convention) would seem to merit some attention:

² For Spanish text, see España, *Boletín Oficial del Estado*, Madrid, 6 July 1977, 317th year, No. 160, p. 15127.

1. Most-favoured-organization clause

Article 3 of the Headquarters Convention provides:

“The Organization shall enjoy all the privileges and immunities customarily accorded to international organizations of a universal character.”

Article 6, paragraph 1, provides:

“The Organization shall receive for its official communications treatment at least as favourable as that given to other international institutions and diplomatic missions in Spain, *inter alia*, in the matter of priorities, rates and taxes for mail and for telephone, telegraph and other communications.”

Article 10, paragraph 5, provides:

“The Spanish Government shall grant the Organization the same facilities in respect of supplies for its official vehicles as those which it grants to diplomatic missions accredited to Madrid.”

2. Clause assimilating the treatment of representatives of members and officials of the Organization to that of members of diplomatic missions

Article 13, paragraph 1, of the Headquarters Convention provides:

“(1) Representatives of members of the Organization to assemblies, conferences or meetings convened by the Organization shall enjoy the following privileges and immunities in Spain:

“... ”

“(c) Customs relief for their personal effects and exemption from customs inspection of their personal luggage on the same terms as those accorded to members of diplomatic missions on temporary mission.”

Article 14 provides:

“(1) The Secretary-General of the Organization shall enjoy the same privileges and immunities, exemptions and relief as are granted to ambassadors serving as heads of diplomatic missions.

“(2) A senior official of the Organization acting on behalf of the Secretary-General by reason of the latter's absence or incapacity shall enjoy the same status as the Secretary-General.

“(3) The Secretary-General of the Organization shall designate those officials who, by reason of the responsibilities attaching to the functions that they exercise, are to enjoy the privileges and immunities, exemptions and relief accorded to diplomatic agents in Spain. The number of such officials shall be determined periodically by agreement with the Spanish Government.

“... ”

3. Most favourable conditions

Article 11, paragraph 2, of the Headquarters Convention provides:

“The Government shall assist the Organization in obtaining the most favourable conditions for its exchange transactions and transfers of funds.”

Provisions similar to those mentioned in the above paragraphs may also be found in the agreements relating to the legal status of the regional offices of WTO concluded with the respective host countries.