

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1975

Volume II

*Documents of the twenty-seventh session
including the report of the Commission
to the General Assembly*

UNITED NATIONS



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New York, 1976



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MOST-FAVOURED-NATION CLAUSE

[Agenda item 3]

DOCUMENT A/CN.4/286*

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

*Draft articles, with commentaries (continued)***

[Original: English/French/Russian]
[6 May 1975]

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* Incorporating document A/CN.4/286 and Corr.1.

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

ABBREVIATIONS

ECSC	European Coal and Steel Community
EEC	European Economic Community
EURATOM	European Atomic Energy Community
GATT	General Agreement on Tariffs and Trade
I.C.J.	International Court of Justice
<i>I.C.J. Reports</i>	<i>I.C.J., Reports of Judgments, Advisory Opinions and Orders</i>
OECD	Organisation for Economic Co-operation and Development
OEEC	Organisation for European Economic Co-operation
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. Proposals concerning the draft articles on the most-favoured-nation clause adopted by the Commission¹

1. In his fifth report,² the Special Rapporteur proposed several draft articles dealing with national treatment and the national treatment clause (articles 9 *et seq.*). The reasons for doing so were briefly given in paragraph 1 of the commentary to articles 9 and 10.

2. The Special Rapporteur still believes that the draft cannot, without a risk of incompleteness, avoid dealing with the national treatment clause and national treatment in parallel to the study of the most-favoured-nation clause and most-favoured-nation treatment. Owing to the close relationship between the two kinds of treatments and the respective clauses, this may not cause particular difficulties.

3. From the point of view of drafting, the inclusion of provisions on national treatment clauses in articles concerning most-favoured-nation clauses can be done in at least four ways:

(a) By leaving the articles on most-favoured-nation clauses intact and inserting a provision indicating which of those articles are applicable, *mutatis mutandis*, to national treatment clauses; this method was not followed by the Commission in the context of other topics;

(b) By introducing into the draft articles the term "a clause" and explaining in the article on the use of terms that the term "a clause" means "a most-favoured-nation clause or a national treatment clause, as the case may be"; this term would then be used in all the articles applicable to both kinds of clauses;

(c) By adopting two groups of articles as two separate chapters in the draft: one on the most-favoured-nation clause and a second on the national treatment clause; a third chapter would be added concerning cases of cumulation of the two clauses and on the absorption of the latter by the former;

(d) By mentioning explicitly both the most-favoured-nation clause and the national treatment clause in the articles applicable to both.

4. The Special Rapporteur, while not having very strong views against the methods mentioned in subparagraphs (b) and (c) of the preceding paragraph, proposes to follow the method indicated in subparagraph (d). This, it is submitted, leads to the adoption of a text which although not as terse as that which could be reached by following the system mentioned in subparagraph (b), will make easier reading and avoid cumbersome repetition, an inevitable consequence of the method described in subparagraph (c).

5. In the light of the foregoing, the proposals concerning individual articles are as follows:

Revised article 1. Scope of the present articles

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

Revised article 2. Use of terms

For the purposes of the present articles:

(a) . . .

(b) "granting State" means a State which grants most-favoured-nation treatment or national treatment as the case may be;

(c) "beneficiary State" means a State which has been granted most-favoured-nation treatment or national treatment as the case may be;

(d) . . .

Revised article 3. Clauses not within the scope of the present articles

The fact that the present articles do not apply (1) to a clause on most-favoured-nation treatment or on national

¹ Articles 1 to 7. See *Yearbook... 1973*, vol. II, pp. 213 *et seq.*, document A/9010/Rev.1, chap. IV, sect. B.

² *Yearbook... 1974*, vol. II (Part One), p. 117, document A/CN.4/280.

treatment contained in an international agreement between States not in written form, ...

(a) . . .

(b) . . .

(c) The application of the provisions of the present articles to the relations of States as between themselves under clauses by which States undertake to accord most-favoured-nation treatment or national treatment to each other, when such clauses are contained in international agreements in written form to which other subjects of international law are also parties.

COMMENTARY TO REVISED ARTICLES 1 TO 3

Revised articles 1 and 2 are self-explanatory. Some explanation is needed as to why no change is proposed in the wording of parts (2) and (3) of the first paragraph of article 3. As to part (2) it seems impossible *ex definitione* that a State accord national treatment to a subject of international law other than a State, i.e. to an international organization, regarding the treatment of such organization with respect to itself. It is, hypothetically, not impossible that national treatment be accorded to an international organization in respect of its property or its officials. However, the Special Rapporteur is not aware of the existence of such clauses and hence does not propose to provide for this hypothesis. As to part (3) of the first paragraph of article 3 it is believed that the according of national treatment by a subject of international law other than a State is *ex definitione* impossible.

Article 4. *Most-favoured-nation-clause* and Article 5. *Most-favoured-nation-treatment*

6. These articles need not be revised. On the occasion of putting the articles in a definitive order, however, they will have to be arranged together with draft article 9 (national treatment clause) and article 10 (national treatment) proposed in the Special Rapporteur's fifth report.³

Revised article 6. *Legal basis of most-favoured-nation treatment and national treatment*

Nothing in the present articles shall imply that a State is entitled to be accorded most-favoured-nation treatment or national treatment by another State otherwise than on the ground of a legal obligation.

COMMENTARY

This revised article extends the rule adopted in respect of most-favoured-nation treatment (art. 6) and makes it applicable to national treatment as well. The validity of the general statement that neither most-favoured-nation treatment nor national treatment can be claimed from another State unless the latter has a legal obligation to extend it seems to be beyond dispute. However, the

background of the rule and its actual content seem to be somewhat different in respect of these two types of treatment. With regard to the most-favoured-nation treatment, the meaning of the rule is, for all practical purposes, that such treatment cannot be claimed except on the basis of a most-favoured-nation clause, i.e. under the provision of a treaty promising most-favoured-nation treatment. The situation is similar but not exactly the same regarding national treatment. It may be true that in most fields, e.g. in that of shipping or in establishment matters, national treatment for the ships or nationals of a country cannot be claimed except on the ground of an appropriate treaty provision. However, among human rights and fundamental freedoms there are many which are equally due to nationals and foreigners and in regard to which, therefore, national treatment has to be granted even in the absence of a specific treaty obligation. In regard to the right to liberty and security, to equality before the courts and tribunals, to protection against interference with one's privacy, family, home or correspondence, to freedom of thought, conscience and religion, etc., the obligation to grant national treatment to all aliens lawfully in the territory of a State rests upon generally recognized customary international law. Thus, there are fields where the granting of national treatment is compulsory under general international law and where the denial of such treatment constitutes a violation of international law. This is not the case regarding most-favoured-nation treatment, which States cannot generally claim from one another except on the basis of a treaty stipulation.⁴ Because, however, revised article 6 covers both situations, it is proposed to adopt it in its newly presented wording.

Article 7. *The source and scope of most-favoured-nation treatment*

7. It is not proposed to make any change in the wording of the title or in the text of article 7. It would seem appropriate, however, to adopt an article parallel to article 7 on the source and scope of national treatment. The Special Rapporteur submits, therefore, the following draft for the consideration of the Commission:

Article X. *The source and scope of national treatment*

Without prejudice to the rules of general international law on the treatment of aliens lawfully in the territory of a State, the right of the beneficiary State to obtain from the granting State national treatment arises from the national treatment clause in force between the granting State and the beneficiary State.

COMMENTARY

The reasons for introducing the article by the phrase "without prejudice . . ." are the same as those given in the commentary on revised article 6. Article X, which is a parallel article to article 7 is drafted in a simpler way than

³ *Ibid.*, p. 124.

⁴ See para. 4 of the commentary to article 6.

the latter. It is believed, however, that its meaning is clear if read together with article 10 (fifth report) defining the term "national treatment".

II. Proposals concerning the draft articles presented by the Special Rapporteur in his fourth and fifth reports and additional commentaries

8. In the fourth report, article 6 was presented under the title "Presumption of unconditional character of the clause".⁵ In the fifth report it was proposed that the text of article 6 should be reduced to its first phrase.⁶ This shorter version is proposed anew with a more precise title and with a parallel article on the national treatment clause as follows:

Revised article 6. Presumption of unconditional character of the most-favoured-nation clause

Except when in appropriate cases most-favoured-nation treatment is accorded under the condition of material reciprocity, the most-favoured-nation clause is unconditional.

Article Y. Presumption of unconditional character of the national treatment clause

Except when national treatment is accorded under the condition of material reciprocity, the national treatment clause is unconditional.

COMMENTARY TO REVISED ARTICLE 6 AND ARTICLE Y

(1) The reader is respectfully referred to the commentaries on article 6⁷ and on articles 6 *bis* and 6 *ter*.⁸

(2) As the text of revised article 6 is unchanged and only its title shows a slight alteration, the novelty of the proposal lies in article Y. This article states the same presumption of unconditionality regarding the national treatment clause as exists in regard to the most-favoured-nation clause. This presumption clearly follows from the general principles of treaty interpretation. It is also believed to be consistent with the constant practice of States. In a letter from the Foreign Minister of France dated 22 July 1929, already cited,⁹ it was stated:

... when treaties provide for national treatment without making such treatment conditional on reciprocity, the question of whether a French national enjoys the same advantages in the territory of the other country no longer arises.¹⁰

⁵ See *Yearbook...* 1973, vol. II, p. 98, document A/CN.4/266.

⁶ See *Yearbook...* 1974, vol. II (Part One), p. 118, document A/CN.4/280, para. 1 of the commentary to articles 6 *bis* and 6 *ter*.

⁷ See *Yearbook...* 1973, vol. II, p. 98, document A/CN.4/266.

⁸ See *Yearbook...* 1974, vol. II (Part One), p. 118, document A/CN.4/280, paras. 1 and 2 of the commentary to articles 6 *bis* and 6 *ter*.

⁹ *Ibid.*, p. 126, commentary to articles 11 and 12.

¹⁰ Quoted by Mme M. Simon-Depitre in *Juris-classeur de droit international* (Paris, Editions techniques), vol. V, fasc. 523, p. 26, para. 66.

The learned commentator explains the text as follows:

An imbalance may result in the sense that the protection of nationals may be more effective in one country than in another, and their rights more extensive.¹¹

She states further:

Since the national treatment clause is the broadest and entails in principle the maximum sacrifices for the country which subscribes to it, the courts have tended to follow their restrictive inclination and to admit in cases where there is doubt, and even on occasion in cases where there is no doubt, a qualification other than that of assimilation to nationals. The most typical example is that of the Franco-Spanish Convention of 7 January 1862, article 1 of which provides that:

"The subjects of the two countries may travel and reside in the respective territories as nationals, establish themselves in places which they consider appropriate for their interests, acquire and own any kind of movable property or real estate, engage in any kind of industry, carry on both wholesale and retail trade, lease any houses, shops and stores which they may find necessary, effect the transport of goods and money and receive shipments both from within the country and from abroad, subject to payment of the duties and taxes and observance, in all cases, of the conditions laid down in the laws and regulations applicable to nationals".

The interpretation of this text has been one of the reasons for the conflict between the Government and the courts with respect to the granting of the right to own commercial property to foreigners enjoying the protection of diplomatic treaties: the Court of Cassation (*Cass. civ.*, 22 December 1931: *D.P.*, 1932, vol. 1, p. 131, comment by *Trasbot*; *Series 1932*, vol. 1, p. 257, comment by *Niboyet*; *Gaz. Pal.*, 1932, vol. 1, p. 205. — 24 February 1932: *Series 1932*, vol. 1, p. 249, comment by *H. Mazeaud*) took the view that the article constituted a reciprocal clause within the meaning of article 11 of the Civil Code and it called for proof of the existence in Spain of legislation analogous to the French law on commercial property, despite the conflicting interpretation given by the Minister for Foreign Affairs (*letter of 22 July 1929*, loc. cit., No. 65). The Court of Cassation subsequently revoked this interpretation and granted the Spanish the right to own commercial property (*Cass. civ.*, 16 February 1937; *Gaz. Pal.*, 1937, vol. 2, p. 687).¹²

(3) Revised article 6 states the presumption of the unconditional character of the most-favoured-nation clause. Articles 6 *bis* and 6 *ter*¹³ give the details as to the effect of an unconditional most-favoured-nation clause and to that of a most-favoured-nation clause conditional on material reciprocity. The same method is now followed regarding the national treatment clause. Article Y states the analogous presumption of unconditionality, whereas articles 11 and 12¹⁴ explain the effect of an unconditional national treatment clause and that of a national treatment clause conditional on material reciprocity. As a result, the order of the articles will have to be rearranged.

Revised article 7. The ejusdem generis rule

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

¹¹ *Ibid.*

¹² *Ibid.*, para. 67.

¹³ *Yearbook...* 1974, vol. II (Part One), p. 118, document A/CN.4/280.

¹⁴ *Ibid.*, p. 126.

COMMENTARY

(1) Revised article 7 differs from the original article 7¹⁵ in so far as it refers not only to the most-favoured-nation clause but also to the national treatment clause. Indeed, the national treatment clause is just as much subject to the *ejusdem generis* rule as the most-favoured-nation clause. This seems to be self-evident and in no need of a detailed explanation. The beneficiary State of a national treatment clause is in this regard in a position similar to the beneficiary State of a most-favoured-nation clause: it cannot claim an advantage of a kind other than that stipulated in the clause.

(2) In the case referred to below, the court rejected a claim based on national treatment clauses on the ground that the treatment claimed was not covered by the clauses upon which the claimant relied.

Heaton v. Delco Appliance Division, General Motors Corp.

This was an appeal by a British subject from a decision of the Workmen's Compensation Board which directed the payment to him, as an alien, of only one half of the commuted amount of the compensation to which a citizen of the United States would be entitled.³⁵ The appellant maintained that he was entitled to the same rights as a citizen of the United States under article X of the Treaty of Amity, Commerce, and Navigation between the United States and Great Britain (the Jay Treaty), signed in London on 19 November 1794, and articles II and V of the Convention between the United States and Great Britain relating to the Tenure and Disposition of Real and Personal Property, signed at Washington on 2 March 1899. The Court, which affirmed the decision of the Workmen's Compensation Board, said:

"Considering the terms, conditions and circumstances under which article X became part of the Treaty of 1794 and giving to it the most favourable interpretation, it was never intended by the contracting parties to include our present day form of compensation between employer and employee or anything vaguely similar to it that might have been in effect at the time of the treaty. Its purpose was, by a Treaty of Amity, Commerce and Navigation, to terminate the differences without respect to the merits; to produce mutual satisfaction and understanding; to regulate the commerce and navigation so as to render the same reciprocal to the benefit and satisfaction of both nations. Article X referred to the debts of individuals of both nations and their protection in the event of a war or national differences. It (article X) was primarily to prevent in the future such unlawful confiscations practiced following the Revolutionary War. The article was directed to the rights of the individual as such and ineffective to abrogate Section 17 of the Workmen's Compensation Law of the State of New York.

"We likewise conclude that articles II and V of the Convention of 1899 is of no help or solace to the claimant. The wording of article II is clear that it was intended for the purpose of disposing of personal property by testament, donation or otherwise and it cannot inferentially under any favorable interpretation be construed to have application to the present facts.

"There is no language in the Treaty which can be construed to make claim for death or injuries arising out of the relationship of employer and employee. The right to recover without alleging negligence or fault is given solely and exclusively by the statute of which Section 17 is a part. Even though social legislation such as this is subject to liberal interpretation, it cannot be so interpreted as to abrogate the wording and intent of the statute.

"... As to the Treaty of 1794 and the Convention of 1899 there is nothing in the language, taking into consideration the time, circumstances and conditions when they were written and also the present day circumstances, that can overcome or abrogate section 17 of the Workmen's Compensation Law of the State of New York.

"...

"It has been necessary to document by way of amendment our own Constitution through the years and many new and modern treaties have been executed by this Government and other nations. Section 17, referred to herein, has been described as a harsh statute which finds very little justification in any principle of fairness. However, the fortuitous circumstances here cannot be overcome by judicial interpretation. Our duty is done when we enforce the law as written by the legislative branch of the Government."

³⁵ Section 17 of the Workmen's Compensation Law reads in part as follows: "Compensation under this chapter to aliens ... about to become nonresidents of the United States ... shall be the same amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children ... and except that the board, may at its option, or upon the application of the insurance carrier, shall, commute as of the date of death all compensation to be paid to such aliens, by paying or causing to be paid to them one-half of the commuted amount of such compensation as determined by the board. In the case of a resident alien about to become nonresident the future payments of compensation shall be computed as of the date of non-residence".¹⁶

Revised article 8. The most-favoured-nation clause and benefit-restricting stipulations (clauses réservées)

The right of the beneficiary State to most-favoured-nation treatment is not affected by an agreement between the granting State and one or more third States confining treatment to their mutual relations.

Article 8 bis. The most-favoured-nation clause and multilateral agreements

The right of the beneficiary State to most-favoured-nation treatment is not affected by the fact that treatment by the granting State of a third State or of persons or things in a determined relationship with it has been accorded under a multilateral agreement.

COMMENTARY TO REVISED ARTICLE 8 AND ARTICLE 8 BIS

(1) In the commentary on article 8,¹⁷ two hypotheses were envisaged and somewhat blurred. One referred to the existence of a "clause réservée" i.e. to cases where the granting State and one or more third States agreed to restrict certain benefits to their mutual relations and intended to exclude from such benefits States which on the basis of most-favoured-nation clauses *ejusdem generis* would be entitled to claim the benefits in question. The other hypothesis referred to in the commentary on article 8 is the case where the treatment due under a most-favoured-nation clause to the beneficiary State has been accorded by the granting State to third States under a multilateral treaty or other multilateral arrangements without being accompanied by a "clause réservée". These

¹⁵ *Yearbook...* 1973, vol. II, p. 102.

¹⁶ *Ibid.*, pp. 141-142, document A/CN.4/269, para. 67.

¹⁷ *Ibid.*, pp. 108 *et seq.*, document A/CN.4/266.

two hypotheses or situations differ considerably. In the first, there exists a stipulation of a particular kind (a "clause réservée") between the granting State and one or more third States. This stipulation can be a multilateral undertaking but it can also be bilateral. In the second, no such express stipulation exists, but the benefit-accorded agreement between the granting State and third States is always a multilateral arrangement.

(2) On the basis of the foregoing considerations it would seem that the two situations deserve to be treated in two separate articles. This has been done in the articles presented above as revised article 8 and article 8 *bis*.

(3) Revised article 8 as presented in the Special Rapporteur's fourth report is a new version of article 8. Its title seems to indicate better the content of the text; it remains to be seen, however, whether the arbitrary translation of the expression "clauses réservées" into English will prove to be acceptable. The reference to the possibility of a contrary provision has been omitted from the text. The provision of revised article 8 is, of course, as most, if not all of the articles in the study, of a dispositive character and not *jus cogens*. It seems superfluous to emphasize this character of the provisions in the individual articles.

(4) As to further comments on revised article 8 the reader is respectfully referred to paragraphs 1 to 13 of the commentary to article 8.

The most-favoured-nation clause and multilateral agreements

(5) Article 8 *bis* is new. Paragraphs 14 to 22 of the commentary on article 8 deal with the situation treated in article 8 *bis*. In addition to what has been stated in that portion of the commentary on article 8, the following comments are submitted by the Special Rapporteur explaining the ideas which lead to the presentation of article 8 *bis*.

(6) In paragraph 19 of the commentary on article 8, under the heading "GATT and non-member States", the question was raised: what is the position of third States, not members of GATT? Can they claim under bilateral most-favoured-nation clauses GATT treatment from members? A cautious answer to this question was given in this way: "There is no reason for a negative answer to this question. That some treaties do expressly except GATT favours from the operation of the clauses does not contradict but rather supports this view".¹⁸

That question, however, has been answered in the affirmative by a recognized authority on GATT matters, John H. Jackson, 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.⁹

Some suggestion was made at the 1947 Geneva meetings that GATT benefits should apply only to GATT members, but this idea was rejected.

In some instances the net result is to greatly reduce the incentive for a nation to enter GATT since, if it has a MFN 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 agreement.¹⁰

⁹ U.N. Doc. EPCT/C.II/3, at 14 (1946).

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.¹⁹

(7) The following three cases further illustrate the point that most-favoured-nation clauses do attract the benefits accorded by the granting State to third States under multilateral agreements. The first case clearly spells out this point in respect of the Hague Convention on Civil Procedure of 17 July 1905.

A. *Asia Trading Co., Limited v. Biltimex*

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 *cautio judicatum solvi*. The plaintiffs opposed the application.

The Court held that the order for the *cautio* must be refused. This followed from article 24 (paras. 1 and 2) of the Netherlands-Indonesian Union Statute agreed upon on 2 November 1949, which promised the subjects of each partner to the Union treatment on a footing of substantial equality with the other's own subjects, and in any case most-favoured-nation treatment.

The latter provision guaranteed to Indonesians exemption from the *cautio judicatum solvi*, because the Netherlands had previously exempted other foreigners and foreign countries from the *cautio* under the Hague Convention on Procedure in Civil Cases of 17 July 1905.²⁰

(8) 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.

¹⁹ 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. 257-258. See also the Second report (*Yearbook... 1970*, vol. II, p. 230, document A/CN.4/228 and Add.1, paras. 183-187).

²⁰ *Yearbook... 1973*, vol. II, p. 137, document A/CN.4/269, para. 55.

¹⁸ *Ibid.*, p. 114, document A/CN.4/266.

B. *McLane v. N.V. Koninklijke Vleeswarenfabriek B. Linthorst en Zonen*

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 1905.³⁶ ... The appellant ... relied [*inter alia* – on] article III, section I, of the Netherlands—United States Treaty of Friendship, Commerce and Navigation of 27 March 1956.³⁷

The appellant submitted that he was entitled to benefit from article 24 of the Hague Convention on Civil Procedure through the operation of this most-favoured-nation clause. The Court, which held that the appeal must be dismissed, said:

“... 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”.

³⁶ Article 24 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”.

³⁷ 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 favourable 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 favourable than that accorded nationals of any third country or that required by international law”.²¹

(9) In the third case, it has been again expressly recognized that privileges provided pursuant to a “multiple or bipartite international treaty” can be claimed on the basis of a most-favoured-nation clause.

C. *Taxation Office v. Fulgor (Greek Electric Company)*

This decision concerned the application to a Swiss company operating in Greece of the provisions of the Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Greece for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, signed at Athens on 25 June 1953.

The Swiss company claimed the application of that convention pursuant to the most-favoured-nation clause included in the agreement ratified by law 3610/1928 on installation and legal protection concluded between Greece and Switzerland. The Greek Council of State said:

“Whereas, as it was considered by this Court ... from the rulings of articles 9 and 11, para. two, of this latter treaty, it becomes evident that the tax privileges provided by any one of the contracting parties to the subjects and firms of the ... third country are extended to the subjects and firms of the other contracting party *de jure* and with no ... barter provided by the third country ... This rightful extension of tax privileges without any barter ... [concerning] the subjects of Greece and Switzerland, takes place in any case ... [regardless of] whether these privileges are provided to the third nation pursuant to home legislation of Greece or Switzerland or pursuant to [a] multiple or bipartite international treaty with the third country and ... [regardless] of the purpose for which they were offered; the more so if this is related to the avoidance of double taxation, since the rulings of above clauses of the Treaty between Greece and Switzerland fail to make any distinction in this respect. Consequently, the application of the rulings of the foregoing Treaty between Greece and Great Britain regarding the income of the Swiss company earned in Greece by virtue of which tax privileges were decreed, was not excluded by the fact that these are included in [the] treaty for the avoidance of double taxation, nor did it depend on the fact ... whether Greek subjects or Greek firms enjoy in Switzerland similar tax privileges as in Great Britain ... Consequently the grounds supported in contradiction in the petition under consideration should be dismissed as being groundless”.²²

(10) Having cited these three cases it may seem useful, before engaging in the further study of the subject indicated in paragraph 22 of the commentary on article 8, to recapitulate briefly the results hitherto arrived at.

Subject to a further study on the problem of the relation between a most-favoured-nation clause and a customs union or a free trade area and subject also to a further study on the relevance, in that context, of the different levels in the economic development of States, the following conclusions have been reached:

(11) As regards the so-called open multilateral treaties, it has been found that there is no such constant and uniform usage, accepted as law, as 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.

The author of a thorough study of recent vintage, quoted several times in previous reports, 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, ...²³

²² *Ibid.*, p. 148, para. 87.

²³ E. Sauvignon, *La clause de la nation la plus favorisée* (Grenoble, Presses Universitaires de Grenoble, 1972), pp. 267–268.

²¹ *Ibid.*, p. 142, para. 68.

(12) As regards the so-called closed multilateral treaties it has also been found that the advantages accorded under such treaties do not escape from the operation of a most-favoured-nation clause. The argument has been made that the main reason (although a false one—cf. in this regard E. Allix, quoted in paragraph 17 of the commentary to article 8) 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 assume also 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.²⁴ 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.

Sauvignon treats this question as one relating to groupings which have not reached the stage of a customs union or a free trade area (*regroupement en-deçà de l'union douanière ou de la zone de libre échange*) and groupings having another object than a customs union or a free trade area (*regroupement ayant un objet autre que l'union douanière ou la zone de libre échange*).²⁵ He examines under these headings the cases ECSC, OEEC (the predecessor of OECD) and the European Convention on Establishment concluded in the framework of the Council of Europe on 13 December 1955. He introduces his analysis with the following words:

... When they [multilateral conventions closed to the accession of third States] establish preferential systems which have not reached the stage of a union or [free trade] area or have another object, the problem of the legal relationship with the most-favoured-nation clause arises again. The beneficiary third States are entitled, in law, to invoke most-favoured-nation treatment. But in practice they may be dissuaded from doing so because such a claim seems politically ill-judged, or because it might prejudice the contractual ties which the claimant has entered into with all the members of the grouping, if the latter decide to react collectively.²⁶

This—it is believed—is a correct evaluation of the situation and an open admission that the operation of the clause extends also to the favours accorded within the multilateral treaties of the type discussed here. It is of course quite another question whether extra-legal considerations, political motives or other factors can or do discourage the beneficiary State from exercising its right.

(13) In his conclusions²⁷ Sauvignon cites an article by Alexandre-Charles Kiss²⁸ in which the learned author develops the following idea: it is generally admitted that

if the granting State and a third State unite into a federal State or even a confederation, the beneficiary of a most-favoured-nation clause loses its rights to the advantages which were accorded by the granting State to the third State before their union took place. Therefore, the author considers—just as it is customary to grant an exception to the operation of a clause to a customs union already in its stage of formation, it would be logical to exempt from the operation of the clause those groupings, the ultimate aim of which is—as e.g. of EEC—to amalgamate the member States into one single State.

(14) Kiss cites also the case of ECSC, against the constituent States of which beneficiary States had not relied upon their clauses. Their reticent attitude was caused—according to Kiss—by the provision of the third paragraph of section 20 of the treaty instituting ECSC,²⁹ which threatens with collective action States wishing to enforce their most-favoured-nation rights. In this connexion he writes:

Clearly we are here leaving the domain of law because the law becomes inapplicable in the actual situation. There is here an incontestable admission that the most-favoured-nation clause is incompatible with the treaties relating to regional groupings and that its application would entail consequences so unacceptable that it is preferable to have recourse to extraordinary measures rather than to accept them.³⁰

To this Sauvignon attaches the following comment:

This opinion must be qualified considerably. It is not certain that the application of the clause to the advantages provided for in close multilateral conventions could always entail unacceptable consequences, and that a new exception to the clause must be introduced. It is, in fact very difficult to establish a criterion for distinguishing between genuine groupings, which seek a permanent consolidation of the ties between the member countries pending the formation of an economic, and subsequently political, union, and *ad hoc* preferences which have no other object than the evasion of the equal treatment rule provided for in the clause. In the latter case, most-favoured-nation treatment constitutes a justified legal obstacle. In the former case, it is incumbent upon the member States to prove the cohesiveness and durability of the grouping by pursuing, with regard to third States benefiting under the clause, an effective collective policy which will deter any attacks on the integrity of the collective régime which has been established.³¹

(15) Kiss concludes his article with the following passage (not quoted by Sauvignon):

It is another question whether, if the occasion arose, a judge, in an endeavour to be fair to all parties, would not consider himself obliged to recognize that it would be desirable for the Government participating in the work of unification to make certain compensatory payments to the third State benefiting under the most-favoured-nation clause.³²

(16) All these passages—it is submitted—support the position taken in article 8 *bis*. The quoted authors see very clearly that *de lege lata* there is no such rule of international law which would except neither open nor closed

²⁴ See para. 17 of the commentary to article 8.

²⁵ Sauvignon, *op. cit.*, pp. 269 *et seq.*

²⁶ *Ibid.*, p. 269.

²⁷ *Ibid.*, p. 277.

²⁸ "La Convention européenne d'établissement et la clause de la nation la plus favorisée", *Annuaire français de droit international*, 1957 (Paris), vol. III, pp. 478–489.

²⁹ See para. 8 of the commentary to article 8.

³⁰ Kiss, *loc. cit.*, p. 486.

³¹ Sauvignon, *op. cit.*, p. 277.

³² Kiss, *loc. cit.*, p. 489.

multilateral treaties from the operation of a most-favoured-nation clause—which is not accompanied by an express proviso to that effect.³³ For the same reason he would also not wish to elaborate on the peculiarities of the so-called “restricted” multilateral treaties. What they do is a search for a solution in cases where the granting State finds itself in a web of its own conflicting treaty obligations. This is, however, a problem which—in the view of the Special Rapporteur — falls beyond the scope of this study.³⁴

III. The case of customs unions and similar associations of States

9. In the following pages an examination will be made of the relation between the most-favoured-nation clause and the advantages granted in the framework of a customs union or other similar associations of States. This seems to be warranted by the fact that customs unions or other such associations of States are not always—though they often are—multilateral. Hence the findings on the relation between the clause and multilateral treaties cannot be automatically applied—at least not to bilateral customs unions. Further, such examination has been promised by the Special Rapporteur³⁵ because of the specificity of such unions and the wealth of problems involved.

10. Before embarking on this study two preliminary clarifications are necessary:

(a) What is understood here under “similar associations of States” besides customs unions is as follows:

- (i) A free trade area;
- (ii) Any interim régime leading to the formation of a customs union or a free trade area; and
- (iii) Any other association or grouping of States which is based upon a customs union, a free trade area, or an interim régime leading or intended to lead to a customs union or a free trade area.

(b) Whenever reference is made to a customs union or free trade area below, all other types of the associations mentioned above are also to be understood. It follows from what is indicated under (a) above that the type of most-favoured-nation clause which is borne in mind for the present purposes is one which covers or is restricted to benefits in respect of customs duties and other matters related to trade.

11. The agreement reproduced below illustrates the problems to be discussed:

³³ Because the result is the same in regard to both “open” and “closed” multilateral treaties, the Special Rapporteur does not propose to engage in an analysis of these two expressions or to examine the wide spectrum of the “grey” area obviously lying between these two extremes.

³⁴ Further proposals concerning articles 6 *quater*, 7 *bis*, 15 and 16 will be made later.

³⁵ See *Yearbook... 1973*, vol. II, pp. 115–116, document A/CN.4/266, para. 22 of the commentary to article 8.

TRADE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS AND THE GOVERNMENT OF THE COMMONWEALTH OF AUSTRALIA. SIGNED AT MOSCOW, ON 15 OCTOBER 1965

The Government of the Union of Soviet Socialist Republics and the Government of the Commonwealth of Australia,

Desiring to develop trade between their two countries to their mutual benefit,

Have agreed as follows:

Article 1

1. The Contracting Parties shall accord each other unconditional most-favoured-nation treatment in all matters with respect to customs duties and charges of any kind imposed on or in connection with importation or exportation of products and with respect to the method of levying such duties and charges, with respect to all rules and formalities connected with importation or exportation, and with respect to all internal taxes or other internal charges of any kind.

2. Accordingly, products of the territory of one of the Contracting Parties imported into the territory of the other Contracting Party shall not be subject, in regard to the matters referred to in paragraph 1 of this Article, to any other or higher duties, taxes or charges, or to any rules or formalities more burdensome, than those to which the like products of any third country are or may hereafter be subject.

3. Similarly, products exported from the territory of one of the Contracting Parties and consigned to the territory of the other Contracting Party shall not be subject, in regard to the matters referred to in paragraph 1 of this Article, to any other or higher duties, taxes or charges, or to any rules or formalities more burdensome, than those to which the like products when consigned to the territory of any third country are or may hereafter be subject.

4. Any advantage, favour, privilege or immunity which has been or may hereafter be granted by either Contracting Party in regard to the matters referred to in paragraph 1 of this Article to any product originating in or consigned to any third country shall be immediately and unconditionally accorded to the like product originating in or consigned to the territory of the other Contracting Party.

Article 2

1. No prohibitions or restrictions, whether in the form of quotas, import or export licences, foreign exchange controls, regulations, directives or any other measures, shall be instituted or maintained by either Contracting Party on the importation of any product from the territory of the other Contracting Party or on the exportation of any product consigned to the territory of the other Contracting Party, unless such prohibitions or restrictions are applicable to all third countries.

2. The provisions of paragraph 1 of this Article shall not apply to import or exchange prohibitions or restrictions applicable to all countries in like circumstances for the purpose of safeguarding the external financial position and balance of payments.

Article 3

The provisions of this Agreement shall not limit the right of either Contracting Party to apply prohibitions or restrictions of any kind which are directed:

(a) to the protection of its essential security interests; or

(b) to the protection of public health or the prevention of diseases and pests in animals or plants.

Article 4

All payments arising from trade between the two countries shall be effected in convertible currency.

Article 5

The provisions of Articles 1 and 2 of this Agreement shall not apply to:

(a) preferences or advantages accorded by the Union of Soviet Socialist Republics to countries immediately adjacent to the Union of Soviet Socialist Republics;

(b) preferences or advantages, accorded by the Commonwealth of Australia within the framework of the Commonwealth of Nations or to Ireland.

Article 6

The Contracting Parties agree to consult together at any time, at the request of either, on any matter affecting the operation of this Agreement.

Article 7

This Agreement shall come into force on the day of its signature and shall remain in force for a period of four years from that day. Thereafter it shall remain in force until the expiration of ninety days from the date on which one of the Contracting Parties receives from the other Contracting Party written notice of its intention to terminate it.

IN WITNESS WHEREOF, the undersigned, being duly authorised by their respective Governments, have signed this Agreement.³⁶

12. As will be seen from articles 3 and 5, the agreement contains exceptions to the most-favoured-nation clause, but no exception concerning a customs union or a free-trade area. It is interesting to note in this connexion that the most-favoured-nation clauses contained in a trade agreement between the Government of the Republic of the Philippines and the Government of the Commonwealth of Australia, which was signed at Manila, on 16 June 1965 and entered into force on that date, contains numerous exceptions to the clause including explicitly the association of one of the parties in a customs union or a free trade area.

The exception clause of this agreement reads as follows:

Article V

The provisions of Articles III and IV of this Agreement shall not apply to:

(a) tariff preferences or other advantages accorded at present by the Republic of the Philippines to the United States of America;

(b) tariff preferences or other advantages accorded by the Commonwealth of Australia to its external territories or to any country at present a member of the Commonwealth of Nations, including its external territories or to Ireland;

(c) tariff preferences or other advantages accorded by either Government to any third country which are not inconsistent with the General Agreement on Tariffs and Trade or which conform to

any international agreement concluded under the auspices of the United Nations, including preferences and advantages resulting from the association of one of the parties in a customs union or free trade area;

(d) such measures as either Government may consider necessary to safeguard its external financial position and balance of payments;

(e) such measures either Government may take to carry out its obligations under any multilateral commodity agreement which is open to participation by the parties to this Agreement.³⁷

13. As seen from the two examples given above, there are clauses which contain and others which do not contain an explicit exception concerning advantages granted within a customs union or a free trade area. The question, therefore, arises, how to interpret a most-favoured-nation clause which does not contain such an explicit exception?

14. According to the general rule of interpretation embodied in the Vienna Convention on the Law of Treaties³⁸ a most-favoured-nation clause, like any other treaty provision, has to 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" (art. 31, para. 1). However, "there shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties" (art. 31, para. 3(c)).

15. Are there relevant rules of international law which would provide for an implied exception concerning customs unions and free trade areas in every most-favoured-nation stipulation concerning customs duties and other related matters? In other words and in a somewhat detailed manner: is it possible "to discern in . . . [the practice of States] any constant and uniform usage"³⁹ exempting favours granted within a customs union or a free trade area from the operation of a most-favoured-nation clause which obliges the grantor State vis-à-vis an outsider beneficiary State? If the answer is in the affirmative, is this usage coupled with a *communis opinio juris* which raises such usage to the level of a rule of customary international law?

16. In the event that one or both of these elements are lacking and no rule of customary law can be established for the purpose of codification, is it desirable, and on what grounds, that the Commission propose the adoption of a rule of the kind as a progressive development of international law and how should such a rule be formulated?

An exercise of this kind is of course carried out by the Commission before the adoption of every draft rule. This logical process is inherent in every work of codification and progressive development. The special emphasis laid upon it here does not detract from its relevance in all other spheres of this and other similar studies.

³⁷ *Ibid.*, vol. 541, p. 34.

³⁸ 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.

³⁹ *Asylum case (Colombia/Peru), Judgement of November 20th 1950. ICJ Reports, 1950, p. 277.*

³⁶ United Nations, *Treaty Series*, vol. 563, pp. 241, 243 and 245.

Definitions

17. According to the Permanent Court of International Justice, the requirements of a customs union are as follows: "uniformity of customs law and customs tariff; unity of the customs frontiers and of the customs territory vis-à-vis third States; freedom from import and export duties in the exchange of goods between the partner States; apportionment of the duties collected according to a fixed quota".⁴⁰

18. While the definition of the Court was intended to be of a general validity, that embodied in GATT serves only the purpose of that agreement, and it is also quite different. According to article XXIV, paragraph 8 of GATT:

(a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

- (i) duties and other restrictive regulations of commerce (except where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
- (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.⁴¹

19. Other parts of article XXIV, however, contain further conditions which have to be fulfilled in order that a customs union or a free-trade area meet the requirements that are necessary for constituting a full-fledged exception to the most-favoured-nation clause of the Agreement. Most of these provisions were quoted in the Special Rapporteur's second report⁴² and are reproduced here for the sake of convenience as follows:

...

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided that* :

(a) with respect to a customs union, or an interim agreement leading to the formation of a customs union, the duties and other

regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;

(b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement, as the case may be; and

(c) any interim agreement referred to in subparagraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

6. If, in fulfilling the requirements of subparagraph 5 (a), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reductions brought about in the corresponding duty of the other constituents of the union.

7. (a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

(b) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of subparagraph (a), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

(c) Any substantial change in the plan or schedule referred to in paragraph 5(c) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.⁴³

20. As we are reminded by Jackson, article XXIV grants

an exception to GATT obligations for three types of regional arrangements: (1) A customs union, (2) a free trade area and (3) an "interim agreement" leading to the formation of either a customs union or free-trade area. The expressed rationale behind this exception is the recognition stated in Article XXIV, paragraph 4 that regional arrangements can "increase freedom of trade" through "closer integration between economies". ... the danger of "raising barriers to the trade of other contracting parties" is also recognized.⁴⁴

⁴⁰ Customs régime between Germany and Austria, Protocol of 19 March 1931, Advisory Opinion of 5 September 1931, *P.C.I.J.*, Series A/B, No. 41, p. 51.

⁴¹ GATT, *Basic Instruments and Selected Documents*, vol. IV, (Sales No. GATT/1969-1), p. 43.

⁴² *Yearbook... 1970*, vol. II, p. 226, document A/CN.4/228 and Add.1, para. 167.

⁴³ GATT, *Basic Instruments and Selected Documents*, vol. IV (*op. cit.*), pp. 41-43.

⁴⁴ Jackson, *op. cit.*, p. 581.

However, nothing is said against barriers to the trade of non-parties.

21. The philosophy of article XXIV is that if the particular legal requirements and prerequisites of one of the three arrangements mentioned are fulfilled, then the exception to GATT obligations (to the most-favoured-nation clause) is automatic—no special action is required by GATT.⁴⁵ According to paragraph 10 of article XXIV, exceptional cases may be approved by the Contracting Parties by a two-thirds majority.

22. For the purpose of the present report, it is of special interest that the terms of paragraph 5 of article XXIV, which establishes the exception, apply only to regional arrangements between territories of contracting parties; thus, if a non-party to GATT belongs to the customs union, free-trade area or interim agreement in question, the arrangement is not eligible for the “automatic exception” in GATT.⁴⁶

23. It is impossible in the context of this report to deal in detail with all the difficulties entailed by the interpretation and application of the provisions of article XXIV. Innumerable GATT documents and a vast literature have analysed in one way or another these provisions.⁴⁷

Suffice it here to indicate briefly some of the most controversial problems:

What are the criteria for “trade creation” and “trade diversion” as these terms are understood to express tersely the idea of paragraph 4?

What is the meaning of the following expressions: “... shall not on the whole be higher or more restrictive ...” (para. 5(a)); “... general incidence of the duties and regulations of commerce applicable ...” (para. 5(a)); “... a plan and schedule ...” (para. 5(c)); “... reasonable length of time ...” (para. 5(c)); “... substantially all the trade ...” (para. 8(a) (i)), etc.?

24. Some remarks on these and other problems in connexion with article XXIV were quoted in the Special Rapporteur’s second report.⁴⁸ The reader is respectfully referred to these paragraphs. Paragraph 171 deserves to be quoted *in extenso*:

Not a single customs union or free-trade area agreement which has been submitted to the Contracting Parties has conformed fully to the requirements of article XXIV. Yet, the Contracting Parties have felt compelled to grant waivers of one kind or another for every one of the proposed agreements.⁴⁹ The Contracting Parties have not been able to say whether the major schemes examined by them qualified as customs unions or free-trade areas under the GATT rules. The formal action in the case of the European Economic Community was to lay aside “for the time being” questions of law and the compatibility of the Treaty with the General Agreement.

⁴⁵ *Ibid.*, pp. 581–582. See also the numerous documentary sources cited by Jackson.

⁴⁶ *Ibid.*, p. 582.

⁴⁷ Jackson, *op. cit.*; T. Flory, *Le GATT, droit international et commerce mondial* (Paris, Librairie générale de droit et de jurisprudence, 1968); K.W. Dam, *The GATT, Law and International Economic Organization* (Chicago, University of Chicago Press, 1970), etc.

⁴⁸ *Yearbook... 1970*, vol. II, p. 227, document A/CN.4/228 and Add.1, paras. 169–170.

In the case of the European Free Trade Association and the Latin American Free Trade Area it was concluded that the legal question could not be “fruitfully discussed further at this stage” and that “at this juncture” it would not be “appropriate to make any formal legal findings”.^{48a}

¹⁸³ K.W. Dam, [“Regional economic arrangements and the GATT: The legacy of a misconception”, in *The University of Chicago Law Review*, vol. 30, No. 4 (Summer 1963)], pp. 660–661.

¹⁸⁴ G. Patterson, [Discrimination in International Trade: The Policy Issues, 1945–1965 (Princeton, N.J., Princeton University Press, 1966)], pp. 157–158. For further details on these cases, see G.P. Verbit, “Preferences and the Public Law of International Trade: The End of Most-Favoured-Nation Treatment?” in *Hague Academy of International Law, Colloquium 1968: International Trade Agreements* (Leiden, Sijthoff, 1969) pp. 48–49.

The practice of States

25. States parties to a treaty granting most-favoured-nation rights are by virtue of their sovereignty free to a limitation of such rights. They can and generally do limit the clause to certain fields (trade, customs duties, consular rights etc.) and can—and very often do—exclude from the operation of the clause certain advantages accorded to specified third States or in specific contexts, or maintain their freedom to withhold most-favoured-nation rights in definite circumstances.⁴⁹

26. Stipulations excluding the concessions accorded within customs unions or similar associations of States are frequent. Snyder, who analysed the economic treaties concluded between the two world wars found 280 customs union exception clauses in that period. He states that

the Treaty of Rapallo is indicative of the general type of provision covering this matter: it excludes from the normal operation of the most-favoured-nation clause “favours granted by one of the contracting parties to a third State on account of a customs union already established or to be established”. Occasionally, “economic union” or “economic understanding” is apparently substituted for customs union, even though they are not necessarily identical.⁵⁰

27. This situation has not changed in essence since the Second World War. It is believed that a majority of trade agreements, i.e. those dealing with customs tariffs and related matters contain an explicit customs union exception to the most-favoured-nation clause. Such provisions show an infinite variety. Some further examples are given below:

TRADE AGREEMENT BETWEEN THE UNION OF SOVIET SOCIALIST REPUBLICS AND THE REPUBLIC OF DAHOMEY. SIGNED AT PORTO-NOVO, ON 10 JULY 1963

Article I

The provisions of this article shall not apply to

...

(c) Advantages resulting from agreements concerning a customs union which have been or may hereafter be concluded by either Contracting Party.⁵¹

⁴⁹ See, e.g. arts. 3 and 5 of the Australia-USSR agreement or art. V of the Australia-Philippines agreement, quoted in paras. 11 and 12 above.

⁵⁰ R.C. Snyder, *The Most-Favoured Clause: An Analysis with Particular Reference to Recent Treaty Practice and Tariffs* (New York, King’s Crown Press, Columbia University, 1948), p. 160.

⁵¹ United Nations, *Treaty Series*, vol. 528, p. 176.

TRADE AGREEMENT BETWEEN THE GOVERNMENT OF GREECE AND THE GOVERNMENT OF PAKISTAN. SIGNED AT ATHENS, ON 17 JANUARY 1963

Article IV

The advantages set out in Article III above of this agreement shall not apply to:

- (i) Preferences which either of the two countries grants to facilitate frontier traffic;
- (ii) Advantages resulting from a customs union which either of the two Contracting Parties had previously concluded or shall conclude, or resulting from a free exchange system as in the cases of the Free Trade Area;
- (iii) Preferences and advantages permitted by GATT, particularly those covered by Article I and paragraph II of Article XXIV of GATT.⁵²

TREATY OF COMMERCE, ESTABLISHMENT AND NAVIGATION BETWEEN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND JAPAN. SIGNED AT LONDON ON 14 NOVEMBER 1962

Article 29

...

3. The provisions of the present Treaty relative to the grant of treatment not less favourable than that accorded to any other foreign country shall not be construed so as to oblige one Contracting Party to extend to the other the benefit of any treatment, preference or privilege which may be extended by the former Contracting Party by virtue of:

- (a) the formation of a customs union or a free trade area, or
- (b) the adoption of an agreement designed to lead to the formation of such union or area within a reasonable length of time.⁵³

The most notable customs union exception clause is obviously article XXIV of GATT, the text of which has been reproduced above.⁵⁴

28. There is no doubt about the fact that it is a very frequent practice of States to except from their most-favoured-nation rights and obligations benefits granted by virtue of a customs union, a free trade area or other associations. As to customs unions, this is not a new phenomenon.

The League of Nations Economic Committee

29. In the Special Rapporteur's first report, the following passage from a League of Nations paper entitled "Recommendations of the Economic Committee relating to tariff policy and the most-favoured-nation clause", dated 16 February 1933, was quoted:

The most-favoured-nation clause frequently includes a provision allowing for the possibility of each of the parties concluding a complete customs union with a third power. In such a case, the economic unit becomes in practice something different from the political unit, and the customs union may be regarded rather as the abolition of a customs frontier than as a form of discrimination between competing foreign purveyors.

In such cases, the exception to the most-favoured-nation clause takes the form of a reservation covering the privileges accorded to a third power in virtue of a customs union which has been or may hereafter be concluded. The clause may be drawn up in different ways, but the variations do not involve substantial differences. It appears in a large number of treaties.

... it is sufficient to declare that customs unions constitute exceptions, recognised by tradition, to the principle of most-favoured-nation treatment.⁵⁵

30. The reference to a "recognised tradition" of the customs union exception—as is evident from the context—clearly points to the traditional insertion of such an exception into clauses on customs matters. The Economic Committee clearly intended to encourage the continuance of this "tradition" as under the heading "Wording of the clause" it recommended a text for clauses on customs matters with the inclusion of the following passage:

Nevertheless, the advantages now accorded or which hereafter be accorded to other adjacent countries in order to facilitate frontier traffic, and advantages resulting from a Customs union already concluded or hereafter to be concluded by either Contracting Party, shall be excepted from the operation of this article.⁵⁶

The 1936 resolution of the Institute of International Law

31. It was the frequency of stipulation of customs unions exceptions which lead B. Nolde to far-fetched conclusions. In his report to the Institute of International Law he cites the passage from the text of the model clause recommended by the League Economic Committee quoted above and continues as follows:

The two cases envisaged in this reservation—frontier traffic and customs unions—are very different, but it is equally evident it could never be considered that either of the special customs régimes to which they refer could be acquired by virtue of the most-favoured-nation clause. Moreover, trade conventions which go into any detail at all always contain these two reservations, and we may consider them as belonging to general international law.⁵⁷

And further:

In fact, it has never been disputed that customs unions do not require any privilege to be granted by virtue of the clause. A very great number of trade treaties state this explicitly, and those which do not do so must be interpreted in this way.⁵⁸

32. The complete indifference of the distinguished rapporteur in 1934 towards quite recent events and to the conduct of important States is, indeed, astonishing and so is the remarkable ease with which the Institute followed the proposal of its rapporteur. The relevant text of the resolution adopted by the Institute at its Brussels session in 1936 on the effects of the most-favoured-nation clause in matters of commerce and navigation reads as follows:

⁵⁵ *Yearbook... 1969*, vol. II, p. 179, document A/CN.4/213, annex I.

⁵⁶ *Ibid.*

⁵⁷ *Annuaire de l'Institut de Droit International, 1934* (Brussels), vol. 38, pp. 452-453.

⁵⁸ *Ibid.*, pp. 453-454.

⁵² *Ibid.*, vol. 538, p. 178.

⁵³ *Ibid.*, vol. 478, pp. 120 and 122.

⁵⁴ See above, paras. 18 *et seq.*

Paragraph 7

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

...

to the treatment resulting from a Customs union which has been or may hereafter be concluded; ...⁵⁹

Official views on an alleged implied exception

33. Among the events and the attitudes of States which the Institute could have taken into account was the notable affair of the customs régime between Austria and Germany which came up before the Council of the League of Nations in 1931 and the official pronouncements of several States to which this case has given rise.

34. The Solicitor for the Department of State of the United States of America expressed the view that the establishment of a customs union between Austria and Germany would not constitute an exception to the most-favoured-nation provisions in the treaty of friendship, commerce, and consular rights of 8 December 1923 with Germany⁶⁰ and of 19 June 1928 with Austria.⁶¹

He stated:

It must be apparent that this Government, at the time of the conclusion of commercial treaties with Germany and Austria, never contemplated that a customs union would be an implied exception to the most-favoured-nation clause, particularly since certain specific exceptions to the clause were expressly stated. Nor can this Government be held to any recognition of such an exception as a principle of international law. This Government has never taken cognizance of the alleged continental tradition of customs unions as implied exceptions; indeed, it is doubtful if such a tradition was ever recognized by other than a few nations. International law does not find its present growth in the traditional habits of continental nations alone... Seemingly the exponents of this idea content themselves with the citation of treaties in which specific exception has been made. It might follow that the specific inclusion of the exception is the tradition and that this established procedure reflects the true legal nature thereof.

The logical conclusion, therefore, would seem to be that, since certain exceptions to the most-favoured-nation provisions were made in the treaties [concluded by the U.S.] with Germany and Austria and such exceptions do not include customs unions, we would be entitled to claim from Germany whatever advantages she may extend to Austrian trade and commerce, and to claim from Austria whatever advantages may be extended by that country to trade and commerce with Germany.

The fact that the contracting parties undertook to make exceptions to the obligation to extend unconditional most-favoured-nation treatment in customs matters and made no exception with respect to a possible customs union would seem to preclude the possibility of regarding such an arrangement as an exception to the most-favoured-nation provisions on the basis of the principle *inclusio unius exclusio alterius*.⁶²

35. The position taken by France was very similar to that of the United States. According to the French memorandum of 14 May 1931 submitted to the Council of the League:

⁵⁹ For the full text of the resolution see *Yearbook... 1969*, vol. II, pp. 180-181, document A/CN.4/213, Annex II.

⁶⁰ League of Nations, *Treaty Series*, vol. LII, p. 133.

⁶¹ *Ibid.*, vol. CXVIII, p. 241.

⁶² G. H. Hackworth, *Digest of International Law*, vol. V (Washington, D. C., U.S. Government Printing Office, 1943), pp. 295-196.

... The fact that certain Powers did not include an exception relating to customs unions in the treaties based on the most-favoured-nation treatment which they concluded with Austria and Germany would give these Powers "the strongest legal grounds for claiming in the present circumstances the full benefit of most-favoured-nation treatment".

The memorandum adds: It would be purposeless to refute this argument by relying on the "Recommendations relating to commercial policy" which the Economic Committee of the League of Nations addressed to the Council in 1929, in which it is said that: "Customs unions constitute exceptions, recognized by tradition, to the principle of most-favoured-nation treatment". But the report immediately adds: "But [the Committee] does not propose to offer an opinion on the more controversial topic of their formation". This constitutes a recognition by the Economic Committee that any customs union that may be formed would give rise from the outset to political or economic objections, sometimes fundamental, on the part of third States. As an example there might be quoted the intervention of Austria-Hungary in 1905 based on the most-favoured-nation treatment which caused a proposed customs union between Bulgaria and Serbia to fail.⁶³

Sauvignon quoting the above passages, adds:

It appears from this memorandum that France, at that moment, reserved the right to use the clause to justify in law its possible political or economic opposition to a customs union. In other words, France did not intend to be legally bound by any contrary customary usage.⁶⁴

The Ouchy Convention 1932

36. This is again an instance which throws some light on the practice of States in the interwar period. According to J. Viner:

... Under this Convention, negotiated at Ouchy but signed at Geneva, July 18 1932, by Belgium, Luxembourg, and the Netherlands, the parties agreed that there should be no increases in existing duties or application of new duties on imports from each other; that no new duties on imports from other countries with which there were treaty relations should be levied unless those states had previously raised their own trade barriers; that existing duties on imports from each other should be reduced by 10 per cent per annum until the total reduction reached 50 per cent; that there should be no new barriers other than import duties on imports from each other; and that there should be open entry to the convention on the part of other countries and extension of its benefits to non-entering countries if they in fact carried out its terms.

Of all the serious projects up to that time for collective tariff agreements, it went furthest in the direction of a genuine lowering of trade barriers. Belgium and the Netherlands, however, both had commercial treaties containing the most-favoured-nation clause with the United Kingdom and other countries, and the Ouchy Convention provided that it should not come into effect until such countries had waived their rights. Great Britain refused to waive its rights; the Ottawa Conference held in the same year passed a resolution declaring that regional agreements could not be allowed to override most-favoured-nation obligations; and the United States made no reply to the request for a waiver. The convention, in consequence, lapsed without ever coming into operation.⁶⁵

⁶³ Cited by Sauvignon, *op. cit.*, p. 239. For the text of the French memorandum, see League of Nations, *Official Journal*, 12th Year, No. 7 (July 1931), p. 1167.

⁶⁴ Sauvignon, *op. cit.*, p. 239.

⁶⁵ 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. 30-31.

The Hague Convention of 1937

37. Also according to J. Viner, this Convention was signed on

... May 28, 1937. The participating countries were the Ouchy Convention countries plus Norway, Sweden, Denmark, and Finland. The Hague convention provided for specified "bindings" of tariff rates, and for removals of specified existing quantitative restrictions on imports from participating countries and undertakings not to introduce new ones on commodities not already subject to them. All non-participating states were declared eligible to adhere to the convention in conformity with terms to be negotiated between them and the countries already parties thereto. It is to be noted that the convention did not provide for reductions, preferential or otherwise, of ordinary import duties, and it was presumably on the strength of this that the participating countries hoped that it would surmount the obstacle of the most-favoured-nation clause.

The Hague convention came into actual operation, but the Netherlands declined to renew it at the end of its first year of operation, and the other parties to it thereupon allowed it to lapse. The explanation offered by the Netherlands for its failure to renew its participation in the convention was that other countries, and especially the United Kingdom, had insisted that most-favoured-nation obligations applied to quotas as well as to tariffs, that economic conditions had changed for the worse since the conclusion of the convention, which made its requirements irksome, and that the expected adherence of additional countries had not occurred.⁶⁶

Attitude of the USSR

38. Under this heading, a study prepared by the League of Nations Secretariat, but published after the dissolution of that Secretariat by the United Nations in 1947 outlines the Soviet position in the period under consideration as follows:

If concrete evidence of the Soviet Union's attitude towards regional exceptions to m.f.n. is meagre because of the rarity and peculiar nature of her treaties, there is no doubt that she has been opposed to admitting such exceptions. She has been categorical in her insistence on the fullest possible interpretation of the m.f.n. clause and there appear to be no instances of Soviet acceptance of a regional exception.

... the USSR raised objections to the preferential agreements negotiated by Germany with certain Danubian countries in 1931. Evidence of her opposition to any "discrimination" is provided in the 1931 discussions in the European Commission on her proposed Economic Non-aggression Pact. Discussion arose on the relation between the principle of non-discrimination and the exceptions to the m.f.n. clause sanctioned by practice (frontier traffic, customs unions, regional clauses, etc.). The Soviet view was that non-discrimination tended to forbid the creation of a commercial and financial régime which would be inflicted on a given country or on a small group of countries when the commercial and financial policy of the country establishing this régime was distinctly more favourable to other countries. To quote the report of the Special Committee set up to examine the Soviet proposal:

"By this declaration, the Soviet delegation considered that it had implicitly replied to a series of questions put by certain delegates in regard to the relation existing between the principle of non-discrimination and the exceptions to the most-favoured-nation clause sanctioned by practice, such as those relating to frontier traffic, customs unions, regional clauses, etc."

As regards the question of how the pact would affect possible preferential agreements, the Soviet delegation considered that these

agreements would only be in contradiction with the draft if they were concluded without the consent of the parties entitled under their commercial treaties to claim the same advantage.⁶⁷

A conclusion with regard to the pre-Second World War period

39. The material presented above leads the Special Rapporteur, and, it is to be hoped, the reader, to the same conclusion which has been reached by Vignes: "... in fact, up to the war of 1939-1945, there was really no consistent practice of States with regard to the granting of full legal status to the (customs union) exception ...".⁶⁸

This realistic evaluation of the situation existing during the period in question can obviously be extended to free trade areas, interim régimes and other groupings of States in regard to which there has also not developed, to say the least, a constant and uniform practice as to their exception—without an explicit provision to that effect—from the operation of a most-favoured-nation clause. The learned author, however, continues his sentence as follows: "... the most recent practice seems to show that customs unions are now unquestionably considered to be an exception". This part of Vignes' statement will be examined in the following paragraphs.

Recent developments

A. De lege lata

40. The view of Vignes is not isolated. Several other authors hold the same or similar view. It is intended here to review their arguments. The purpose of the exercise is, let the reader be reminded, to find out whether it is possible to establish a generally recognized custom to the effect that the beneficiary of a most-favoured-nation clause relating to trade in general and customs and other related matters in particular, (here it is dealt always with this type of clause only) cannot claim from the granting State favours which the latter accords to his partner within a customs union, a free trade area, an interim régime or another closed or open grouping of States, even if the clause—or the treaty embodying it—is silent on such eventualities. For the sake of brevity the question may be put in the following form: is there a rule of international law establishing to clauses of the type mentioned an implied customs union exception? (When speaking of customs unions, it is meant for the present purposes the other types of grouping also.)

41. To begin, the following statement may be made: the presumption obviously militates against such an exception. If States promise each other most-favoured-nation treatment, they are supposed to carry out their promise. They

⁶⁷ *Customs Unions, A League of Nations Contribution to the Study of Customs Union Problems* (United Nations Publication, Sales No. 1948.II.D.3), p. 58.

⁶⁸ 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* (Leiden, Sijthoff, 1971), vol. 130, p. 278.

⁶⁶ *Ibid.*, pp. 31-32.

may limit such promise, but if they do not, they have to bear the consequences. To put it in another way:

As a matter of general principle, it should not be possible to imply exceptions to the most-favoured-nation clause, regardless of whether such an exception would be in favour of a customs union, a region or an economic union. The reason is, of course, that bargained-for advantages should not be denied a treaty partner because of the unilateral action of the other. The failure to stipulate the exception expressly, however, would make such a denial on the basis of implied exceptions nothing short of unilateral action.⁶⁹

42. What arguments can be and are put forward for the purpose of rebutting the presumption? They can be dealt with one by one.

43. (A) "It should be noted first of all that there are many treaties (the majority of trade treaties) which contain a provision exempting customs unions from the scope of the clause" writes Sauvignon, himself taking a stand for the implied exception. He adds, however: "Compared with the positions formerly taken by the major trading Powers, these explicit reservations can give the impression that the international community sets aside any customary usage in the matter".⁷⁰ Although he later on argues against it, this latter conclusion seems to the Special Rapporteur more convincing.

44. (B) Sauvignon writes further:

In reality there are two arguments which support the view that the frequency of the exclusion of customs unions amounts to a practice recognized as lawful and that a customary usage therefore exists.

The first argument is that the authors who adduce the diplomatic practice of the major States and demonstrate the reservations of those States with regard to customs unions (McNair, Hackworth, Kiss) generally base their opinion on old documents, clearly pre-dating the Second World War.⁷¹

This argument cannot be taken too seriously. What we are interested in is the practice of States and their *communis opinio*. And as to modern practice, the situation is not always that the small States form customs unions and the big Powers insist upon their most-favoured-nation rights, but often the opposite. In Europe, e.g. some smaller States complain about the infringement of their most-favoured-nation rights by the groupings of more powerful ones.

45. (C) The next argument relies upon article XXIV of GATT. Sauvignon writes:

GATT was established in 1947, and that is the second argument. Article XXIV of the General Agreement exempts customs unions from the scope of the clause. Eighty States have thus confirmed the exception, which the majority of them already recognized in their bilateral agreements. It is difficult not to see in this consensus a recognition on the part of the international community of the necessity and mandatory character of the exception.⁷²

⁶⁹ P. Hay, "European Common Market and the most-favoured-nation clause," *University of Pittsburgh Law Review*, vol. 23 (1962) p. 679.

⁷⁰ Sauvignon, *op. cit.*, p. 241.

⁷¹ *Ibid.*

⁷² *Ibid.*, pp. 241-242.

Vignes follows the same line of thought:

We must recognize the support which this argument [i.e. the implied customs union exception] obtained with the signing of the General Agreement and thus with its recognition by the 95 States participating *de jure* or *de facto* in the General Agreement.⁷³

46. For the Special Rapporteur, it is difficult to agree with this type of reasoning. The General Agreement, however important, is one agreement among many. The parties to this Agreement conceded to each other certain most-favoured-nation rights and stipulated certain exceptions, as that of article XXIV, which is a rather complicated arrangement. Can one infer from this fact that the parties to this Agreement when they conclude treaties with non-parties containing the most-favoured-nation clause have to be considered as bound by the terms of article XXIV in relation to their treaty partners and vice versa? And what about the treaties of a State which under article XXXI of GATT withdrew from the Agreement, treaties concluded after the withdrawal? And what about treaties between two or more non-parties to GATT? How will they be bound by the terms of a treaty which is for them *res inter alios acta*? Or does GATT possess such a "radiation effect" which would impose upon non-parties the rule of article XXIV, as one which passed into the general *corpus* of international law on its acceptance by a *communis opinio iuris*?⁷⁴

47. (D) Another argument considers a customs union as a new entity and perhaps a new subject of international law.⁷⁵ If the association of States into such unions could be assimilated to a uniting of States, the argument goes, then most-favoured-nation rights based on favours accorded by one member of the union to the other could not be claimed by an outsider after the establishment of the union.

48. Since the States participating in such unions usually continued as independent and sovereign States, this view is difficult to accept. The International Law Commission, when preparing the draft articles on succession of States in respect of treaties made it plain that associations of States having the character of international organizations such as, for example, the United Nations, etc., could not be considered a uniting of States and the same applied to hybrid unions which might appear to have some analogy with a uniting of States but did not result in a new State.⁷⁶

The Commission, having cited the example of EEC, which—at least from the point of view of succession in respect of treaties—appeared to the Commission to keep on the plane of intergovernmental organizations, went on to say:

Thus, article 234 of the Treaty of Rome⁷⁷ unmistakably approaches the question of the pre-Community treaties of member States with third countries from the angle of the rules governing the

⁷³ Vignes, *loc. cit.*, p. 278.

⁷⁴ See para. 52 below.

⁷⁵ Hay, *loc. cit.*, p. 680.

⁷⁶ See *Yearbook... 1974*, vol. II (Part One), p. 253, document A/9610/Rev.1, para. 3 of the commentary to articles 30, 31 and 32.

⁷⁷ For the text of the article, see *Yearbook... 1973*, vol. II, p. 109, document A/CN.4/266, para. 9 of the commentary to article 8.

application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention) on the Law of Treaties. In other words, pre-Community treaties are dealt with in the Rome Treaty in the context of the compatibility of treaty obligations and not of the succession of States. The same is true of the instruments which established the other European Communities.⁷⁸ Furthermore, the Treaty of Accession of 22 January 1972,⁷⁹ which sets out the conditions under which four additional States may join EEC and EURATOM, deals with the pre-accession treaties of the candidate States on the basis of compatibility of treaty obligations—of requiring them to bring their existing treaty obligations into line with the obligations arising from their accession to the Communities. Similarly, the Treaty of Accession expressly provides for the new member States to become bound by various categories of pre-accession treaties concluded by the Communities or by their original members and does not rely on the operation of any principle of succession.

Numerous other economic unions have been created in various forms and with varying degrees of "community" machinery; e.g. EFTA, LAFTA and other free-trade areas and the Benelux. In general, the constitutions of these economic unions leave in no doubt their essential character as intergovernmental organizations. In the case of the Belgium-Luxembourg Economic Union, if Belgium may be expressly empowered to conclude treaties on behalf of the Union, the relationship between the two countries within the Union appears to remain definitively on the international plane. In practice all these economic unions, including the closely integrated Liechtenstein-Swiss Customs Union, have been treated as international unions and not as involving the creation of a new State.⁸⁰

49. This chain of reasoning leads to the conclusion that an economic association or "integration" of States, however close, but falling short of a uniting of States, does not by itself terminate previously existing agreements of participants in general and their most-favoured-nation obligations in particular. An argument admitting the continued existence of treaties but claiming that the formation of a new entity excepts certain areas from the application of those treaties is equally lacking in justification.⁸¹

50. (E) An argument closely related to the former refers to the changed circumstances created by the formation of a customs union or another type of association of States. Here again it seems untenable to maintain that, in the absence of a political union among the participants, the changed circumstances of one of the parties should justify a modification by implication. This follows from the general rule that any recognition of the effect of changed circumstances requires more than a voluntary and

unilateral change of circumstances by one of the treaty partners.⁸²

Sauvignon writes in the same sense:

... even if we suppose that the establishment of a multilateral preferential system constitutes a fundamental change in the circumstances and that this change had not been envisaged by the parties to the treaty providing for the most-favoured-nation treatment, the *clausula* would still not come into play: it cannot be invoked by a State when the State itself brought about the changed circumstances. (V.J. Leca, *Les techniques de révision des conventions multilatérales*, especially p. 312.)

It rests entirely with the granting State to refuse to accede to the multilateral agreement establishing the preferential system.⁸³

51. (F) The rather isolated arguments of Pescatore have been dealt with already in these reports. One is based upon an unjustified extension of the *ejusdem generis* rule:

There is no common measure between a treaty designed simply to facilitate international trade and the much more ambitious and fundamental objective of a treaty designed to bring about economic integration in the form of a free-trade area, a customs union or an economic union. It has thus been concluded that the "commercial" most-favoured-nation clause has no effect with regard to advantages granted within the framework of an integration system ... etc.⁸⁴

The other is based on a somewhat arbitrary and only partially relevant argument that national treatment can generally not be attracted by most-favoured-nation clause and even less so, if national treatment is accorded within an economic union.⁸⁵

As to the view of the Special Rapporteur on these ideas, the reader is referred to the fourth and fifth reports.⁸⁶

Even Sauvignon⁸⁷ and Vignes⁸⁸ seem to be rather sceptical concerning these views.

52. (G) The crux of the matter is, of course, whether the existence of a customary rule of an implied customs union exception can be established. This is after all the thesis often put forward in literature and supported mostly by the frequency of the exception-stipulations. What is necessary for the establishment of the existence of a customary rule of international law has been again examined quite recently by the International Court of Justice. In its judgment in the North Sea Continental Shelf case the Court affirmed that rules while only conventional or contractual in their origin, might pass into the general *corpus* of international law and might be accepted as such by the *opinio juris*, so as to become binding even for countries which had never, and did not

⁷⁸ Treaty instituting the European Coal and Steel Community, section 17 of the Convention on Transitional Provisions (United Nations, Treaty Series, vol. 261, pp. 297 and 299; and Treaty establishing the European Atomic Energy Community, articles 105–106 (*ibid.*, vol. 298, p. 205).

⁷⁹ Treaty concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community: Act concerning the conditions of accession and the adjustments to the treaties, article 4 (*Official Journal of the European Communities—Legislation*, Special Edition, Luxembourg, 27 March 1972, No. L. 73, pp. 14–15).

⁸⁰ *Yearbook... 1974*, vol. II (Part One), pp. 253–254, document A/9610/Rev. 1, chap. II, sect. D, paras. 4 and 5 of the commentary to articles 30, 31 and 32.

⁸¹ Hay, *loc. cit.*, p. 681.

⁸² *Ibid.*, pp. 681–682.

⁸³ Sauvignon, *op. cit.*, p. 254, note 2.

⁸⁴ *Annuaire de l'Institut de droit international*, 1969 (Basle), vol. 53, t. Ier, (1969), p. 209.

⁸⁵ *Ibid.*, p. 208.

⁸⁶ See *Yearbook... 1973*, vol. II, pp. 107–108, document A/CN.4/266, paras. 13–16 of the commentary to article 7; and *Yearbook... 1974*, vol. II, (Part One), pp. 127–128, document A/CN.4/280, para. 8 of the commentary to article 13.

⁸⁷ Sauvignon, *op. cit.*, p. 53, foot-note 2, pp. 73–74 and pp. 234–235.

⁸⁸ Vignes, *op. cit.*, pp. 282–283 and foot-note 65.

become parties to the convention in question. According to the Court this process is perfectly possible and does from time to time occur. This result, however, is not lightly to be regarded as having been attained.⁸⁹ According to the Court, for the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, "an indispensable requirement would be that . . . State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved".⁹⁰ As to the nature of the required State practice the Court holds that it must be "settled" and moreover carried out in such a way, "as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency even or habitual character of the acts is not in itself enough".⁹¹

53. (H) That the alleged customary rule of an implied customs union exception (and the more so of an exception of other kinds of groupings) falls far short of the requirements set out above, needs hardly any proof. To remain in the orbit of the problems connected with EEC, which is based upon a customs union (article 9 of the Treaty of Rome) it seems to be clear that not only did the founders of the Community not rely upon a rule of exception in the case of customs unions, but, on the contrary, they "unmistakably" approached "the question of pre-Community treaties from the angle of the rules governing the application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention)".⁹² The stand taken in 1957 was reaffirmed in 1972 on the occasion of the conclusion of the Treaty of Accession of 22 January 1972 which again deals with the pre-accession treaties of the candidate States on the basis of compatibility of treaty obligations—in requiring them to bring their existing treaty obligations into line with the obligations arising from their accession to the Communities.

54. In these circumstances it is difficult to attribute sufficient weight to the official paper of the then Government of the Federal Republic of Germany which in 1957, relying on the customs union exception, interpreted article 234 of the Rome Treaty in its explanations submitted to the Parliament, to mean that the six member States have agreed that EEC benefits are excepted from the application of the most-favoured-nation clause.⁹³ Nor can the

fact that controversies, protests and diplomatic steps have led in several cases to more or less satisfactory compromises mostly to the detriment but sometimes to the benefit of outsiders be considered as sufficient to establish a general practice and *communis opinio* of States.⁹⁴

55. (I) No adherent of the implied customs union exception has ever offered a satisfactory solution to the formidable problem presented by those treaties which contain explicit provisions as to one or more exceptions to the clause without reference to customs unions or the like. How could the implied customs union exception surmount the formidable difficulty of the *inclusio unius, exclusio alterius* principle?

56. (J) Mention should be made finally of the views of modern authors, who in recent times have adopted a negative position in regard to the implied customs union exception rule. In addition to those already mentioned reference can be made to Usenko, who in the standard Soviet textbook writes as follows:

It is impossible to agree with the view that there exists a rule of international law which excepts from the scope of the principle of most-favoured-nation treatment advantages granted under a customs union. If such an exception existed in international law, it would not be necessary for States, whenever they wish to make this exception, to enter scrupulous reservations in trade agreements to the effect that the scope of the principle of most-favoured-nation treatment does not extend to any advantages resulting from the customs union...

Since there are no rules of a non-treaty nature in international law which might establish exceptions to the most-favoured-nation clause (see below for exceptions in the case of the developing countries), it follows that the only lawful exceptions are those which are made with the agreement of the country to which they are applied.⁹⁵

The same view is held by a Polish scholar, T. Szurski.⁹⁶

57. M. Giuliano, in his Hague lectures, after a thorough analysis of the relevant practice of States comes to the following conclusion:

In the light of the facts of international practice which we have just considered, it seems clear that the doctrine in question [i.e. the implied customs union exception] is not established in international law. If a treaty does not contain an explicit provision to the contrary, the most-favoured-nation treatment must also be extended to the advantages resulting from a customs union between one or other of the contracting parties and a third State.

Giuliano adds however:

Nevertheless, an entirely different problem is that of the timeliness or, if you wish, the reasonableness of the limitations imposed on the operation of the clause which were discussed earlier. From this standpoint, there cannot be any room for doubt, since—as we have already had an opportunity to note—the problem of the equal treatment of nations in trade matters never arises in the abstract and as a principle having absolute validity. And it is precisely for that reason that Governments have always taken great care to insert these exceptions in trade treaties.⁹⁷

⁸⁹ *I.C.J. Reports 1969*, p. 42.

⁹⁰ *Ibid.*, p. 44.

⁹¹ *Ibid.*, p. 45.

⁹² See above, para. 48.

⁹³ See *Verhandlung des Deutschen Bundestags, 2. Wahlperiode 1953: Anlagen zu den stenographischen Berichten*, vol. 57 (Bonn, 1957), Drucksache [fascicle] 3440, p. 157. See also the remarks of E.T. Usenko in State Institute of Law of the Soviet Academy of Sciences, [F.I. Kozhevnikov et al eds.], *Kurs mezhdunarodnogo prava*, vol. IV (Moscow, Nauka, 1968), p. 268.

⁹⁴ Sauvignon, *op. cit.*, p. 246.

⁹⁵ State Institute of Law of the Soviet Academy of Sciences, *Kurs...* (*op. cit.*), p. 268.

⁹⁶ *Zasada największego uprzywilejowania w Uchadzie Ogolnym w Sprawie Taryf Celnych i Handly (GATT)* (Warsaw, 1970), chap. IV.

⁹⁷ M. Giuliano, "Quelques aspects juridiques de la co-opération intergouvernementale en matière d'échanges et de paiements internationaux", *Recueil des Cours ... 1968*, — II vol. 124 (Leiden, Sijthoff, 1969), pp. 601–602.

B. De lege ferenda

58. Should the Commission evaluate the situation as one where progressive development of international law is needed in the sense that the benefits of customs unions, etc. become a full-fledged exception to the operation of the most-favoured-nation clause? The Special Rapporteur's answer to this question would be in the negative. His reasons are as follows.

59. (A) The expression of such need would involve a value judgement as to the desirability of establishing customs unions, etc. Whether the formation of such groupings is desirable or not leads us from the field of law to that of economics, which the Commission may not wish to enter. However, even economists are not entirely certain whether regional arrangements are beneficial and, if so, what characteristics differentiate the beneficial ones from the detrimental ones.⁹⁸

60. How formidable are the economic questions involved is well summarized by a great expert on the matter, Professor Gardner Patterson, as follows:

There was a great flowering of theoretical work on the whole question of the economic aspect of regional economic groupings.¹ There is space here only to point out that this theoretical work demonstrated that the problem was a very complex one and that any such regional integration would have several economic effects. It would create some trade among the members; that is, some members would now buy goods from another member rather than produce them themselves because the goods in question were no longer subject to tariffs, etc. It would divert some trade away from non members to members; that is, some members would now buy from another member goods which had previously been bought from a non member because those from the latter now had to bear higher duties than those from the former. It would shift consumption from some goods produced by non members to different goods produced by members because the latter goods were now less expensive to consumers as a result of the change in tariff structures. It would probably improve the members' terms of trade vis-à-vis non members. All of these except the first would tend to be harmful to non members. But, the theoretical analysis showed, there were also "dynamic" effects. Regionalism would probably also have a favorable effect on the rate of growth of the members, as compared with the previous situation. This is because it would permit fuller exploitation of economies of scale, especially in those firms or industries benefitting from any trade creation; because of the buoyant effects of larger duty-free markets on entrepreneurial expectations and so investment; because of the restraining effects of larger markets upon monopolistic practices; because of external economies, including better use of the areas' technological and organizational skills, etc. This faster rate of growth, in turn, would tend to increase members' imports from non members. This theoretical analysis showed that the net effect of all this on non members and on the world as a whole, could be either beneficial or detrimental, depending on the particular facts of the case. Very little could, in fact, be said in the absence of the facts on cost conditions, mobility of resources, elasticities of demand, etc., etc. And few of these facts were in any instance available.

Perhaps most important of all, the most recent theoretical analysis has shown that if members of a regional bloc place a collective community value not only on the flow of goods and services to the market-places but also on the fact of industrialization or diversification *per se*, then the participants may come to value trade diversion for its own sake for this is the way in which each member can increase its own level of industrialization or degree of diversification, be it

admittedly at the cost of economic efficiency and of lost markets by non members. Indeed, as the theoretical literature cited above has noted, from the point of view of the members, except for the probably not very important terms of trade effects, there are few if any strictly economic efficiency aspects, or economic welfare grounds as usually defined, on which a discriminatory regional bloc is superior to unconditional most-favored-nation free trade arrangements. There are, of course, non-economic arguments for regional economic integration, and given the practice of demanding reciprocity as a condition for tariff cuts MFN free trade arrangements may often not be a genuine alternative, but this last point does lend support to the view that, on purely economic grounds at least, one of the great attractions of regional economic groupings to their members is precisely that they do divert trade away from non members.

¹ The literature is now extensive, but the classics are: Jacob Viner, *The Customs Union Issue*, 1950; James Meade, *The Theory of International Economic Policy*, Vol. I, *The Balance of Payments*, 1951 and Vol. II, *Trade and Welfare*, 1955, and *The Theory of Customs Unions*, 1956; R.G. Lipsey and Kelvin Lancaster, "The General Theory of Second Best", *Review of Economic Studies*, 1956-1957, No. 63, pp. 11-32; R.G. Lipsey, "The Theory of Customs Unions: A General Survey", *Economic Journal*, September 1960; J.M. Fleming "On Making the Best of Balance of Payments Restrictions on Imports", *Economic Journal*, March 1951, pp. 48-71; Tibor Scitovsky, *Economic Theory and Western European Integration*, 1958, and Bela Balassa, *The Theory of Economic Integration*, 1961. Harry G. Johnson, in his *Money, Trade, and Economic Growth*, 1962, pp. 46-74, gives an excellent short synthesis and extension of this literature. See also C.A. Cooper and B.F. Massell, "Toward a General Theory of Customs Unions for Developing Countries", *The Journal of Political Economy*, October 1965, pp. 461-476.⁹⁹

61. (B) If for one reason or another one should still wish to draft a rule establishing a general exception of customs unions and other like associations one would encounter tremendous difficulties. How should such a rule define a customs union, a free-trade area and other relevant groupings? Should it take over the terms of GATT which, as we have seen above, were not conducive to the legal solution of the difficulties which have arisen in regard to such unions? How would non-GATT members react to such proposal? There are still some 60 such States in the world, representing a considerable part of its population. Or should we simply refer in such a rule to customs unions, free-trade areas, etc. without elaborating further on the meaning of these notions as is frequently done in bilateral treaties? We would then arrive to a result which—in the words of the Court—owing to "the very considerable, still unresolved controversies as to the exact meaning and scope of this notion, must raise further doubts as to the potential norm-creating character of the rule".¹⁰⁰

62. (C) Under these circumstances, the Special Rapporteur's conclusion is, that:

Because no customary rule of international law exists establishing an implied customs union exception, etc.; because, further, it is a general practice of States to insert in their treaties any exception they may wish to make in regard to their most-favoured-nation pledge; and because there is no compelling evidence as to the desirability of substituting a general rule for the particular arrangements of the parties the best course of action is to leave matters where they are.

63. While the Special Rapporteur has given much thought to this question and has devoted a considerable part of his present report to it, he would not wish to exaggerate its importance. In the relation between States

⁹⁹ G. Patterson, "The most-Favored-Nation Clause and Economic Integration", *Annuaire européen*, 1965 (The Hague), vol. XIII (1967), pp. 148-149.

¹⁰⁰ North Sea Continental Shelf Cases, *ICJ Reports* 1969, p. 43.

⁹⁸ Jackson, *op. cit.*, p. 621.

parties to GATT, article XXIV more or less settles the matter. In relations between them and outsiders and between outsiders *inter se* stipulations making exceptions to a most-favoured-nation clause are very frequent. Where such exceptions include a reference to a customs union or a free-trade area etc., the problem is settled more or less according to the precision of the stipulation. Where exceptions are stipulated in other matters but not in regard to customs unions, as e.g. in the USSR-Australia treaty of 1965, quoted above,¹⁰¹ it is the feeling of the Special Rapporteur, that the *inclusio unius, exclusio alterius* principle cannot be overruled. There remain the presumably not too numerous cases where the clause stands without any stipulated exception whatsoever. Hence it could be said that the problem—if one exists—is marginal even if in individual cases it is aggravated by the bitterness of the dispute between the party which was not circum-spect enough when drafting the treaty and the one which feels that its rights and interests based on the clause are violated.

Thus the Special Rapporteur's choice is not to propose to create customs and other unions exceptions to the general rule. This he submits with one reservation: the matter will be reviewed in the course of the further study on the functioning of the clause in relation to the developing countries. In the course of this review account will be taken of the situation as described in annex I to the second report under the heading "Trade among developing countries"¹⁰² as well as of more recent developments.

IV. The most-favoured-nation clause and the different levels in the economic development of States

64. This is a field where in recent years dramatic developments have taken place. On this the Special Rapporteur wrote a few years ago as follows:

I think that we cannot fail to recognize that international law does have new rules in this field, or, at least, that such rules are being evolved. According to the emerging *communis opinio*, it has become the duty of the developed industrialized countries to grant preferences to the developing countries. In his book on GATT, Flory—invoking Lacharrière and Virally—writes as follows: "The principle of the duality of the rules applicable to the industrialized countries and to the developing countries is tending to become one of the new principles of international economic and trade law. In short, the new principle of the duality of regulations corresponds to the idea of a law suited to the economic problems of underdevelopment and differs from the principle governing relations among the developed countries. It is based on the new international law of development" (p. 189). This statement is in keeping with the urgent claims which have been pressed at the sessions of UNCTAD.

...
We must see clearly that the most urgent task and the common responsibility of today's generation—and indeed of the generations of the future—is to come to the aid of the developing countries. In the final analysis, this is a question of human rights, of the right to

life, and often of the right to life alone, of several hundreds of millions of people.¹⁰³

In the present context we shall have to follow these developments only in so far as they have a bearing on the operation of most-favoured-nation clauses.

Developments in UNCTAD

65. On the general problems created by the different levels of economic development for the operation of the most-favoured-nation clause in the field of international commerce, the Special Rapporteur—for lack of space—simply and respectfully refers to the passage in his second report entitled: "Developing countries and the most-favoured-nation clause in general".¹⁰⁴ Furthermore, the same report, under the heading "The case for preferences in favour of developing countries in their trade with developed countries", sets out, on the basis of a memorandum received from UNCTAD, the fundamental difference between the so-called special or vertical or preferential arrangements between *some* developing countries and *some* developed countries and a generalized, non-reciprocal, non-discriminatory system of preferences. It outlines the *unanimous* agreement, reached at the Second UNCTAD Conference in 1968 and embodied in resolution 21 (II), favouring the introduction of this latter type of preference system. The necessity of gradually phasing out the special preferences is also explained.¹⁰⁵

66. Later in 1970, in a period not covered by the Special Rapporteur's second report, the Special Committee on Preferences, established by resolution 21 (II) of UNCTAD as a subsidiary organ of the Trade and Development Board, succeeded in reaching "Agreed conclusions" on a generalized system of preferences and these conclusions were annexed to decision 75(S-IV) of the Trade and Development Board.¹⁰⁶

The following are excerpts from that very important document:

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

¹⁰¹ See para. 11 above.

¹⁰² *Yearbook...* 1970, vol. II, p. 238, document A/CN.4/228 and Add.1.

¹⁰³ *Annuaire de l'Institut de Droit International*, 1969 (Basle), vol. 53, tome I (1969), pp. 276-278.

¹⁰⁴ *Yearbook...* 1970, vol. II, p. 231, document A/CN.4/228 and Add.1, para. 188.

¹⁰⁵ *Ibid.*, pp. 234-235, para. 200.

¹⁰⁶ *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 15 (A/8015/Rev.1)*, pp. 265 *et seq.*

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 intensive 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 Organisation 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; ⁹ 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^a, 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 (III) 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

1. It is agreed that the rules of origin should facilitate the achievement of the objectives of Conference resolution 21 (II) on the generalized system of preferences, in this connexion, to ensure effectively for the beneficiary countries the advantages of preferential treatment for those exports which will qualify therefor; to help to ensure equivalence in conditions of access to the markets of the preference-giving countries, and to avoid distortion of trade.

2. Satisfactory functioning of the rules of origin will be greatly helped if it is possible to establish close and confident collaboration between the competent authorities of the donor and beneficiary countries, particularly concerning documentation and control. It is agreed that such co-operation should be assured bilaterally and as appropriate through the institutional arrangements as provided for in the relevant part of these conclusions.

3. It is recognized that it is desirable to have rules of origin as uniform as possible and as simple to administer as practicable. The Working Group on Rules of Origin had, at a technical level, formulated preliminary texts on a number of important aspects of the rules of origin. However, in regard to the basic element, for any rules of origin, namely, the criterion for substantial transformation, the Group did not at this stage arrive at common views.

...

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.

[#] TD/B/AC.5/24.

^{*} See *Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. III and Corr. 2, *Problems and policies of trade in manufactures and semi-manufactures* (United Nations publication, Sales No. E.68.11.D.16), document TD/56, annex, part one, section A.

67. 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 by resolution 2626 (XXV):

(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.

Development in GATT

68. In the second report on the most-favoured-nation clause a brief description was given of part IV of the General Agreement which was added to the original text

in 1966 with the intention of satisfying the trade needs of developing countries.¹⁰⁷ 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 have 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 is 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-reciprocal and 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 should 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

¹⁰⁷ *Yearbook... 1970*, vol. II, p. 232, document A/CN.4/228 and Add.1, para. 192.

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.¹⁰⁸

The functioning of the generalized system of preferences

69. The Soviet Union was the first country which introduced as early as 1965 a unilateral system of duty-free imports from developing countries. Such duty-free treatment 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 would, in addition to according tariff preferences, 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.¹⁰⁹

70. Australia followed suit in 1966 with a more restricted unilateral system, and Hungary announced its own in 1968. According to the latter—as it has been amplified and improved in 1971 and 1974—the Hungarian preferential list of 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; 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 can, in collaboration with the President of the National Board for Materials and Prices 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 has been enlarged, the product coverage of the system has also been broadened and some tariff rates have been reduced.¹¹⁰

The Hungarian system allows preferences only provisionally for those countries which on 1 January 1972 extend special (reverse) preferences to certain developed countries. It is assumed that these reverse preferences will be eliminated by 31 December 1975.¹¹¹

71. The EEC has 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 which may be imported in this way and certain sensitive items such as textiles and shoes given less generous treatment.

72. The generalized system of preferences of the United States of America is contained in title V of its Trade Act.¹¹² Its section 501 authorizes the President to extend preferences. Section 502 defines the notion of a “beneficiary developing country” excluding from that notion—with certain exceptions—“communist countries” and others. Section 503 determines the articles eligible for preferential treatment, excluding some import sensitive articles. Section 504 contains limitation 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.

73. It is perhaps too early to assess the results, success or failure, of the generalized system of preferences. Some voices of complaint have already been heard. According to the report of the Trade and Development Board on its fifth special session (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 product 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

¹⁰⁸ GATT, *Basic Instruments and Selected Documents, Supplement No. 18* (Sales No: GATT/1972-1), pp. 24-26.

¹⁰⁹ See *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. 1 (Jan.-Feb. 1971), pp. 56-57.

¹¹⁰ GATT documents L/3301 and L/4106.

¹¹¹ *Ibid.*

¹¹² United States of America, *U.S. Code: Congressional and Administrative News* (Washington, D.C., 1975), No. 13 (30 January 1975), p. 6956 (93rd Congress, 2nd session, Public Law 93-618).

of preferences and made such preferences disparate, while creating considerable uncertainty.¹¹³

74. The Charter of Economic Rights and Duties of States proclaimed in General Assembly resolution 3281 (XXIX) also contains provisions pertinent to the problems under consideration. Thus, article 18, on the generalized system of preferences:

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 preferences and other generally agreed differential measures in their favour.

Again, article 26:

All States have the duty to coexist 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.

Articles 12, para. 1, and 21 on regional groupings:

Article 12

1. States have the right, in agreement with the parties concerned, to participate in subregional, regional and interregional co-operation

¹¹³ *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 15 (A/9015/Rev.1)*, pp. 21-22, part one, chap. I, paras. 89-90.

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

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.

Preliminary conclusions

75. What remains to be done after this sketchy presentation of the situation regarding trade (movement of goods) between developed and developing countries, is the formulation of legal rules which adequately reflect the *communis opinio* discernible from the diverse manifestations of States. The main line of at least one of such rules has been given by the agreed conclusions reached by the Special Committee on Preferences.¹¹⁴ Thus an exception seems to be recognized to the operation of most-favoured-nation clauses relating to customs tariffs and similar matters in the following sense: if the beneficiary State of such a clause is a developed State, it is not entitled under the clause to claim the benefits accorded in the framework of a developed granting State's scheme of generalized preferences to a developing State.

Before presenting, however, a more precise formulation of this rule—and presumably of others—the Special Rapporteur wishes to study the matter further and possibly consult with the Commission.

¹¹⁴ See Section IX (Legal status) of the Special Committee's agreed conclusions reproduced in para. 66 above.

QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

[Agenda item 4]

DOCUMENT A/CN.4/285

Fourth report on the question of treaties concluded between States and international organizations, or between two or more international organizations by Mr. Paul Reuter, Special Rapporteur

*Draft articles with commentaries (continued)**

[Original: French]
[21 March 1975]

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* For draft articles 1-4 and 6, see the third report (*Yearbook... 1974*, vol. II (Part One), p. 135, document A/CN.4/279).

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 ABBREVIATIONS

[1975] 1 C.M.L.R.	<i>Common Market Law Reports</i> , vol. XV (1975) (London)
EEC	European Economic Community
FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
UPU	Universal Postal Union

Preface

1. At the twenty-ninth session of the General Assembly, the Sixth Committee devoted 14 meetings to consideration of the report of the International Law Commission on the work of its twenty-sixth session.¹ About 20 delegations, accounting for the majority of those which took part in the discussion of the report, mentioned in terms which were an encouragement to the Special Rapporteur the work of the Commission on the articles concerning treaties concluded between States and international organizations or between two or more international organizations.² In these statements, suggestions and recommendations were made which will undoubtedly assist the future work of the International Law Commission on this subject. Following this discussion, the Sixth Committee recommended that the International Law Commission should *inter alia*:

(d) Proceed with the preparation of draft articles on treaties concluded between States and international organizations or between international organizations.

2. The General Assembly, in its turn, adopted the same recommendation in its resolution 3315 (XXIX) of 14 December 1974. The Special Rapporteur therefore considered that it was his duty to present in this fourth report the continuation of the draft articles, the first five articles having been adopted by the Commission in 1974.³ The draft articles presented in this report cover the questions dealt with in articles 7 to 34 of the Vienna Convention on the Law of Treaties (1969);⁴ in addition, provisions have been added corresponding to three subparagraphs in article 2, paragraph 1 of the 1969 Convention, study of which had been postponed until certain articles to which they seemed to be related were considered.

3. Five articles involve no change in relation to the provisions of the 1969 Convention: article 26 (*Pacta sunt servanda*), article 28 (Non-retroactivity of treaties) and the whole of part III, section 3, of the Convention (articles 31, 32 and 33) concerning interpretation of treaties. These are very general rules relating to the very essence of the conventional mechanism. Most of the other articles of the 1969 Convention—and in particular articles 8, 10, 12, 13, 15, 17, 18, 19 to 23, 24 and 25—required only purely drafting changes, of which the most important sometimes consisted in distinguishing for the sake of clarity, as had already been done previously, between treaties between

one or more States and one or more international organizations, and treaties between two or more international organizations. In certain cases, however (for example articles 16, 27 or 29), the drafting changes—or even the lack of drafting changes—pose more difficult problems.

4. Finally, a small number of substantive problems have been raised by the articles submitted to the Commission.

5. In the first place, mention must be made of the question of full powers (article 7); in fact there is in practice considerable freedom with regard to full powers of international organizations and the problem arises of how to respect this practice while at the same time establishing a general principle.

6. Secondly, articles 9 and 10 concerning adoption and authentication require clarification of the role of international organizations. When such organizations intervene as potential parties to a treaty, with a position entirely comparable to that of a State, the rules of the 1969 Convention may apply. But sometimes international organizations play, with regard to a treaty, a role which is not that of a potential party, or it is not intended to give them all the rights of a party to a treaty: in this case, the rules of the Convention should not apply.

7. Thirdly, article 11 of the 1969 Convention raises the question, in the wording which evolved during the discussion at the United Nations Conference on the Law of Treaties, of the entire system of the Convention regarding the various forms of conclusion of treaties. The significance of this system must be analysed before it can be transposed to agreements concluded by international organizations. In fact, although the 1969 Convention is extremely flexible regarding the substance and name of the procedures, the question of “ratification” in the case of international organizations requires further study.

8. Fourthly, while articles 19 *et seq.* concerning reservations may be extended to agreements of international organizations with no difficulty, attention must be drawn to two important points. The first is that such an extension is for the time being of hardly any practical consequence, because international organizations do not in fact participate in open multilateral conventions for which the question of reservations is important. Secondly, if in the future multilateral conventions were in fact to be opened to international organizations, it would be necessary in general to draw a clear distinction between the competence of the organizations and that of the member States; otherwise inextricable difficulties would arise with regard to reservations.

9. Lastly, both territorial scope (article 29) and application of successive treaties relating to the same subject-matter (article 30) must be entirely reconsidered in the light of specific factors, the most important of which is the relationship between the organization and its member States.

10. These are the general features of the draft articles submitted in the present report for the consideration of the Commission.

¹ *Yearbook... 1974*, vol. II (Part One), p. 157, document A/9610/Rev.1.

² See *Official Records of the General Assembly, Twenty-ninth Session, Annexes*, agenda item 87, document A/9897, paras. 136–157.

³ See *Yearbook... 1974*, vol. II (Part One), p. 135 *et seq.*, document A/CN.4/279, and p. 292, document A/9610/Rev.1, para. 134.

⁴ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289. The Convention will be referred to hereafter as “the 1969 Convention”.

Draft articles and commentary

PART II. CONCLUSION AND ENTRY
INTO FORCE OF TREATIES

SECTION I. CONCLUSION OF TREATIES

*Article 7. Full powers*⁵

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(a) he produces appropriate full powers; or

(b) it appears from the practice of the States and international organizations concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with 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;

(b) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ or of a treaty with that organization.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the organization to be bound by a treaty if:

(a) he produces appropriate full powers; or

(b) it appears from the practice of the States and international organizations concerned or from other circum-

stances that their intention was to consider that person as representing the organization for such purposes and to dispense with full powers.

COMMENTARY

(1) The first two paragraphs of this draft article deal with the powers of representatives of States and the third paragraph deals with the powers of representatives of international organizations.

(2) It was necessary to reproduce the essence of the provisions of the 1969 Convention concerning representatives of States; this is because such representatives are called upon to take part in all treaties covered by these draft articles which are concluded between one or more States and one or more international organizations. It would not have been sufficient simply to include a reference to article 7 of the 1969 Convention, since the present draft must constitute an autonomous text in which all the provisions are self-sufficient. Paragraphs 1 and 2 of the present draft article involve only minor changes in relation to the text of the 1969 Convention, which do not seem to raise difficulties.

(3) In the first place, reference is made in paragraph 1(b) to the practice not only of the States but also of the organizations concerned. Secondly, paragraph 2(b) of article 7 of the 1969 Convention has not been included, because it deals exclusively with the case of a bilateral treaty between States, which is necessarily outside the scope of these draft articles. Thirdly, the enumeration in paragraph 2(c) of article 7 of the 1969 Convention, which has become paragraph 2(b) of the present draft article, has been supplemented by a reference to the special case of a treaty concluded between the permanent representative of a State to an organization and that organization itself.⁶

⁵ Corresponding provision of the 1969 Convention:

Article 7. Full powers

"1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the States to be bound by a treaty if:

(a) he produces appropriate full powers; or

(b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with 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;

(b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

(c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ".

⁶ The term "accredited representative", taken from the 1969 Convention, seems to be equivalent to the term "head of mission" employed in the Vienna Convention of 14 March 1975 on the Representation of States in Their Relations with International Organizations of a Universal Character, article 12 of which adopts the same solution as is proposed above. Article 12 of that Convention reads as follows:

"1. The head of mission, by virtue of his functions and without having to produce full powers, is considered as representing his State for the purpose of adopting the text of a treaty between that State and the Organization.

"2. The head of mission is not considered by virtue of his functions as representing his State for the purpose of signing a treaty, or signing a treaty *ad referendum*, between that State and the Organization unless it appears from the practice of the Organization, or from other circumstances, that the intention of the parties was to dispense with full powers".

(See the International Law Commission's commentary on article 12 of its draft articles on the representation of States in their relations with international organizations (*Yearbook... 1971*, vol. II (Part One), p. 284, document A/8410/Rev.1, chap. II, Sect. D).)

⁷ For the text of the Convention, see *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), document A/CONF.67/16. The Convention will be referred to hereafter as "the Convention on the representation of States".

(4) With regard to representatives of international organizations, with whom paragraph 3 of this draft article is concerned, the practice may be summarized as follows:⁷

(a) In general, international organizations do not issue full powers to their representatives;

(b) The proof that a person is empowered to perform certain acts relating to the conclusion of a treaty sometimes derives simply from his functions, or from a deliberation of an organ concerning the conclusion of a treaty, or from a specific instrument; in the latter case, this is usually an informal instrument, such as a simple letter, rather than a formal instrument properly so called;

(c) The main reasons why in practice explicit powers are infrequently used seem to be the following. The treaties concluded by organizations are, with very few exceptions, bilateral treaties⁸ which are only the last phase of lengthy contacts and consultations during which it has been established clearly, and usually in writing, which person is to represent the organization; moreover, it is the heads of the international secretariats or their immediate colleagues who in fact usually play the essential role, and the heads of secretariats are reluctant to resort to powers because it is difficult to imagine that they could issue the powers to themselves or that they could find a person more suitable than themselves to issue them.⁹

(5) In the opinion of the Special Rapporteur, one should clearly avoid any proposal which might impose upon practice servitudes which have so far not proved necessary in practice; but one should not go to the opposite extreme and dismiss the solution of principle whereby an organization would be able to issue full powers, since the development of organizations—either through access to open multilateral conventions or through the conclusion of treaties which bind more complicated administrative

structures—¹⁰ will make recourse to powers useful. The Special Rapporteur is therefore in favour of retaining a provision on the full powers of representatives of international organizations and would consider it inadvisable to try to tone down the term “full powers” by using any other expression which would indicate that these powers are not necessarily given in a very solemn form; the same is true of the powers of representatives of States and it was on the basis of comment by Governments that the International Law Commission unified the terminology of the texts which were to become the 1969 Convention by adopting the term “full powers”.¹¹

(6) There are ultimately two possible solutions. In a resolution adopted at its session in Rome, from 5 to 15 September 1973, the Institute of International Law gave its approval to the following formulation:

Unless he is dispensed from doing so by his function or by practice, a person representing an organization for the purpose of adopting or authenticating the text of an agreement or for the purpose of expressing the consent of the organization to be bound by the agreement shall provide the other party with proof of his status, if that party so requests.¹²

(7) This formulation establishes the principle that the general solution is non-production of powers, since it establishes the right of “the other party” to demand them, with certain exceptions linked to practice or to the functions of the representative. While there is no objection in principle to a solution of this kind, there is perhaps no need to give a ruling on the freedom—proper solely to bilateral agreements—to request or not request that powers be produced, but simply to decide whether or not a representative needs powers. It would seem possible only to establish the rule that every representative needs powers, while leaving as much margin as is desired for exceptions. It may be asked whether, among the exceptions, special treatment should be given to the “functions” of the representative. This is the method followed in the 1969 Convention with regard to representatives of States; but that Convention refers—quite rightly—to very specific functions. If one cannot define these functions—as is indeed the case with representatives of international organizations—nothing is in fact added to the simple reference to “practice”. It has not yet been established that functions can be defined either by their purpose or by the rank of the person con-

⁷ See “The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat” (*Yearbook... 1967*, vol. II, p. 154, document A/CN.4/L.118 and Add.1 and 2); H. Chiu, *The Capacity of International Organizations to conclude Treaties, and the Special Legal Aspects of the Treaties so Concluded* (The Hague, Nijhoff, 1966) p. 100; J. W. Schneider, *Treaty-Making Power of International Organizations* (Geneva, Droz, 1959) pp. 32 and 63; R.-J. Dupuy, “L’application des règles du droit international général des traités aux accords conclus par les organisations internationales”, *Annuaire de l’Institut de droit international*, 1973 (Basle), vol. 55, pp. 287, 366 and 718.

⁸ Emphasis has repeatedly been placed in the past on the real and political obstacles which still stand in the way of the participation of international organizations in open multilateral treaties. See *Yearbook... 1972*, vol. II, pp. 172, 175, 183, 185 and 191–194, document A/CN.4/258, paras. 3, 12, 42, 48 and 64–75; and *Yearbook... 1973*, vol. II, pp. 79–81 and 86–87, document A/CN.4/271, paras. 23–33 and 69–77.

⁹ In addition to the Secretariat study mentioned in foot-note 7 above, reference may be made to the replies from international organizations to the Special Rapporteur’s questionnaire. See also *Yearbook... 1973*, vol. II, pp. 84–85, document A/CN.4/271, paras. 56–64; and the information given by Paul C. Szasz, *The Law and Practices of the International Atomic Energy Agency*, Legal Series No. 7, (STI/PUB/250) (Vienna, IAEA, 1970), pp. 910 *et seq.*

¹⁰ In the European Communities, powers are used, for instance, when the Council of Ministers of the European Economic Community has decided to conclude an agreement and the President of the Council is then “authorized to designate the persons empowered to sign the Agreement and to confer upon them the necessary powers to bind the Community” (for an example, see the Council decision of 9 August 1974 concerning an Agreement between the European Economic Community and the World Food Programme, *Official Journal of the European Communities Legislation* (Luxembourg), 17th year, No. L307 (18 November 1974), p. 10.

¹¹ Compare the first report of Sir Humphrey Waldock, article 4 and commentary (*Yearbook... 1962*, vol. II, pp. 38 *et seq.*, document A/CN.4/144) and the fourth report by the same author, article 1, para. 1 (e), and article 4 (*Yearbook... 1965*, vol. II, pp. 15 and 18 *et seq.*, document A/CN.4/177 and Add.1 and 2).

¹² *Annuaire de l’Institut de droit international*, 1973 (Basle), vol. 55, p. 792.

cerned, so as to evolve a formulation which would be valid for all organizations whatsoever.¹³

(8) One can therefore accept a second solution, which in the opinion of the Special Rapporteur has the advantage of being closer to the formulation used for representatives of States in article 7 of the 1969 Convention. No reference is made to the representative's functions and the necessary drafting change is made in article 7, paragraph 1, of the 1969 Convention to make it applicable to representatives of organizations. Thus the principle of full powers is retained, but the way is left open in a very general and flexible manner for all the waivers which in fact currently represent the usual practice.

Article 2. Use of terms

*Paragraph 1 (c)*¹⁴

1(c) "full powers" means a document emanating from the competent authority of a State or international organization and designating a person or persons to represent the State or organization for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State or organization to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

COMMENTARY

The adoption of the definition included in the 1969 Convention, with purely drafting changes, is a necessary consequence of the adoption of draft article 7.

*Article 8. Subsequent confirmation of an act performed without authorization*¹⁵

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 international organization for that purpose is without legal effect unless afterwards confirmed by that State or organization.

¹³ A reference to the "chief administrative officer of the Organization", using the wording of article 85 of the Convention on the Representation of States, would not only be difficult to apply to all organizations, but would not reflect the practice regarding full powers, since the immediate colleagues of secretaries-general are also exempt from producing full powers.

¹⁴ Corresponding provision of the 1969 Convention:

"Article 2. Use of terms

"1. For the purposes of the present Convention

"...

"(c) 'full powers' means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty."

¹⁵ Corresponding provision of the 1969 Convention:

"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 for that purpose is without legal effect unless afterwards confirmed by that State."

COMMENTARY

Except for drafting changes, the text of this article is the same as that of the corresponding article of the 1969 Convention.

*Article 9. Adoption of the text*¹⁶

1. The adoption of the text of a treaty concluded between one or more States and one or more international organizations takes place by the consent of the State or States and the organization or organizations participating as potential parties in its drawing up.

2. The adoption of the text of a treaty between several international organizations takes place by the consent of the organizations participating as potential parties in its drawing up.

3. The adoption of the text of a treaty at an international conference admitting, in addition to States, one or more international organizations possessing the same rights as States at that conference, takes place by the vote of two thirds of the States and organizations present and voting, unless by the same majority the States and organizations shall decide to apply a different rule.

COMMENTARY

(1) The preparation of a draft article corresponding to article 9 of the 1969 Convention involved the resolution of a drafting difficulty and a substantive problem.

(2) From the standpoint of drafting, it seemed that the text would be clearer if, as in the case of some other articles, a separate paragraph was devoted to each of the two main categories of treaties dealt with in article 1 of the draft articles,¹⁷ namely treaties concluded between one or more States and one or more international organizations, and treaties concluded between international organizations, even though the rule embodied in the two paragraphs is the same.

(3) With regard to substance, although no problem arises in referring to the States participating in the drawing up of the text of a treaty, the same is not true in the case of international organizations. As is well known, it is perfectly possible for an international organization to "participate in the drawing up of the text of a treaty" even though it is not expected to become a party to that treaty; this is the case for many treaties between States concluded under the auspices of an international organization, especially the draft treaties prepared by the International

¹⁶ Corresponding provision of the 1969 Convention:

"Article 9. Adoption of the text

"1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.

"2. The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule."

¹⁷ See *Yearbook... 1974*, vol. II (Part One), p. 294, document A/9610/Rev.1, Chap. IV, sect. B.

Law Commission. Would it be possible for an organization thus to participate in the drawing up of the text of a treaty although it was not expected to become a party to that treaty, while other organizations were destined to become parties and participated in that capacity in the negotiation on the same footing as States? The Special Rapporteur felt that he should not disregard that eventuality,¹⁸ of which the following example could be imagined: the United Nations might participate in the drawing up of the text of an economic agreement on a given product and the text would serve as a starting-point for an agreement concluded between two States and a regional organization administering a customs union. In order to avoid all ambiguity it is necessary to introduce—as has been done in paragraphs 1 and 2—the idea that the requirement relating to the consent of the organizations which participated in the drawing up of the text concerns only the organizations which so participated *as potential parties*. If it should seem preferable not to use this form of wording it would also be possible to say “which participated in that drawing up *during the negotiation*”, but this wording is less precise.

(4) The difficulty seems to disappear in the case of negotiation at a *conference*, but another difficulty immediately arises, involving the concept of a “party” to a treaty. This is a point which has been discussed at length in earlier reports.¹⁹ In preparing its draft articles on the law of treaties the International Law Commission never considered whether the complex of rights and obligations which might belong to a State as “party” to a treaty could, setting aside the case of reservations, be attenuated; but once other subjects of law, especially international organizations, are introduced into the treaty machinery, the problem can no longer be avoided. In fact, the reasons justifying the hesitation of States to admit international organizations as full and complete “parties”, especially in the case of multilateral treaties, may lead to the provision of a special status for organizations, especially with regard to the basic rights to participate in the drawing up, adoption, entry into force, modification and revision of the treaty. It would probably be for the States concerned to define in the case of each treaty, should they so desire, the particular conditions to be extended to organizations which were to become “parties” to the treaty under a special régime, and the Special Rapporteur does not think that the time has come to propose a general framework for this topic. But in the case of a rule as important as that of the two-thirds majority at international conferences, the vote of international organizations should not be placed on the same footing as the vote of States unless the organizations have the same rights as States at that conference: organizations accorded only some of the rights of the parties to a treaty cannot be included when calculating the two-thirds majority.

¹⁸ A similar problem was previously set aside in connexion with article 2, para. 1 (e) (see *Yearbook... 1974*, vol. II (Part One), p. 294, document A/9610/Rev.1, chap. IV, sect. B).

¹⁹ Especially the second report (*Yearbook... 1973*, vol. II, pp. 80–81, document A/CN.4/271, paras. 29 *et seq.*); and the first report (*Yearbook... 1972*, vol. II, p. 193, document A/CN.4/258, para. 73).

Article 2. Use of terms

Paragraph 1 (g)²⁰

(g) “party” means a State which has consented to be bound by the treaty and for which the treaty is in force; in the same conditions it means an international organization when its position with regard to the treaty is identical to that of a State party;

COMMENTARY

In the light of the considerations discussed above in connexion with draft article 9, the status of “party” to a treaty should be accorded only to international organizations whose relations with the treaty are in every respect comparable to those of the States parties. Organizations which are not in this position cannot *ipso facto* be accorded the full status of “party to a treaty”; their rights and obligations must be established on a case-by-case basis according to the particular régime to which they are subject.

Article 10. Authentication of the text²¹

The text of a treaty 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 as potential parties in its drawing up; or

(b) failing such procedure, by the signature, a signature *ad referendum* or initialling by the representatives of those States and organizations of the text of the treaty or of the Final Act of a conference incorporating the text.

COMMENTARY

The changes are prompted by the same consideration as that set out in paragraph 3 of the commentary on draft article 9.

²⁰ Corresponding provision of the 1969 Convention:

“Article 2. Use of terms

“1. For the purposes of the present Convention

“... ”

“(g) ‘party’ means a State which has consented to be bound by the treaty and for which the treaty is in force.”

²¹ Corresponding provision of the 1969 Convention:

“Article 10. Authentication of the text

“The text of a treaty is established as authentic and definitive:

“(a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or

“(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.”

Article 11. Means of expressing consent to be bound by a treaty²²

1. The consent of a State to be bound by a treaty may be 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 may be expressed by signature, exchange of instruments constituting a treaty, acceptance, approval or accession, or by any other means if so agreed.

COMMENTARY

(1) Should article 11 of the 1969 Convention form the basis of a corresponding article in the present draft articles? This question raises first of all the matter of the scope of this article within the 1969 Convention. In fact, it serves as an introduction to articles 12, 13, 14 and 15, and its value is primarily descriptive. However, this character appears much more marked when one considers the evolution of article 11. First, in the original proposals of the Special Rapporteur, Sir Humphrey Waldock,²³ all the terms used were defined (article 1 (*g*), (*i*), (*j*), (*k*)) and generally speaking the articles dealing with each of the procedures enumerated were very long. After the debate in the Commission, however, the definitions had virtually disappeared from article 1 and merely followed from the commentaries.²⁴ In 1965, the observation made by a number of Governments showed that the lack of definitions resulted in a certain obscurity; the Special Rapporteur noted those observations²⁵ but proposed no remedy other than stressing that the terms were used in the sense given them in international law, irrespective of the meaning which they might be given in a specific national law. In its final report on the work of its eighteenth session²⁶ the International Law Commission maintained its general position, especially in the definitions contained in article 2. The position of the Commission may be summarized as follows: there are international acts designed to establish on an international plane the consent of a State to be bound by a treaty and these acts are the subject of a diversified and partially uncertain terminology. The presentation of the subject-matter was greatly modified by the proposals made by Poland and the United States at the United Nations Conference on the Law of Treaties, which were the origin of the existing article 11.²⁷ This new

article introduced the articles which were to follow, completed as far as the exchange of instruments constituting a treaty was concerned by a new article 13, but it also stressed the purely descriptive character of all those provisions. In fact, it added "any other means if so agreed" to the list of procedures still undefined by which a State expresses its consent to be bound by a treaty. Consequently, the import of articles 11-15 was tantamount to saying the expression of consent is effected by any means, designated by any term, provided that this procedure has in one way or another been provided for or accepted by the States concerned. The purpose of this set of articles thus became largely descriptive; although the nature of signature (article 12), exchange of instruments constituting a treaty (article 13) and accession (article 15) raise few difficulties, the same as cannot be said of ratification, acceptance or approval (article 14); the nuances introduced into the way in which States can reach agreement on recourse to one or other of the procedures for expression of consent to be bound merely illustrate the sovereign freedom of States.

(2) The impression is thus given that this set of articles was included in the 1969 Convention primarily to reassure Governments by mentioning a terminology which was familiar to them and by demonstrating through many examples the wide freedom which they possessed. Another solution, consisting of formulating a more simple general principle in abstract terms, would probably not have had the same advantages, although from a theoretical point of view it would have been more intellectually satisfying.

(3) These considerations, which tend to define the precise scope of article 11 and the following articles of the 1969 Convention, dispose one to remain faithful, in the case of treaties to which international organizations are parties, to the method established by the United Nations Conference on the Law of Treaties and the 1969 Convention which it prepared. Some of the imprecisions of the Convention are thus incorporated in the present draft articles, but are not aggravated. One example is that of "approval"; it has been pointed out,²⁸ it is true, that in the practice of certain organizations the term "approval" has quite a different meaning from that which seems to follow from article 2, paragraph 1 (*b*) and article 11 of the 1969 Convention, but it should be remembered that in adopting article 2, paragraph 2, of the present draft articles the Commission adopted a general principle which eliminates all possibility of misunderstanding.²⁹

²² Corresponding provision of the 1969 Convention:

"Article 11. Means of expressing consent to be bound by a treaty

"The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."

²³ *Yearbook...* 1962, vol. II, p. 31, document A/CN.4/144.

²⁴ *Ibid.*, p. 161, document A/5209, chap. II, sect. II, article 1.

²⁵ *Yearbook...* 1965, vol. II, pp. 14-15, document A/CN.4/177 and Add.1 and 2, article 1, para. 1 (*d*); and *ibid.*, p. 158, document A/6009, para. 22.

²⁶ *Yearbook...* 1966, vol. II, A/6309/Rev.1, part two, chap. II, sect. C, para. 9 of the commentary to article 2.

²⁷ *Yearbook...* 1972, vol. II, p. 188, document A/CN.4/258, para. 55 and foot-note 141.

²⁸ K. Zemanek, "Agreements concluded by international organizations and the Vienna Convention on the Law of Treaties," *University of Toledo Law Review* (Toledo, Ohio), 1971, Nos. 1 and 2, p. 176. It was, apparently, both the uncertainty of the terminology and the doubts that might be raised by the term "ratification" which led the representative of Thailand to observe quite rightly at the 1496th meeting of the Sixth Committee of the General Assembly that the term "acceptance" could be used to include ratification as well as accession and that the terminology should be flexible (*Official Records of the General Assembly, Twenty-ninth Session, Sixth Committee, 1496th meeting, para. 5*).

²⁹ "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 or by the rules of any international organization" (*Yearbook...* 1974, vol. II (Part One), p. 295, document A/9610/Rev.1, chap. IV, sect. B).

(4) It would thus be possible to propose a draft article 11 which would differ only by a simple drafting change from the corresponding provision of the 1969 Convention and would read as follows:

The consent of a State or international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

The Special Rapporteur was, however, deterred from adopting that course by a scruple concerning *ratification*. Whatever the uncertainties surrounding that term, which the International Law Commission did not define in the 1969 Convention, it remains closely linked to a lengthy tradition according to which the Head of State is the highest representative of the State on the international plane and in the case of formal treaties expresses his will on two occasions: first, through negotiators or diplomats holding full powers issued in his name and second, by the ratification of the agreement concluded by those representatives. Such concepts, whose monarchical origins are obvious, are foreign to international organizations which, by virtue of a general rule, have no recognized representative in international relations. It was noted long ago that the term "ratification" was not used in the practice of organizations;³⁰ despite an example (which is moreover subject to interpretation)³¹ that is frequently cited (although the references are not always given), it seems that practice clearly runs counter to this example and that it is preferable not to use the term "ratification", but rather "approval" or any other term "if so agreed" in the case of international organizations.

(5) That is why draft article 11 has been divided into two paragraphs, the first relating to States and reproducing article 11 of the Vienna Convention, and the second relating to international organizations and omitting the term "ratification", which was used in the first paragraph.

Article 2. Use of terms

Paragraph (b)³²

(b) "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State

³⁰ H. Blix, "The requirement of ratification", *The British Year Book of International Law 1953* (London), vol. 30 (1954), p. 352.

³¹ J.W. Schneider, *op. cit.* p. 54; H. Chiu *op. cit.*, p. 105; the example cited, (following *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. II, (United Nations publication, Sales No. 61.V.3), p. 187) is the agreement of 30 October 1950 between Italy and FAO (FAO document CL 10/7), which mentions a resolution of the Conference authorizing the Director-General to negotiate an agreement provided that it was referred to the Council "for ratification"; but "ratification" here merely means "adoption", since the agreement was to come into force (art. XVIII) following an exchange of notes between the Director-General, duly authorized by a resolution of the Council, and the authorized representative of the Italian Government.

³² Corresponding provision of the 1969 Convention:

"Article 2. Use of terms

"1. For the purposes of the present Convention
"...

or international organization establishes on the international plane its consent to be bound by a treaty; "ratification" means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

COMMENTARY

The change with respect to the corresponding provision of the 1969 Convention is justified by the comments made on ratification in the commentary on article 11 of the present draft articles.

Article 12. Consent to be bound by a treaty expressed by signature³³

1. The consent of a State or international organization to be bound by a treaty is expressed by the signature of the representative of that State or organization when:

(a) the treaty provides that signature shall have that effect;

(b) it is otherwise established that the negotiating States or organizations were agreed that signature should have that effect; or

(c) the intention of the State or organization to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

(a) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States and organizations so agreed;

(b) the signature *ad referendum* of a treaty by a representative of a State or organization, if confirmed by his State or organization, constitutes a full signature of the treaty.

COMMENTARY

The only changes made are drafting changes designed to extend the corresponding article of the 1969 Convention to cover international organizations.

"(b) 'ratification', 'acceptance', 'approval' and 'accession' mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty."

³³ Corresponding provision of the 1969 Convention:

"Article 12. Consent to be bound by a treaty expressed by signature

"1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

(a) the treaty provides that signature shall have that effect;

(b) it is otherwise established that the negotiating States 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. For the purposes of paragraph 1:

(a) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;

(b) the signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty."

Article 13. Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty³⁴

1. The consent of a State or international organization to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) it is otherwise established that that State and that organization were agreed that the exchange of instruments should have that effect.

2. The consent of two international organizations to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) it is otherwise established that those organizations were agreed that the exchange of instruments should have that effect.

COMMENTARY

There are two differences, relating solely to drafting questions, between the wording of this draft article and that of the corresponding article of the 1969 Convention. First, for the sake of clarity, the two fundamental cases, namely treaties between States and organizations and treaties between organizations, are dealt with in separate paragraphs. Second, the proposed wording is based on the fact that in practice treaties concluded by an exchange of instruments constituting a treaty operate only as bilateral conventions. This simplification does not present any problems, because in the unlikely event that a tripartite agreement should be concluded by an exchange of letters, such exchange would in effect establish three sets of bilateral relations.

Article 14. Consent to be bound by a treaty expressed by acceptance, approval or ratification³⁵

1. The consent of a State or international organization to be bound by a treaty is expressed by acceptance or approval when:

³⁴ Corresponding provision of the 1969 Convention:

“Article 13. Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty

“The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

“(a) the instruments provide that their exchange shall have that effect; or

“(b) it is otherwise established that those States were agreed that the exchange of instruments should have that effect.”

³⁵ Corresponding provision of the Vienna Convention:

“Article 14. Consent to be bound by a treaty expressed by ratification, acceptance or approval

“1. The consent of a State to be bound by a treaty is expressed by ratification when:

“(a) the treaty provides for such consent to be expressed by means of ratification;

(a) the treaty provides for such consent to be expressed by means of acceptance or approval;

(b) it is otherwise established that the negotiating States and organizations were agreed that acceptance or approval should be required;

(c) the representative of the State or organization has signed the treaty subject to acceptance or approval; or

(d) the intention of the State or organization to sign the treaty subject to acceptance or approval appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by ratification under conditions similar to those which apply to acceptance or approval.

COMMENTARY

As regards acceptance and approval, cases involving States and cases involving international organizations can be dealt with simultaneously; ratification, however, must be limited to cases involving States, in order to take into account the considerations on which draft article 11 is based.³⁶ The order followed in article 14 of the 1969 Convention has therefore been reversed; thus, the draft article deals first with acceptance and approval and then with ratification.

Article 15. Consent to be bound by a treaty expressed by accession³⁷

The consent of a State or international organization to be bound by a treaty is expressed by accession when:

(a) the treaty provides that such consent may be expressed by that State or organization by means of accession;

(b) it is otherwise established that the negotiating States and international organizations were agreed that such consent may be expressed by that State or organization by means of accession; or

“(b) it is otherwise established that the negotiating States 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 a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.”

³⁶ See above, para. 4 of the commentary to article 11.

³⁷ Corresponding provision of the 1969 Convention:

“Article 15. Consent to be bound by a treaty expressed by accession

“The consent of a State to be bound by a treaty is expressed by accession when:

“(a) the treaty provides that such consent may be expressed by that State by means of accession;

“(b) it is otherwise established that the negotiating States were agreed that such consent may 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.”

(c) all the parties have subsequently agreed that such consent may be expressed by that State or organization by means of accession.

COMMENTARY

Compared with the corresponding text of the 1969 Convention, this draft article contains only the drafting changes required to take account of international organizations.

*Article 16. Exchange, deposit or notification of instruments of ratification, acceptance, approval or accession*³⁸

Unless the treaty otherwise provides or it is otherwise agreed, instruments of ratification, acceptance, approval or accession establish the consent of a State or international organization, as the case may be, to be bound by a treaty upon:

- (a) their exchange between a contracting State and a contracting international organization, or between two contracting international organizations;
- (b) their deposit with the depositary; or
- (c) their notification to the contracting States and international organizations or to the depositary, if so agreed.

COMMENTARY

Article 16 of the 1969 Convention is basically designed to establish the moment at which the consent to be bound by a treaty is established and in operation with respect to other contracting parties.³⁹ There is no reason why the rules it establishes should not apply to international organizations. Some drafting changes have been made with respect to the corresponding draft article:

(a) The title of the article has been completed by including a reference to notification, which was inexplicably omitted from the 1969 Convention.

(b) The reservation "unless the treaty otherwise provides", at the beginning of article 16 of the 1969 Convention, has been completed by the phrase "unless it is otherwise agreed", which appears in so many articles of that Convention. Indeed, the international organizations should be allowed as much latitude as possible on this

³⁸ Corresponding provision of the 1969 Convention:

"Article 16. *Exchange or deposit of instruments of ratification, acceptance, approval or accession*

"Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

- "(a) their exchange between the contracting States;
- "(b) their deposit with the depositary; or
- "(c) their notification to the contracting States or to the depositary, if so agreed."

³⁹ See *Yearbook... 1966*, vol. II, p. 201, document A/6309/Rev.1, part two, chap. II, commentary to article 13.

point. The existence of practices that differ considerably from those relating to treaties between States has already been noted.⁴⁰ It is becoming increasingly common for each party to notify the other of the completion of all the procedures required under the legal rules applicable for each party for the establishment of definitive consent to be bound by a treaty.

(c) The inclusion of the words "as the case may be" makes it possible to take into account what was said above concerning non-recourse by international organizations to the ratification procedure.⁴¹

(d) The wording of draft article 13 was taken into account in drafting subparagraph (a).

*Article 17. Consent to be bound by part of a treaty and choice of differing provisions*⁴²

1. Without prejudice to articles 19 to 23, the consent of a State or international organization to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States or international organizations so agree.

2. The consent of a State or international organization to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

COMMENTARY

Compared with the corresponding text of the 1969 Convention, this draft article contains only the drafting changes required to take account of international organizations.

⁴⁰ Thus, Chiu (*op. cit.*, p. 104), points out that sometimes bilateral agreements between two international organizations come into force upon the latest approval by the competent collective organ, although it is not always clear how the approval is communicated to the other organization. Occasionally, a protocol of entry into force is signed after the actual entry into force. In this regard, see R.J. Dupuy, *op. cit.*, p. 300. In the case of a bilateral agreement between a State and an international organization which is subject to ratification by the State, the organization goes through a corresponding formality which is called "adoption", "approval" or some other name. Thus, the parties follow a formula according to which the treaty is concluded on the date on which they notify each other of the completion of the required procedures. Another example, with one difference, is the procedure followed for the agreement between the European Economic Community and the People's Republic of Bangladesh (*Official Journal of the European Communities—Legislation* (Luxembourg), 3 December 1974, 17th year, No. L.323, p. 18 *et seq.*

⁴¹ See above, para. 4 of the commentary to article 11.

⁴² Corresponding provision of the 1969 Convention:

"Article 17. *Consent to be bound by part of a treaty and choice of differing provisions*

"1. Without prejudice to articles 19 and 23, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

"2. The consent of a State to be bound by a treaty 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 force⁴³

A State or international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) the State or organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, as the case may be, until the State or organization shall have made its intention clear not to become a party to the treaty; or

(b) the State or organization has expressed 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.

COMMENTARY

Compared with the corresponding text of the 1969 Convention, this draft article contains only the drafting changes required to take account of international organizations.

SECTION 2. RESERVATIONS

General commentary on section 2

(1) Articles 19 to 23 of the 1969 Convention dealing with reservations, are clearly one of the principal parts of the Convention, on account of both their technical preciseness and the great flexibility which they have introduced into the régime of multilateral conventions. It must therefore be admitted at the outset that analogous provisions prepared with the object of the present draft articles in mind are only of limited immediate practical interest. It has been said, and should be constantly repeated, that treaties concluded by international organizations are almost always bilateral treaties, for which reservations may come into play in theory but are of no interest in practice. The few multilateral treaties to which international organizations are parties are all treaties which fall under the provisions of article 20, paragraph 2; in other words, they only allow a very limited play to the reservations mechanism. Multilateral treaties open to a large number of signatories constitute the area in which reservations have a real practical function, and it is well-

known that at present there are still very serious obstacles to the accession of international organizations to such treaties. To devote draft articles to reservations, therefore, meets a logical need which is only beginning to emerge in concrete form.

(2) Given this qualification, there is no reason to put international organizations in a situation different from that of States in the matter of reservations. It is the quality of being a "party" to a treaty which governs the whole system of reservations. It follows from the definition previously retained⁴⁴ that an organization is described as a "party" to a treaty only if it has been admitted to a treaty régime in exactly the same conditions as a State. This means that the reservations régime established for States may be extended to international organizations only if, by definition, the organization is placed on exactly the same footing as the State. It is therefore clearly a question of making a choice of a political nature which is for the time being entirely in the hands of States; they may refuse access to a treaty to one organization or to all organizations; they may also admit an organization to partial enjoyment of the treaty régime; it is only in a third case, when the organization is fully admitted to the treaty régime as a "party", that the general reservations régime will apply.

(3) Some may perhaps remain open to the idea that reservations to a treaty are an evil which cannot be entirely proscribed and must be accepted as a concession to the sovereignty of States, but should be restricted as much as possible. From this viewpoint, one may perhaps come to think that organizations, which cannot claim the same sovereignty (and to which a kind of natural disinterestedness is sometimes attributed), should not enjoy the same freedom as States. Arguments of this kind are, however, highly questionable in every respect. Reservations cannot be qualified at the ethical level; they reflect a fact, namely that there are minorities whose interests are as respectable as those of majorities; organizations whose activity as often as not reflects that of a majority of their members may be in a minority in a broader perspective; there is therefore no reason to be stricter towards them than towards States.

(4) There may also be a fear that if an organization is admitted as a party to a treaty at the same time as the States which are members of that organization, all sorts of complications may arise from the play of reservations and objections which might cause an organization to be divided and opposed to its own members. This objection is not wholly unrealistic, but it goes well beyond the problem of reservations; it only draws attention to the fact that if an organization and its members may be admitted as separate parties to a treaty, it is on condition that the respective areas of competence of the organization and of its members should be clearly separate. If this were not the case, the majority of member States of an organization would have a twofold participation in the treaty, as States and as an organization, and a contradiction might arise between the commitments of the organization and those of its members which were not parties to the treaty

⁴³ Corresponding provision of the 1969 Convention:

Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force

"A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

"(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

"(b) it has expressed 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."

⁴⁴ See above, article 2, para. 1 (g).

or which, being parties to the treaty, by means of their own reservations had defined their obligations in a different way from the organization. That is why it cannot be accepted without precautions that an organization should be party to a treaty at the same time as its own members; either a situation of this kind must be governed by special rules, or else it must be ensured that the areas of competence of the organization and of its member States are clearly defined, and that the rules of the treaty will apply in different situations for the organization and for its member States. This, for instance, would occur in the case of a copyright convention, to which an organization acceded solely to protect its own publications, while its member States acceded to the Convention in respect of publications (excluding those of the organization) issued in their respective territories. These considerations shed further light on the reasons why multilateral treaties have not hitherto been open to international organizations and probably will become so only in certain specific cases. If, however, for the sake of argument, it is assumed that the organization has become a party to such a convention, to defend and promote its own specific interests, there is no reason to treat that organization differently from a State.

(5) It is in this spirit and in the light of these considerations that draft articles which extend the rules embodied in articles 19 to 23 of the 1969 Convention to the agreements to which international organizations are parties will be submitted. These draft articles will contain only minor drafting changes in relation to the corresponding texts of the 1969 Convention; no special commentary will be made.

*Article 19. Formulation of reservations*⁴⁵

A State, when signing, ratifying, accepting, approving or acceding to a treaty, and an international organization, when signing, accepting, approving or acceding to a treaty, 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.

⁴⁵ Corresponding provision of the 1969 Convention:

Article 19. Formulation of reservations

"A State may, when signing, ratifying, accepting, approving or acceding to a treaty, 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 20. Acceptance of and objection to reservations*⁴⁶

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States or international organizations unless the treaty so provides.

2. When it appears from the limited number of the negotiating States or international organizations and the object and purpose of a treaty 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. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting State or international organization of a reservation constitutes the reserving party a party to the treaty in relation to that other contracting party if or when the treaty is in force for those contracting parties;

(b) an objection by another contracting State or international organization to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving contracting parties unless a contrary intention is definitely expressed by the objecting contracting party;

(c) an act expressing the consent of a contracting State or international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State or international organization has accepted the reservation.

⁴⁶ Corresponding provision of the 1969 Convention:

Article 20. Acceptance of and objection to reservations

"1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting State unless the treaty so provides.

"2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty 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. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

"4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

"(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

"(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving State unless the contrary intention is definitely expressed by the objecting State;

"(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

"5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State 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."

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a contracting State or international organization if it shall have raised no objection to the reservation by the end of a period of 12 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*⁴⁷

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State or international organization 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 contracting State or international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving contracting party, the provisions to which the reservation relates do not apply as between the two contracting parties to the extent of the reservation.

*Article 22. Withdrawal of reservations and of objections to reservations*⁴⁸

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State

⁴⁷ Corresponding provision of the 1969 Convention:

"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, 20 and 23:

(a) modifies for the reserving State 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 State.

"2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

"3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation."

⁴⁸ Corresponding provision of the 1969 Convention:

"Article 22. Withdrawal of reservations and of objections to reservations"

"1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

"2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

"3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation."

or international organization which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State or international organization only when notice of it has been received by that State or international organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the reserving party.

*Article 23. Procedure regarding reservations*⁴⁹

1. 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 international organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization, as the case may be, 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.

SECTION 3. ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

*Article 24. Entry into force*⁵⁰

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States and international organizations may agree.

⁴⁹ Corresponding provision of the 1969 Convention:

"Article 23. Procedure regarding reservations"

"1. 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 other States entitled to become parties to the treaty.

"2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State 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."

⁵⁰ Corresponding provision of the 1969 Convention:

"Article 24. Entry into force"

"1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree."

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States and international organizations.

3. When the consent of a State or international organization to be bound by a treaty 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 regulating the authentication of its text, the establishment of the consent of States and 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.

COMMENTARY

It was pointed out earlier⁵¹ that, particularly in the case of bilateral treaties between international organizations, varied and frequently original formulas are found in practice; however, the text of article 24 of the Convention is extremely flexible and is perfectly suitable, with a few changes of a purely drafting character, for treaties to which international organizations are parties.

*Article 25. Provisional application*⁵²

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

- (a) the treaty itself so provides; or
- (b) the negotiating States or international organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States or international organizations have otherwise

"2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

"3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

"4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States 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."

⁵¹ See foot-note 40 above.

⁵² Corresponding provision of the 1969 Convention:

"Article 25. Provisional application

"1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

- "(a) the treaty itself so provides; or
- "(b) the negotiating States have in some other manner so agreed.

"2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty".

agreed, the provisional application of a treaty or a part of a treaty with respect to a State or organization shall be terminated if that State or organization notifies the other States or organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

COMMENTARY

This text differs from article 25 of the 1969 Convention only with respect to the drafting changes needed in order to take account of international organizations.

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.⁵³

*Article 27. Internal law of a State, rules of an international organization and observance of treaties*⁵⁴

Without prejudice to article 46, failure to perform a treaty may not be justified

(a) in the case of a State, by the provisions of its internal law;

(b) in the case of an international organization, by the rules of the organization.

COMMENTARY

(1) The general principle underlying article 27 of the 1969 Convention is certainly valid also in the case of international organizations. In this latter instance, however, it requires some basic clarification and a terminological choice.

(2) The question was touched on earlier, with regard to article 2, paragraph 2, by the International Law Commission at its twenty-sixth session.⁵⁵ The Commission finally drafted that paragraph as follows:

⁵³ The titles of part III, of section 1 of this part, and of article 26, and the text of article 26 reproduce unchanged the wording of the 1969 Convention on the Law of Treaties.

⁵⁴ Corresponding provision of the 1969 Convention:

"Article 27. Internal law and observance of treaties

"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

⁵⁵ See *Yearbook... 1974*, vol. II (Part One), pp. 296-297, document A/9610/Rev.1, chap. IV, sect. B, paras. 14-16 of the commentary to article 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 or by the rules of any international organization.

Draft article 27 uses the same expression for the purposes of consistency with article 2.

(3) It is doubtless of no purpose to revert to a question which, as the Special Rapporteur noted in his first report,⁵⁶ has long held the Commission's attention in the past. By adopting the expression "rules of the organization" the Commission remains faithful to the wording of texts which have already been approved by international conferences, namely article 5 of the 1969 Convention which provides that:

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

and article 3 of the Convention on the Representation of States, which reads as follows:

The provisions of the present Convention are without prejudice to any relevant rules of the Organization or to any relevant rules of procedure of the conference.

As the Commission stated in the report on its twenty-sixth session: "Other expressions such as 'internal law of an organization', 'law proper to an organization' and the like were discarded for substantive reasons or for the sake of simplicity".⁵⁷

(4) The expression "rules of the organization" is to be understood in a broad sense and includes the constituent instrument of the organization, such written rules as it may have been able to elaborate in the exercise of its powers, and the unwritten rules resulting from the practices established by the organization.⁵⁸

There should also, it seems, be included among these rules of the organization such rules as derive from other treaties concluded by the organization; it would be unreasonable for an organization to be able, for example, to invoke the provisions of a headquarters agreement as a pretext for failing to perform a treaty of co-operation which it has concluded with another international organization.⁵⁹

⁵⁶ See *Yearbook... 1972*, vol. II, pp. 178-182, document A/CN.4/258, paras. 25-36.

⁵⁷ *Yearbook... 1974*, vol. II (Part One), p. 297, document A/9610/Rev.1, chap. IV, sect. B, para. 16 of the commentary to article 2.

⁵⁸ The Convention on the Representation of States, in article 1, paragraph 1, sub-paragraph 34, defines the expression "rules of the Organization" as follows:

"1. For the purposes of the present Convention:

"...

"(34) 'rules of the Organization' means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the Organization."

⁵⁹ In the case of an organization which has centralized institutions and, in particular, a court of justice, the rules of the organization tend to be organized in a *system* which necessarily includes the rules deriving from treaties which it has concluded; see the judgement of the Court of Justice of the European Communities of 30 April 1974, R. and V. Haegeman v. Belgian State, Case 181/73, [1975] 1 C.M.L.R., p. 515).

This latter extension of the concept of "rules of the organization" should, however, be understood as being subject to the special provisions provided for under draft article 30, which will be considered at a later stage.

SECTION 2. APPLICATION OF TREATIES

*Article 28. Non-retroactivity of treaties*⁶⁰

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.

COMMENTARY

It will always be possible to criticize any wording which attempts to reduce a rule on the subject to a few simple formulas. The Special Rapporteur therefore felt that, in accordance with a general line of conduct endorsed previously, he should refrain from any attempt to improve on the Convention, independently of specific problems relating to international organizations.

*Article 29. Territorial scope of treaties*⁶¹

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each State Party in respect of its entire territory.

COMMENTARY

(1) Article 29 is one of those articles which, if we refer to the work of the Commission and of the United Nations Conference on the Law of Treaties, might give rise to misunderstandings. In order to avoid such misunderstandings and to show what specific problems arise with regard to treaties concluded by international organizations, it might be useful to consider the origins of article 29 of the 1969 Convention.

(2) In its original proposal, the International Law Commission sought to regulate fundamentally the *territorial scope* of rules established by a treaty, in the absence of any indication resulting from the treaty or from any other circumstance; it in no way intended to exclude or resolve questions relating to extra-territorial application, or to take sides on questions relating to constitutional structure such as those which exist above all (but not exclusively) in

⁶⁰ The text of art. 28 of the 1969 Convention is identical with draft art. 28.

⁶¹ Corresponding provision of the 1969 Convention:

"Article 29. *Territorial scope of treaties*

"Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."

federations, and still less to refer, even by name, to what was, at one time, called the "colonial clause" in treaties.⁶²

(3) Before and during the Conference, objections were voiced again and were reflected, *inter alia*, in an amendment submitted by the Ukrainian Soviet Socialist Republic; but in accepting that amendment, the Drafting Committee regarded it only as a drafting change and the text, thus modified, was adopted without opposition, both in the Committee of the Whole and in the plenary meeting, and became the present article 29 of the 1969 Convention.⁶³ It therefore seems that the idea behind article 29 is that a distinction must be made between the treaty and the application of some of the rules established by the treaty. The treaty binds the State and the whole State, since, from the point of view of international law, the State is indivisible, while the application of the rules which it establishes, although it extends to the entire territory unless there is an indication to the contrary, may be limited to certain parts of it. Without going into the question of whether the idea is as certain as it appears at first sight, it must be recognized that it is difficult to express and cannot perhaps be translated entirely satisfactorily.

(4) In any event, it is certain that if the formula of the article is to be retained with regard to States parties to treaties to which the present draft articles apply, article 29 of the 1969 Convention must be modified along the lines indicated in the draft article 29 set out above, as the Special Rapporteur proposes.

(5) This solution, however, which only resolves a drafting problem, by no means exhausts the question. In fact, it might be wondered whether it would not be permissible to accept the concept of "territory of an organization". It would not be difficult to give examples of international organizations in whose proceedings use is made of formulas which refer to the notion of territory in connexion with the organization: "single postal territory" (UPU)⁶⁴, "single territory", "territory of the Community".⁶⁵ However, it must be recognized that in most cases the use of such terminology is not intended to imply a claim that the international organization in question has seen itself as having been assigned a territory similar to the territory of a State. When, for example, the régime of a customs union X is being defined and mention is made of the "customs territory of X", the intention is only to define the spatial extent of the régime of the customs union, and, in a more general way, the term "territory"

refers only to the spatial scope of application of given rules. Taken in that narrow sense, it does not give rise to any objections from the legal standpoint. However, in the current state of evolution of international law, it is probable that many Governments would raise objections to any reference to the notion of territory in connexion with an international organization.

(6) It is true that any reference to the territory of an organization could be avoided by referring simply to the territory of its member States. If a solution of that kind was adopted, draft article 29 should include a second paragraph worded as follows:

Unless a different intention appears from the treaty or is otherwise established, the scope of application of a treaty extends, in the case of an international organization which is a party to the treaty, to the entire territory of the States members of that organization.

However, a formula of that kind represents a considerable departure from article 29 of the 1969 Convention in the use which it makes of the term "scope of application" ("*champ d'application*"), which gives rise to difficulties of translation into other languages; in any event, the text of the first paragraph would have to be changed in order to bring it into line with this second paragraph. Moreover, such wording would inevitably raise, at least apparently, the question of the effects of treaties concluded by an international organization with regard to States which are members of that organization, a very difficult question which the Special Rapporteur will have to study in his next report in connexion with draft articles 34 *et seq.* For all these reasons, he relies on the judgement of the Commission on this point.

(7) In reality, the application of article 29 of the 1969 Convention to the case of treaties to which one or more international organizations are parties might give rise to a quite different problem, but one which does not arise for a State. Whereas the unitary structure of the modern State is very pronounced at the international level, the same is not necessarily true of all international organizations. As has been observed on several occasions,⁶⁶ apart from their statutory organs, organizations often comprise subsidiary organs, based on a decision by the organization, and "connected organs", whose existence rests on an inter-State convention but which find themselves, with the consent of the organization, connected with the latter; it might be wondered to what extent, as far as external relations are concerned, subsidiary organs or connected organs enjoy genuine autonomy. To what extent do agreements concluded by such an organ or on its behalf commit the whole organization? To what extent do agreements concluded by the organization bind the "subsidiary organs" and the "connected organs"? These two questions are complementary and the second is probably of greater interest to organizations than that of determining the *spatial* scope of application of treaties concluded by an organization.

(8) This point is, however, mentioned only to show that the question of the spatial scope of application of rules established by a treaty to which an organization is a

⁶² The final report of the International Law Commission gives a summary of the difficulties which the Commission encountered and which were emphasized by certain Governments (*Yearbook... 1966*, vol. II, commentary on art. 25, p. 213).

⁶³ For complete references to all the preparatory work, see S. Rosenne, *The Law of Treaties, A Guide to the Legislative History of the Vienna Convention* (Leiden, Sijthoff, 1970), pp. 206 *et seq.*

⁶⁴ Constitution of UPU, article 1 (United Nations, *Treaty Series*, vol. 611, p. 64).

⁶⁵ For instance, one might quote the following extract from the judgement handed down on 12 December 1974 in case 36-74 by the Court of Justice of the European Communities:

"The rule on non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community." ([1975] 1 C.M.L.R., p. 335.)

⁶⁶ For instance, in the second report (*Yearbook... 1973*, vol. II, pp. 85-86, document A/CN.4/271, paras. 65-68).

party is not the most important question for the organization. But the Special Rapporteur will not propose any article on the extension to the subsidiary organs and connected organs of international organizations of rules established by treaties concluded by the latter because it did not seem to the International Law Commission that the matter was sufficiently ripe to be a subject for codification.⁶⁷

Article 30. Application of successive treaties relating to the same subject-matter⁶⁸

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States and 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 States or international organizations parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State or international organization party to both treaties and a State or international organization party to only one of the treaties, the treaty which binds the

⁶⁷ See *Yearbook... 1973*, vol. II, p. 224, document A/9C10/Rev.1 para. 131.

⁶⁸ Corresponding provision of the 1969 Convention:

Article 30. Application of successive treaties relating to the same subject-matter

"1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States 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 States 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, the treaty to which both States are parties 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 from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty."

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 from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State or another international organization under another treaty.

COMMENTARY

(1) With the exception of a few essential drafting changes in paragraphs 1, 4 and 5, no change is proposed from the corresponding provisions of the 1969 Convention. This does not mean that the draft article gives rise to no difficulties and calls for no commentary.

(2) Mention should first of all be made of a few features of article 30 of the 1969 Convention. The Convention establishes, in respect of relations between successive treaties relating to the same subject-matter, a differentiated system which comprises a general régime, represented by article 30, and covers particular cases, such as the amendment and modification of treaties (arts. 39, 40, 41) and the termination and suspension of operation of treaties (arts. 54, 57, 58, 59). Moreover, as is reflected in article 30, paragraph 5, this provision is not intended to recognize or deal with questions relating to legality or responsibility which might arise in connexion with successive treaties relating to the same subject-matter; its sole purpose is to regulate a question of priority of application.⁶⁹ But it was perhaps difficult to be more specific; if, for instance, reference had been made to what was meant by "the same subject-matter", many questions might have been asked; in order to fulfil the condition of relating to "the same subject-matter", is it sufficient for two successive treaties, although dealing with a different general subject, to raise the same point in a particular provision? Or must the general subject be identical? On this latter question, the Expert Consultant, at the request of one delegation, made the following reply at the United Nations Conference on the Law of Treaties:

[The words "relating to the same subject-matter"] should not be held to cover cases where a general treaty impinged indirectly on the content of a particular provision of an earlier treaty; in such cases, the question involved such principles as *generalia specialibus non derogant*.⁷⁰

As the 1969 Convention does not deal elsewhere with problems relating to a conflict between successive treaties which include incompatible provisions and which would require an analysis questioning their general or specialized character, it must be concluded that, despite its apparent complexity, the Convention by no means examined all aspects of the problem.

⁶⁹ See *Yearbook... 1966*, vol. II, pp. 214-217, document A/6309/Rev. 1, part II, chap. II, commentary to article 26.

⁷⁰ *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. 253, 91st meeting of the Committee of the Whole, para. 41.

(3) It is possible to give another example, which is similar to the previous one. By referring in paragraph 1 to Article 103 of the Charter of the United Nations, the Committee showed not only that on occasion it interpreted the concept of "treaties relating to the same subject-matter" fairly broadly (what treaty could relate to the same subject-matter as the Charter?), but that it neglected to make generally applicable the case thus provided for. In fact, the 1969 Convention extends to the constituent charters of international organizations and should it not, at least in respect of treaties concluded between the States members of each international organization, establish the principle of the priority of the constituent charters in respect of treaties concluded between States members of those organizations? But since neither the International Law Commission nor the United Nations Conference on the Law of Treaties wished to consider the matter extensively, the Special Rapporteur will not attempt to consider in connexion with the present draft articles all the specific cases which might come to mind, particularly those resulting from the fact that perhaps a distinction should be made as to whether or not the parties to the successive treaties in question include States which are States members of the international organizations concerned.

(4) In the very first paragraph, article 30 raises a question of principle. Without discussing here the interpretation of Article 103 of the Charter, it raises the question of the possible effects of Article 103 with regard to States which are not Members of the United Nations.⁷¹ But the effect of Article 103 with regard to *international organizations* presents specific questions. To take first the case of the United Nations itself, although it is not a party to the Charter, the Organization is not a third party in relation to its constituent charter⁷² and it is quite clear that if the United Nations was to conclude an international treaty which was contrary to the provisions of the Charter, there would be not merely a question of priority, but a question of nullity since it seems—and this is a question which will be discussed later in connexion with a draft article corresponding to article 46 of the 1969 Convention—that such a treaty might be null and void.

(5) If the problem is considered in a more general way, can it be said that international organizations are third parties in relation to the Charter of the United Nations not only because they cannot be members of the Organization but because this is so under the rules of the 1969 Convention itself (arts. 34 *et seq.*)? The Special Rapporteur has received no mandate to discuss such a question, which falls within the subject-matter covered by the Convention, since the latter relates also to the constituent charters of international organizations. However, he felt that it would be rather difficult to accept that interna-

tional organizations, the vast majority of whose members are States Members of the United Nations, could disregard the rules of the Charter.

(6) However, if it is considered preferable to keep more closely to the text of Article 103 (which deals with the "obligations of the Members of the United Nations" and with nothing else), and to make a distinction between the general principles of the Charter, which have today acquired a customary value for all members of the international community, and the specific provisions, which would only bind Member States, article 30, paragraph 1, should be worded as follows:

1. The rights and obligations of States and international organizations parties to successive treaties relating to the same subject-matter shall, subject, in respect of States, to Article 103 of the Charter of the United Nations, be determined in accordance with the following paragraphs.

SECTION 3. INTERPRETATION OF TREATIES

General commentary to section 3

(1) Part III, section 3, of the 1969 Convention consists of three articles which are, on the conventional plane, the exact translation, for the purposes of interpretation, of the provisions governing a general agreement, whoever the parties to it might be; moreover, these three articles have been drafted without using the word "State". They can therefore be transferred as they stand, without any substantive or drafting changes, to the present set of draft articles.

(2) There is indirect confirmation of this conclusion. Never, to the knowledge of the Special Rapporteur, has it been suggested that the interpretation of treaties to which one or more international organizations are parties presents special features. The same does not apply to treaties which are the constituent instrument of an international organization. In fact, by consulting international judicial practice, it is possible to hold that the interpretation of the constituent charters of international organizations presents particular characteristics, for instance because of the importance which should be attached to teleological factors.⁷³ However, the question has never been raised either in the International Law Commission or at the Conference on the Law of Treaties; it was no doubt felt that the provisions in part III, section 3, of the 1969 Convention allowed those factors to be given their proper place, in so far as was necessary. In any event, the constituent charters present more original features, by comparison with treaties between States, than do treaties to which international organizations are parties.

*Article 31. General rule of interpretation*⁷⁴

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms

⁷³ For instance, Ch. de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (Paris, Pédone, 1963), p. 140.

⁷⁴ Text identical with the corresponding provision of the 1969 Convention.

⁷¹ L. M. Goodrich, E. Hambro, A. P. Simons, *Charter of the United Nations*, 3rd ed. (New York, Columbia University Press, 1969), p. 614. At the United Nations Conference on the Law of Treaties, the representative of Switzerland indicated that his country would be obliged to make a reservation to the future Convention with regard to the proposed article (see *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.164, 31st meeting of the Committee of the Whole, para. 9).

⁷² See *Yearbook... 1973*, vol. II, p. 90, document A/CN.4/271, para. 91.

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*⁷⁵

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty

⁷⁵ Text identical with the corresponding provision of the 1969 Convention.

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*⁷⁶

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 text 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.

⁷⁶ Text identical with the corresponding provision of the 1969 Convention.

CO-OPERATION WITH OTHER BODIES

[Agenda item 8]

DOCUMENT A/CN.4/287

Statement made by Mr. Endre Ustor, observer for the International Law Commission
at the sixteenth session of the Asian-African Legal Consultative Committee*

[Original: English]
[7 July 1975]

It is a great privilege and honour for me to attend the sixteenth session of the Asian-African Legal Consultative Committee and to represent here the International Law Commission of the United Nations. It is also a pleasure for me to congratulate the President, on his election to his high office and to express my firm conviction that under his able chairmanship this session of the Committee will be able to carry out its work successfully. I also warmly congratulate the distinguished Vice-President on his election and Mr. Sen, the Secretary General, on his re-election. I should like also to avail myself of this opportunity to express my deep gratitude for the generous hospitality with which the Government of Iran has received me.

The International Law Commission deeply appreciates the co-operation existing between itself and the Committee and the fact that the founders of the Committee enshrined this co-operation in the Committee's statutes. According to article 3, paragraph (a) of the Statutes one of the functions of the Committee—and indeed the first mentioned among the others—is “to examine questions that are under consideration by the International Law Commission and to arrange for the views of the Committee to be placed before the Commission; to consider the reports of the Commission and to make recommendations thereon to the Governments of the participating countries”. Members of the International Law Commission esteem highly the practice of the sending by the two bodies of observers to each other's sessions. On the last occasion, when the Commission was honoured by the visit of Mr. Nishimura on behalf of the Committee, members emphasized that since the geographic area covered by the Committee was

so immense and characterized by so many rich and varied cultures and legal inheritances, the Committee had a valuable contribution to make to the work of the Commission which, indeed, often drew inspiration from the result of the Committee's proceedings.

The year 1974 was marked for the Commission by the sad event of the death of Professor Milan Bartoš of Yugoslavia, the great diplomatist and jurist whose vast knowledge, wisdom and warm personality his colleagues will never forget. The Commission devoted one solemn meeting to paying tribute to his memory. Mr. Milan Šahović, a compatriot of Mr. Bartoš, was elected in his place. Mr. Šahović is a well known scholar of international law; he held the chair of the Sixth Committee of the General Assembly at its twenty-ninth session with great distinction.

The main task of the commission for the year 1974 was to complete the second reading of its draft articles on succession of States in respect of treaties. On the basis of the favourable comments of Governments, the Commission has not changed the structure of its 1972 draft too much. The new draft deals with the following types of State succession:

(a) *Succession in respect of part of territory.* Here the moving treaty-frontier rule applies. Shortly stated, this rule means that on a territory's undergoing a change of sovereignty, it passes automatically out of the treaty régime of the predecessor sovereign into the treaty régime of the successor sovereign.

(b) On the most important case of the *newly independent States* the Commission maintained its previous stand. It adhered to the clean slate principle, i.e. that a newly independent State is not bound to maintain in force or to become a party to any treaty concluded by its predecessor. It was felt that this clearly follows from the right of peoples to self-determination.

This freedom of the newly independent State is—in the view of the Commission—not restricted by a possible

* In accordance with the decision taken by the International Law Commission at its twenty-sixth session (*Yearbook... 1974*, vol. II (Part One), p. 306, document A/9610/Rev. 1, para. 173), Mr. Endre Ustor, Chairman of the Commission at that session, attended the sixteenth session of the Asian-African Legal Consultative Committee, held in Teheran, Iran, from 26 January to 2 February 1975, as an observer for the Commission.

devolution agreement concluded between the predecessor and the successor State. The newly independent State is thus held completely free to maintain or not maintain its status in respect of the predecessor State's treaties. In respect of bilateral treaties and the so-called restricted multilateral treaties, however, the freedom to maintain the predecessor's treaty is subject to the express or tacit agreement of the other States parties.

An important general rule qualifies the "clean slate" of the newly independent State, namely that boundary régimes and other territorial régimes are not affected by State succession. The effect of this general rule is that all successor States are entitled to enjoy the rights arising from such inherited régimes and are bound to carry the burden of obligations stemming therefrom. Of course, if these régimes have been based on void or voidable treaties, these may be challenged by the successor State.

With respect to the position of newly independent States there is one important point which the Commission left open and to the consideration of the Governments. This point is whether a special provision should not be made for multilateral treaties which are of a universal character. It has been argued that it is of the utmost importance to the newly independent States and to the international community as a whole that such universal conventions as the humanitarian conventions, the ILO conventions, the Universal Postal Convention, etc., if they are already applied in respect of the territory to which the succession relates, should not cease to be in force for the newly independent State, at least not until such time as that State gives notice of the termination of the said treaty for itself. This solution would, in relation to general multilateral treaties, introduce the "contracting out" system into the draft, which otherwise has been based on the principle of "contracting in".

(c) Another part of the draft deals with the case of the creation of a new State by *uniting of States* and by *separation of States*. Unlike the articles on the newly independent States, this part is based on the *ipso jure* continuity principle. As an exception to this are the cases where the separated part of a State becomes a State in circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State. In such cases the rules pertaining to newly independent States apply.

After the conclusion of the topic of succession of States

in respect of treaties, not much time was left for the Commission to deal with other topics on its agenda. It still continued its study on State responsibility which is a subject belonging to the very core of international law. It found some time to deal with treaties between States and international organizations or between two or more international organizations and lastly it took up the consideration of the topic of "Legal problems relating to the non-navigational uses of international waterways". No work was done on two items, namely on succession of States in respect of matters other than treaties and the most-favoured-nation clause.

Finally, I have to report briefly on that meeting of the Commission by which it celebrated its twenty-fifth anniversary. Such a meeting gives occasion for reflection, stock-taking and speculation on the future. Members were able to recount the results of the Commission with an amount of satisfaction. Thus Professor Ago, who after the sad departure of Milan Bartoš has become the senior member of the Commission, said that the activities of the International Law Commission were less spectacular than those of other United Nations bodies, but there was reason to believe that in the long term its work would not be the least important. Ambassador Tsuruoka, another long-time member of the Commission, reminded the audience that in the new world where the birth of a great number of States had created a new diplomatic, political and economic climate, the Commission was called upon to play an increasingly important part, meeting the new needs and aspirations, and taking into account all the trends of ideas and legitimate interests of all people. Among these interests, peace and security are of course the first.

Concluding with these words I should like to emphasize that it is precisely for the proper accomplishment of these tasks that the Commission counts mostly on the assistance of this Committee. To the activities of this Committee I beg to wish on behalf of the International Law Commission and on my own part every success. I wish good health and good luck to the President, and to you all who have had the good chance of assembling here in the imperial and hospitable city of Teheran. I am sure that your meeting—so splendidly organized by Mr. Sen, the Secretary General and his able collaborators also from the host country—that your meeting will be pleasant and fruitful to the benefit of all countries of Asia and Africa and indeed, to the benefit of the whole international community.

REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

DOCUMENT A/10010/REV.1

Report of the International Law Commission on the work of its twenty-seventh session, 5 May–25 July 1975

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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.

ABBREVIATIONS

ECE	Economic Commission for Europe
EEC	European Economic Community
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
<i>ICJ Reports</i>	<i>ICJ, Reports of Judgments, Advisory Opinions and Orders</i>
ILO	International Labour Organisation
IMCO	Inter-Governmental Maritime Consultative Organization
ITU	International Telecommunication Union
OEEC	Organization for European Economic Co-operation
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 and Documents</i>
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDO	United Nations Industrial Development Organization
UPU	Universal Postal Union
WHO	World Health Organization
WMO	World Meteorological Organization

international organizations, contains a description of the Commission's work on that question, together with seventeen draft articles provisionally adopted so far, as well as commentaries to the twelve of those articles and six additional sub-paragraphs to the article concerning use of terms, provisionally adopted at the twenty-seventh session. Chapter VI is concerned with the law of the non-navigational uses of international watercourses, the organization and programme of work of the Commission and a number of administrative and other questions.

A. Membership and attendance

2. The Commission consists of the following members:

Mr. Roberto AGO (Italy);
 Mr. Mohammed BEDJAOUI (Algeria);
 Mr. Ali Suat BILGE (Turkey);
 Mr. Juan José CALLE Y CALLE (Peru);
 Mr. Jorge CASTAÑEDA (Mexico);
 Mr. Abdullah EL-ERIAN (Egypt);
 Mr. Taslim O. ELIAS (Nigeria);
 Mr. Edvard HAMBRO (Norway);
 Mr. Richard D. KEARNEY (United States of America);
 Mr. Alfredo MARTÍNEZ MORENO (El Salvador);
 Mr. C. W. PINTO (Sri Lanka);
 Mr. R. Q. QUENTIN-BAXTER (New Zealand);
 Mr. Alfred RAMANGASOAVINA (Madagascar);
 Mr. Paul REUTER (France);
 Mr. Zenon ROSSIDES (Cyprus);
 Mr. Milan SAHOVIĆ (Yugoslavia);
 Mr. José SETTE CÂMARA (Brazil);
 Mr. Abdul Hakim TABIBI (Afghanistan);
 Mr. Arnold J. P. TAMMES (Netherlands);
 Mr. Doudou THIAM (Senegal);
 Mr. Senjin TSURUOKA (Japan);
 Mr. N. A. USHAKOV (Union of Soviet Socialist Republics);
 Mr. Endre USTOR (Hungary);
 Sir Francis VALLAT (United Kingdom of Great Britain and Northern Ireland);
 Mr. Mustafa Kamil YASSEEN (Iraq).

3. All members attended meetings of the twenty-seventh session of the Commission. Certain members, owing to their official duties, were unable to attend a number of meetings.

B. Officers

4. At its 1302nd meeting, held on 5 May 1975, the Commission elected the following officers:

Chairman: Mr. Abdul Hakim Tabibi

First Vice-Chairman: Mr. Mohammed Bedjaoui

Second Vice-Chairman: Mr. Milan Šahović

Chairman of the Drafting Committee: Mr. R. Q. Quentin-Baxter

Rapporteur: Mr. Alfredo Martínez Moreno

C. Drafting Committee

5. On 12 May 1975, at its 1307th meeting, the Commission appointed a Drafting Committee composed of the following members: Mr. Roberto Ago, Mr. Taslim O. Elias, Mr. C. W. Pinto, Mr. Alfred Ramangasoavina, Mr. Paul Reuter, Mr. Milan Šahović, Mr. Arnold J. P. Tammes, Mr. Senjin Tsuruoka, Mr. N. A. Ushakov and Sir Francis Vallat. Mr. R. Q. Quentin-Baxter was elected by the Commission to serve as Chairman of the Drafting Committee. Mr. Alfredo Martínez Moreno also took part in the Committee's work in his capacity as Rapporteur of the Commission. Mr. Juan José Calle y Calle also served on the Committee for some time.

D. Secretariat

6. Mr. Erik Suy, Legal Counsel, attended the 1302nd meeting of the Commission and represented the Secretary-General on that occasion. Mr. Yuri M. Rybakov, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission from the 1349th to the 1359th meetings. Mr. Nicolas Teslenko and Mr. Santiago Torres-Bernárdez acted as Deputy Secretaries to the Commission and Mr. Eduardo Valencia-Ospina and Mr. Larry D. Johnson served as Assistant Secretaries to the Commission.

E. Agenda

7. The Commission adopted an agenda for the twenty-seventh session, consisting of the following items:

1. State responsibility
2. Succession of States in respect of matters other than treaties
3. Most-favoured-nation clause
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. Long-term programme of work
7. Organization of future work
8. Co-operation with other bodies
9. Date and place of the twenty-eighth session
10. Other business

8. In the course of the session, the Commission held fifty-eight public meetings (1302nd to 1359th meetings). In addition, the Drafting Committee held twenty-one meetings and the Expanded Bureau of the Commission and a sub-group thereof held six meetings. The Commission considered all the items on its agenda, with the exception of item 5 (The law of the non-navigational uses of international watercourses) as explained below.¹

¹ See chap. VI, sect. A.

Chapter II

STATE RESPONSIBILITY

A. Introduction

1. HISTORICAL REVIEW OF THE WORK OF THE COMMISSION

9. At its first session, in 1949, the International Law Commission included the question of State responsibility in the list of fourteen topics of international law selected for codification. In 1955, following the adoption by the General Assembly of resolution 799 (VIII) of 7 December 1953, the Commission appointed Mr. F.V. García Amador Special Rapporteur for the topic. Between 1956 and 1961 Mr. García Amador submitted to the Commission six successive reports on State responsibility. Being occupied throughout those years with the codification of other branches of international law, such as arbitral procedure and diplomatic and consular intercourse and immunities, the Commission was not able to undertake the codification of the topic of State responsibility, although from time to time, particularly in 1956, 1957, 1959 and 1960, it held some general exchanges of views on the question.²

10. In 1960 the question of the codification of State responsibility was raised in the Sixth Committee of the General Assembly for the first time since 1953. It was considered in 1961 and 1962 by the Sixth Committee and by the International Law Commission in the context of the programme of future work in the field of the codification and progressive development of international law. The discussion brought out differences of opinion regarding the approach to the subject, in particular as to whether the Commission should begin by codifying the rules governing State responsibility as a general and separate topic, or whether it should take up certain particular topics of the law of nations, such as the status of aliens, and at the same time, within this context, should set out to codify the rules whose violation entailed international responsibility, as well as the rules of responsibility in the proper sense of the term. Finally it was agreed, both in the General Assembly and in the International Law Commission, that it was a question not merely of continuing work already begun but of taking up the subject again *ex novo*, that State responsibility should be included among the priority topics, and that measures should be taken to speed up work on its codification. As Mr. García Amador was no longer a member, the Commission agreed in 1962 that it would be necessary to carry out some preparatory work before a special rapporteur was appointed, and it entrusted this task to a Sub-Committee on State Responsibility of ten members.³

11. The work of the Sub-Committee on State Responsibility was reviewed by the Commission at its 686th

meeting, during its fifteenth session (1963), on the basis of the report submitted by the Chairman of the Sub-Committee, Mr. Ago.⁴ All the members of the Commission who took part in the discussions agreed with the general conclusions formulated by the Sub-Committee, namely: (a) that, with a view to the codification of the topic, priority should be given to the definition of the general rules governing international responsibility of the State; (b) that there would be no question of neglecting the experience and material gathered on certain particular aspects of the topic, 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 which new developments in international law might have had on State responsibility. The members of the Commission also approved the programme of work proposed by the Sub-Committee. After having unanimously approved the report of the Sub-Committee, the Commission at the same session appointed Mr. Roberto Ago as Special Rapporteur for the topic of State responsibility. It was also agreed that the Secretariat should prepare a number of working papers on the topic.⁵

12. The Commission decided not to begin its consideration of the substance of the question of State responsibility until it had completed its study of the law of treaties and special missions; it was unable to do so until 1969. Before this, in 1967, having before it a note on State responsibility submitted by the Special Rapporteur,⁶ the Commission, as newly constituted, confirmed the instructions given him in 1963.⁷

13. In 1969, at the twenty-first session of the Commission, the Special Rapporteur submitted his first report on the international responsibility of States.⁸ The report contained a review of previous work on the codification of the topic and reproduced, as annexes, the most important texts prepared in the course of earlier codification

⁴ *Yearbook... 1963*, vol. II, p. 227, document A/5509, annex I. For the summary records of the 2nd to the 5th meetings of the Sub-Committee and the memoranda submitted by its members, see *Yearbook... 1963*, vol. II, pp. 228 *et seq.* document A/5509, annex I, appendices I and II.

⁵ In 1964 the Secretariat prepared and circulated, in accordance with the Commission's request, a working paper containing a summary of the discussions in various United Nations organs and the resulting decisions (*Yearbook... 1964*, vol. II, p. 125, document A/CN.4/165) and a digest of the decisions of international tribunals relating to State responsibility (*ibid.*, p. 132, document A/CN.4/169). A supplement to each of these two documents, bringing them up to date, was issued by the Secretariat in 1969 (*Yearbook... 1969*, vol. II, p. 114, document A/CN.4/209, and *ibid.*, p. 101, document A/CN.4/208).

⁶ *Yearbook... 1967*, vol. II, p. 325, document A/CN.4/196. The note was considered at the Commission's 934th and 935th meetings (*ibid.*, vol. I, pp. 225-227).

⁷ *Yearbook... 1967*, vol. II, p. 368, document A/6709/Rev.1 and Rev.1/Corr.1, para. 42.

⁸ *Yearbook... 1969*, vol. II, p. 125, document A/CN.4/217 and Add.1.

² For a detailed history of the question up to 1969, see *Yearbook... 1969*, vol. II, p. 299, document A/7610/Rev.1, chap. IV.

³ Mr. Ago (Chairman), Mr. Briggs, Mr. Gros, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Tunkin, Mr. Tsuruoka and Mr. Yasseen.

work, both individual and collective, official and unofficial.⁹

14. In introducing his report,¹⁰ the Special Rapporteur reviewed the ideas which had guided the International Law Commission since the time when, having been forced to recognize that its previous efforts had led to an impasse in the codification of this essential chapter of international law, it decided to take up the study of the topic of responsibility again, but from a fresh viewpoint. He also summarized the plan adopted by the Commission at its fifteenth (1963) and nineteenth (1967) sessions, on the strength of which the Commission had decided to try to give a fresh impetus to the work of codification and reach some positive results, in pursuance of the recommendations of the General Assembly in resolutions 1765 (XVII), 1902 (XVIII), 2045 (XX), 2167 (XXI), 2272 (XXII) and 2400 (XXIII).

15. The Commission discussed the Special Rapporteur's first report in detail at its 1011th to 1013th and 1036th meetings.¹¹ The debate revealed a considerable identity of views in the Commission as to the most appropriate way of continuing the work on State responsibility and as to the criteria that should govern the preparation of the different parts of the draft articles which the Commission proposed to undertake. The Commission's conclusions in that regard were subsequently set out in its report on the work of its twenty-first session.¹²

16. The conclusions reached by the Commission at its twenty-first session were favourably received at the twenty-fourth session of the General Assembly.¹³ The over-all plan for the study of the topic, the successive stages for the execution of the plan and the criteria for the different parts of the draft met with the general approval of the Sixth Committee. The General Assembly, in resolution 2501 (XXIV) of 12 November 1969, recommended that the Commission should continue its work on State responsibility.

17. On the basis of the directives laid down by the International Law Commission and the recommendations of the General Assembly, the Special Rapporteur began to consider, in succession, the many and diverse questions raised by the topic as a whole. He submitted to the Commission at its twenty-second session, in 1970, a second report on State responsibility entitled "The origin of international responsibility".¹⁴ The introduction to the report contained a detailed plan of work for the first phase of the study of the topic, in which attention is to be focused on the subjective and objective conditions for

the existence of an internationally wrongful act. The introduction was followed by a first chapter dealing with a number of general fundamental principles governing the topic as a whole. The Special Rapporteur presented his second report at the 1074th and 1075th meetings of the Commission.¹⁵ At the same time he submitted a questionnaire listing a number of points on which he wished to know the views of members of the Commission for the purposes of the continuation of his work.¹⁶

18. At its 1075th, 1076th, 1079th and 1080th meetings, the Commission discussed the Special Rapporteur's second report in a general manner.¹⁷ At the 1081st meeting, the Special Rapporteur summarized the main conclusions as to method, substance and terminology to be drawn from the Commission's broad review.¹⁸ It was agreed that the Special Rapporteur's third report and those to follow it would contain a detailed analysis of the various conditions which must be met for a State to be regarded as having committed an internationally wrongful act and as having thereby incurred international responsibility.¹⁹

19. At the twenty-fifth session of the General Assembly, the Sixth Committee found that the conclusions reached by the Commission at its 1970 session were generally acceptable.²⁰ In resolution 2634 (XXV) of 12 November 1970, the General Assembly recommended that the Commission should continue its work on State responsibility.

20. At the twenty-third session of the Commission, in 1971, the Special Rapporteur submitted his third report, entitled "The internationally wrongful act of the State, source of international responsibility".²¹ This report began with an introduction setting out the various conclusions reached by the Commission following its consideration of the second report. The introduction was followed by a first chapter ("General Principles"), divided into four sections (articles 1-4). In this chapter the Special Rapporteur reproduced the material included in chapter I of his second report, revised and supplemented in the light of the discussion in the Commission at its twenty-second session. The report ended with sections 1 to 6 (articles 5 to 9) of chapter II of the draft ("The 'act of the State' according to international law"), dealing with the conditions for the attribution to the State, as a subject of international law, of an act which might constitute a source of international responsibility.

21. Consideration of the conditions for attributing to the State, as a subject of international law, an act which might constitute a source of international responsibility

⁹ A list of these texts appears in the report of the International Law Commission on the work of its twenty-fifth session (*Yearbook... 1973*, vol. II, p. 166, document A/9010/Rev. 1, foot-note 14).

¹⁰ *Yearbook... 1969*, vol. I, pp. 104-106, 1011th meeting, paras. 2-19.

¹¹ *Ibid.*, pp. 104-117 and 239-242.

¹² *Yearbook... 1969*, vol. II, p. 233, document A/7610/Rev.1, paras. 80-84.

¹³ *Official Records of the General Assembly, Twenty-fourth Session, Sixth Committee*, 1102nd-1111th and 1110th meetings and *ibid.*, Annexes, agenda items 86 and 94(b), document A/7746, paras. 86-89).

¹⁴ *Yearbook... 1970*, vol. II, p. 177, document A/CN.4/233.

¹⁵ *Ibid.*, vol. I, pp. 175-178 and 181-187.

¹⁶ *Ibid.*, pp. 175-176.

¹⁷ *Ibid.*, pp. 181-192 and 209-222.

¹⁸ *Ibid.*, pp. 223-227.

¹⁹ *Yearbook... 1970*, vol. II, pp. 307-309, document A/8010/Rev.1, paras. 70-83.

²⁰ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, paras. 98-107.

²¹ *Yearbook... 1971*, vol. II (Part One), p. 199, document A/CN.4/246 and Add.1-3. At the same session, the Special Rapporteur submitted a second addendum to his first report (*ibid.*, p. 193, document A/CN.4/217/Add.2).

was continued and completed in the fourth report by the Special Rapporteur, which was submitted in 1972 at the Commission's twenty-fourth session.²² This report contains sections 7 to 10 (articles 10 to 13)²³ of chapter II of the draft ("The 'act of the State' according to international law").

22. Being occupied with the preparation of draft articles on the representation of States in their relations with international organizations, on the succession of States in respect of treaties and on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, the Commission did not have time to consider the topic of State responsibility either at its twenty-third session (1971) or at its twenty-fourth session (1972). The Commission included in its reports on those sessions however, a brief progress report on the study of State responsibility undertaken by the Special Rapporteur.²⁴

23. At the twenty-sixth session of the General Assembly (1971), the view was taken in the Sixth Committee that the Special Rapporteur's work made a valuable contribution to the preparation by the Commission of draft articles on the subject.²⁵ In its resolution 2780 (XXVI) of 3 December 1971, the General Assembly recommended that the Commission should continue its work with a view to making substantial progress in the preparation of draft articles on State responsibility. At the General Assembly's twenty-seventh session (1972), a number of representatives in the Sixth Committee considered that the International Law Commission should give the highest priority to the study of State responsibility,²⁶ and the Assembly, in resolution 2926 (XXVII) of 28 November 1972, recommended that the Commission should prepare a first set of draft articles on State responsibility.

24. In 1973, at its twenty-fifth session, the Commission began the preparation of a set of draft articles on State responsibility in accordance with the General Assembly's recommendations. Having considered at its 1202nd to 1213th and 1215th meetings chapter I and chapter II, sections 1 to 3, of the third report by the Special Rapporteur, the Commission adopted on first reading, at its 1225th and 1226th meetings, the text proposed by the Drafting Committee for draft articles 1 to 6: i.e. the articles of chapter I ("General principles") of the draft (articles 1 to 4) and the first two articles (articles 5 and 6) of chapter II ("The 'act of the State' according to international law"). The text of these articles and the commentaries thereto were reproduced in the Commission's report on the work of its twenty-fifth session.²⁷

²² *Yearbook... 1972*, vol. II, p. 71, document A/CN.4/264 and Add.1.

²³ These became articles 10 to 15 of the draft after their consideration by the Commission (see para. 52 below).

²⁴ *Yearbook... 1971*, vol. II, Part One, p. 344, document A/8410/Rev.1, chap. III, sect. C; *Yearbook... 1972*, vol. II, p. 323, document A/8710/Rev.1, chap. IV, sect. B

²⁵ *Ibid.*, agenda item 88, document A/8537, paras. 137 and 138.

²⁶ *Ibid.*, *Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, para. 195.

²⁷ *Yearbook... 1973*, vol. II, p. 173, document A/9010/Rev.1, chap. II, sect. B. The text of the draft articles is also reproduced in sect. B below.

25. The limitation of the scope of the present draft articles to responsibility for internationally wrongful acts, the distinction made between "primary" and "secondary" rules and the inductive method followed by the Special Rapporteur and the Commission in the preparation of the draft articles were approved by most of the representatives who took part in the discussion in the Sixth Committee at the twenty-eighth session of the General Assembly.²⁸ On the whole, the provisions of the draft adopted by the Commission in 1973 also elicited favourable comments. The General Assembly, by its resolution 3071 (XXVIII) of 30 November 1973, recommended that the Commission should continue on a priority basis at its twenty-sixth session its work on State responsibility, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII), 1902 (XVIII), 2400 (XXIII) and 2926 (XXVII), with a view to the preparation of a first set of draft articles on responsibility of States for internationally wrongful acts, and that the Commission should undertake, at an appropriate time, a separate study of the topic of international liability for injurious consequences arising out of the performance of other activities.²⁹

26. In 1974, at its twenty-sixth session, the Commission continued its consideration of draft chapter II ("The 'act of the State' according to international law"). At its 1251st to 1253rd and 1255th to 1263rd meetings, the Commission examined chapter II, sections 4-6, of the Special Rapporteur's third report. At its 1278th meeting, the Commission examined the text of articles 7-9 as proposed by the Drafting Committee, and adopted the text of those articles on first reading. The text of the articles and the commentaries thereto were reproduced in the Commission's report on the work of its twenty-sixth session.³⁰

27. On the whole, the draft provisions adopted by the Commission in 1974 received favourable comment from the representatives who spoke in the discussion in the Sixth Committee at the twenty-ninth session of the General Assembly.³¹ In its resolution 3315 (XXIX) of 14 December 1974, the General Assembly recommended that the International Law Commission should continue on a high priority basis at its twenty-seventh session its work on State responsibility, taking into account General Assembly resolutions 1765 (XVII), 1902 (XVIII), 2400 (XXIII), 2926 (XXVII) and 3071 (XXVIII), with a view to the preparation of a first set of draft articles on responsibility of States for internationally wrongful acts at the earliest possible time and to take up, as soon as appropriate, the separate topic of international liability for injurious consequences arising out of acts not prohibited by international law.

²⁸ *Ibid.*, *Twenty-eighth Session, Annexes*, agenda item 89, document A/9334, paras. 25-28.

²⁹ With regard to the action taken by the Commission on this last recommendation of the General Assembly, see para. 34 below.

³⁰ *Yearbook... 1974*, vol. II (Part One), p. 272, document A/9610/Rev.1, chap. III, sect. B, 2. The text of the articles is also reproduced in sect. B below.

³¹ *Official Records of the General Assembly, Twenty-ninth Session, Annexes*, agenda item 87, document A/9897, paras. 101-135.

28. At its current session, the Commission completed its study of chapter II ("The 'act of the State' according to international law") of the draft articles on State responsibility, i.e. the provisions relating to the conditions for the attribution to the State, as a subject of international law, of an act which might constitute a source of international responsibility. At its 1303rd to 1317th meetings, the Commission examined chapter II, sections 7-10, of the Special Rapporteur's fourth report and referred the articles contained in those sections to the Drafting Committee. At its 1345th meeting, the Commission examined the text of articles 10-15 as proposed by the Drafting Committee, and adopted the text of those articles on first reading.

29. At its twenty-eighth session, the Commission will resume its study of the topic at the point where it left off at the current session. It will thus examine, on the basis of the relevant sections of a fifth report now being prepared by the Special Rapporteur, a whole series of questions arising under draft chapter III ("Breach of an international obligation") which, as its title indicates, is concerned with the objective element of the internationally wrongful act.

30. The text of all the draft articles on State responsibility adopted by the Commission so far, and also the text of articles 10-15 and the commentaries thereto as adopted at the current session, are reproduced below for the information of the General Assembly.³²

2. GENERAL REMARKS CONCERNING THE DRAFT ARTICLES³³

(a) FORM OF THE DRAFT

31. The final form to be given to the codification of State responsibility is obviously a question which will have to be settled later, when the Commission has completed the draft. The Commission, in accordance with its statute, will then formulate the recommendation it considers appropriate. Without prejudging this recommendation, the Commission has decided to give its study on State responsibility the form of a *set of draft articles*, as expressly recommended by the General Assembly in resolutions 2780 (XXVI), 2926 (XXVII), 3071 (XXVIII) and 3315 (XXIX). The Commission, too, feels that the preparation of a set of draft articles is the most effective method of identifying and developing the rules of international law concerning State responsibility. The articles now being prepared are drafted in a form in which they can be used as a basis for concluding a convention, if that is eventually decided.

³² See sect. B.

³³ The general considerations which follow are based largely on the conclusions reached and decisions taken by the Commission in 1963, during its consideration of the report of the Sub-Committee on State Responsibility, and in 1969, 1970 and 1973 during its consideration of the first, second and third reports of the Special Rapporteur. They constitute the framework for the work in progress on the preparation of a set of draft articles on State responsibility.

(b) SCOPE OF THE DRAFT

(i) *Responsibility of States*

32. As with other topics it has undertaken to codify in the past, the Commission intends to limit its study of international responsibility, for the time being, to State responsibility. It does not underrate the importance of studying questions relating to the responsibility of subjects of international law other than States. The overriding need for clarity in the examination of the topic and the organic nature of the draft, however, clearly makes it necessary to defer consideration of such other questions.

(ii) *Responsibility for internationally wrongful acts*

33. The draft articles under consideration 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 those concerning the obligation to make good any harmful consequences arising out of certain lawful activities, especially those which because of their nature present certain risks. The Commission takes the view, however, that questions in this latter category should not be dealt with jointly with those in the former category. In view of the entirely different basis of the liability for risk and the different nature of the rules governing it, as well as its content and the forms it may assume, a joint examination of the two subjects could only make both of them more difficult to grasp. Being obliged to accept any risks inherent in an activity which is itself lawful, and being obliged to face the consequences—which are not necessarily limited to compensation—of the breach of a legal obligation, are two different matters. It is only because of the relative poverty of legal language that the same term is sometimes used to designate both. In the light of these considerations and in order to avoid any misunderstanding, the Commission, while reserving for later consideration the question of a final title for the present draft, wishes to emphasize that the expression "State responsibility" which appears in the title of the draft articles, is to be understood as meaning solely "responsibility of States for internationally wrongful acts".

34. The limitation of the present draft articles to the responsibility of States for internationally wrongful acts will not, of course, prevent the Commission from undertaking in due time a separate 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 its resolutions 3071 (XXVIII) and 3315 (XXIX). What the Commission should not do is to deal in one and the same draft with two matters which, though possessing certain common features and characteristics, are quite distinct. For reasons of this kind the Commission considered that it was particularly necessary to adopt, for the definition of the principle stated in article 1 of the present draft, a formulation which, while indicating that the internationally wrongful act is a source of international responsibility, does not lend itself to an interpretation that might automatically

rule out the existence of another possible source of "responsibility".

(iii) *General rules which govern responsibility*

35. International responsibility bears some very different aspects from other topics of which the Commission has undertaken the codification. In its previous drafts, the Commission has generally concentrated on defining the rules of international law which, in one or another sector of inter-State relations, impose specific obligations on States and may, in a certain sense, be termed "primary". In dealing with the topic of responsibility, on the other hand, the Commission is undertaking to define other rules which, in contradistinction to those mentioned above, may be described as "secondary" inasmuch as they purport to determine the legal consequences of failure to fulfil obligations established by the "primary" rules. In preparing the present draft articles, therefore, the Commission intends to concentrate on determining the rules which govern responsibility, maintaining a strict distinction between this task and that of stating the rules which impose on States obligations the violation of which may be a source of responsibility. This strict distinction seemed to the Commission to be essential if the topic of international responsibility was to be placed in its proper perspective and viewed as a whole.

36. The need to take into consideration the content, nature and scope of the obligations laid on the State by the "primary" rules of international law and to distinguish on that basis between different categories of international obligations will undoubtedly become plainly apparent when the objective element of the internationally wrongful act comes up for study. In order to be able to assess the gravity of the internationally wrongful act and to determine the consequences attributable to that act, it will undoubtedly be necessary to take into consideration the fact that the importance attached by the international community to respect for some obligations—for example, those concerned with peace-keeping—will be of a completely different order from that attached to respect for other obligations, specifically because of the content of the former. It will also be necessary to distinguish some obligations from others according to the aims they pursue and the results sought from them, if we are to be able to determine in each case whether or not there has been a breach of an international obligation and, if so, to fix the time of commission of the internationally wrongful act. These various aspects will be gone into at the appropriate time. But they must not be allowed to obscure the essential fact that it is one thing to state a rule and the obligation it imposes, and another to determine whether there has been a breach of that obligation and what should be the consequences of the breach. Only the second aspect comes within the sphere of responsibility proper; to encourage any confusion on this point would be to raise an obstacle which might once again frustrate any hope of successful codification. That is clear from past experience.

37. In the present draft articles, the Commission is proposing to codify the rules governing the responsibility of States for internationally wrongful acts *in general*, and not only with regard to certain particular sectors such as

responsibility for acts harmful to the person or property of aliens. The international responsibility of the State is a situation which results not just from the breach of certain specific international obligations, but from the breach of *any* international obligation, whether established by the rules governing one particular matter or by those governing another matter. The draft articles accordingly deal with the *general rules of the international responsibility of the State for internationally wrongful acts*: that is to say, the rules which govern all the new legal relationships that may follow from an internationally wrongful act of a State, regardless of the particular sector to which the rule violated by the act may belong.

(c) STRUCTURE OF THE DRAFT

(i) *General plan*

38. In broad outline, and subject to any decisions which the Commission may take later, the structure of the proposed draft articles corresponds to the plan for studying the international responsibility of States adopted by the Commission on the basis of the proposals of the Special Rapporteur.

39. The Commission agreed that the topic of international responsibility was one of those where the progressive development of international law could be particularly important especially—as the Special Rapporteur has shown—with regard to the distinction between different categories of breaches of international obligations and to the content and degrees of responsibility. The Commission wishes expressly to state, however, that in its view the relative importance of progressive development and of the codification of accepted principles cannot be settled according to any pre-established plan. It must emerge in practical form from the solutions found for the various problems.

40. The Commission also felt that it would be better to postpone any decision concerning the desirability of beginning the draft articles on State responsibility with an article giving definitions or an article indicating what matters would be excluded from the scope of the articles. 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 of the draft. Care should be taken to avoid definitions or initial formulations that might prejudice solutions to be adopted later. In the first phase of the study, the draft will be based on a *general notion of responsibility, that term denoting the set of new legal relationships to which an internationally wrongful act on the part of a State may give rise in various cases*. Later it will be for the Commission to say whether, for example, such relationships may arise only between that State and the State whose rights have suffered injury, or also between the first-mentioned State and other subjects of international law, or possibly even with the international community as a whole. For the time being the Commission will confine itself to explaining in the commentaries to the articles, whenever necessary, the meaning of expressions used.

41. Lastly, the Commission agreed on the main phases in which the draft is to be prepared. In general, the first phase will be concerned with the origin of international responsibility and the second with the content, forms and degrees of international responsibility. Once these two essential tasks are completed, the Commission may, if it sees fit, decide to add a third part to the draft, in which to consider certain problems concerning the settlement of disputes and what has been termed the "implementation" ("*mise en œuvre*") of the international responsibility of the State.

(1) *Part 1: The origin of international responsibility*

42. This part is concerned with determining on what grounds and under what circumstances a State may be held to have committed an internationally wrongful act which, as such, is a source of international responsibility. Within this general framework, the first task in preparing the draft articles is to formulate the basic general principles governing the topic. Once these principles have been established, the next step is to deal with all the questions relating to the subjective element of the internationally wrongful act: that is to say, questions concerning the possibility of attributing particular conduct (a particular act or omission) to the State as a subject of international law, and hence of considering this conduct as an act of the State under international law. It will then be necessary to solve the problems which arise with regard to the objective element of the internationally wrongful act: in other words, to establish in what circumstances the conduct attributed to the State should be considered as constituting a breach of an international obligation. In this way it will be possible to bring together the two conditions for an act of the State to be characterized as an internationally wrongful act giving rise, as such, to State responsibility at the inter-State level. The next step will be to examine the questions which arise in connexion with the possible participation of more than one State in the same unlawful situation, and with the responsibility which a State may sometimes incur through the internationally wrongful act of another State. The study of the questions covered by part 1 of the plan will end with an analysis of the various circumstances whose existence might preclude, attenuate or aggravate any wrongfulness of the conduct attributed to the State. It will then be possible to pass on to the second phase of the work.

(2) *Part 2: The content, forms and degrees of international responsibility*

43. In the second phase of the study plan, the aim will be to determine what consequences an internationally wrongful act of a State may have under international law in different hypothetical cases, in order to arrive at a definition of the content, forms and degrees of international responsibility and to incorporate appropriate provisions in the draft articles. It will first be necessary to establish in what cases a State which has committed an internationally wrongful act may be held to have incurred an obligation to make reparation, and in what cases such a State should be considered as becoming

liable to a penalty. The establishment of a distinction between internationally wrongful acts giving rise only to an obligation to make reparation and internationally wrongful acts incurring a penalty; the possible basis for such a distinction; and the relationship between the reparative and the punitive consequences of an internationally wrongful act, are some of the questions of principle which will have to be settled before the other matters covered by the second phase of the study plan can be taken up. In this context it will also be necessary to consider a possible distinction between cases where legal relationships arising out of the internationally wrongful act are established solely between the State which has committed the act and the State directly injured by it, and cases where such relationships are also established with other States or even with the international community as a whole. The next step will be to study the more specific issues arising in connexion with reparation and penalties as consequences of the internationally wrongful act of a State under international law. This will entail going into questions relating to modes of reparation (*restitutio in integrum*, reparation by equivalent or compensation, satisfaction), the extent of reparation, the criteria for fixing reparation, the different types of penalties (individual and collective) and the various material forms (reprisals, etc.) they can take, with due regard, in particular, to pertinent developments resulting from the adoption of the Charter of the United Nations and the establishment of the United Nations system in practice.

(3) *Possible part 3: The settlement of disputes and the "implementation" ("*mise en œuvre*") of international responsibility*

44. Only after completing its consideration of matters properly within the scope of the topic of State responsibility will the Commission be able to decide whether it should stop there or add to the draft a set of articles concerning the settlement of disputes arising out of the application and interpretation of the rules codified in the draft articles. It will then be time to consider also whether or not to include in the draft the clarification of matters connected with what has been termed the "implementation" ("*mise en œuvre*") of international responsibility. The Special Rapporteur doubts whether questions relating to the submission of international claims, the time and form of their submission, legitimate means of supporting them, diplomatic protection and other related matters should be included in a draft concerned essentially with the statement of general rules on international responsibility. It is in any case too early to take a final decision in the matter.

(ii) *Structure and contents of part 1 of the draft (the origin of international responsibility)*

45. Part 1 of the draft—the part concerned with determining on what grounds and under what circumstances a State may be held to have committed an internationally wrongful act which, as such, is a source of international

responsibility—is divided into chapters and articles as follows:³⁴

CHAPTER I. GENERAL PRINCIPLES

Article 1—Responsibility of a State for its internationally wrongful acts

Article 2—Possibility that every State may be held to have committed an internationally wrongful act

Article 3—Elements of an internationally wrongful act of a State

Article 4—Characterization of an act of a State as internationally wrongful

CHAPTER II. THE ACT OF THE STATE UNDER INTERNATIONAL LAW

Article 5—Attribution to the State of the conduct of its organs

Article 6—Irrelevance of the position of the organ 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

Article 8—Attribution to the State of the conduct of persons acting in fact on behalf of the State

Article 9—Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization

Article 10—Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

Article 11—Conduct of persons not acting on behalf of the State

Article 12—Conduct of organs of another State

Article 13—Conduct of organs of an international organization

Article 14—Conduct of organs of an insurrectional movement

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

CHAPTER III. [BREACH OF AN INTERNATIONAL OBLIGATION]

Article [16]—[Irrelevance of the source of the international obligation breached to the existence of an internationally wrongful act]

Article [17]—[Breach of a legal obligation essential to the international community. International crimes]

Article [18]—[Need for the international obligation to be in force at the time of the alleged breach]

Article [19]—[Breach of an obligation of conduct]

Article [20]—[Breach of an obligation of result (exhaustion of internal remedies)]

Article [21]—[Breach of an international obligation brought to light through an external event]

Article [22]—[Time of the breach of an international obligation (*tempus commissi delicti*)]

CHAPTER IV. [PARTICIPATION BY OTHER STATES IN THE INTERNATIONALLY WRONGFUL ACT OF A STATE]

Article [23]—[Incitement, complicity, assistance of another State]

Article [24]—[Indirect responsibility of a State for the internationally wrongful act of another State]

³⁴ In the case of chapters, and articles which have not yet been considered by the Commission, the information in the table is, of course, only provisional and very approximate. Their titles, which are in no way final, have therefore been placed in square brackets.

CHAPTER V. [CIRCUMSTANCES PRECLUDING WRONGFULNESS AND ATTENUATING OR AGGRAVATING CIRCUMSTANCES]

Article [25]—[*Force majeure*—Fortuitous event]

Article [26]—[State of emergency]

Article [27]—[Self-defence]

Article [28]—[Legitimate application of a sanction]

Article [29]—[Consent of the injured State]

Article [30]—[Attenuating circumstances]

Article [31]—[Aggravating circumstances]

(1) *General principles (chapter I)*

46. Chapter I of the draft articles is concerned with “general principles”. It contains, first, a definition of the fundamental principle attaching responsibility to every internationally wrongful act of the State (*article 1*). Next it states the principle, closely linked to the first, that every State is subject to the possibility of being held, under international law, to have committed an internationally wrongful act entailing its international responsibility (*article 2*). This is logically followed by the principle which states the two elements, subjective and objective, of a wrongful act of the State under international law (*article 3*). The chapter ends with the definition of a fourth general principle, namely, that the internal law of a State is irrelevant to the characterization of an act of that State as internationally wrongful (*article 4*). The text of these provisions was adopted by the Commission in 1973, at its twenty-fifth session.³⁵

(2) *The act of the State under international law (chapter II)*

47. Chapter II is concerned with the subjective element of the internationally wrongful act, and hence with the determination of the conditions in which a particular kind of conduct must be considered as an “act of the State” under international law. After an *introductory commentary* setting forth preliminary considerations designed to take into account certain theoretical difficulties and to affirm in any case the autonomy of international law in this matter, the chapter contains a series of rules in the form of articles. These rules seek, in the first place, to establish whose conduct may be considered as an act of the State under international law. First comes the principal category, the organs of the State—those so characterized under the internal law of that State. Next comes conduct whose authors do not, strictly speaking, form part of the organization of the State but which is also considered as an act of the State under international law. In the second place, it is necessary to decide within this general context whether conduct in all these different categories should or should not be attributed to the State under international law when it has been adopted under certain specific conditions. In the third place, the analysis ends on a negative note by stating the rules which specify those

³⁵ See para. 24 above. The text of all the articles of chapter I is reproduced below in section B.1. For the text of these articles and commentaries thereto, see *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 10 (A/9010/Rev.1)*, chap. II, sect. B (*Yearbook ... 1973*, vol. II, p. 173, document A/9010/Rev. 1, chap. II, sect. B).

categories of conduct that cannot be attributed to the State, and at the same time considering what the international situation of the State may be in relation to such conduct. At the present session the Commission completed its study of this chapter of the draft by adopting the last six articles thereof (articles 10–15); the *introduction* to the chapter and its first five articles (articles 5–9) had been adopted at the twenty-fifth and twenty-sixth sessions of the Commission.³⁶

48. The first article (article 5) of chapter II of the draft lays down the rule which, in this matter, constitutes the starting point—the rule that an act or omission may be taken into consideration for the purposes of attribution to the State as an internationally wrongful act if it has been committed by an organ of the State: that is to say, by an organ possessing that status under the internal legal order of the State and acting in that capacity in the case in question. As a corollary to this rule, the second article (*article 6*) explains that, for the purposes of attribution of its conduct to the State, it is immaterial to which of the main branches of the State structure the organ in question belongs, whether its functions concern international relations or are of a purely internal character, and whether it holds a superior or subordinate position in the organization of the State. The third article (*article 7*) concerns the attribution to the State, as a subject of international law, of the conduct of organs not of the State itself but of other entities empowered by the internal law of the State to exercise elements of the governmental authority (territorial governmental entities or entities not forming part of the formal structure of the State or of a territorial governmental entity). The fourth article (*article 8*) deals with the attribution to the State—again with a view to establishing its international responsibility—of the conduct of persons or groups of persons who do not formally possess the status of organs of the State or of one of the entities referred to in article 7 but who acted in fact on behalf of the State or were in fact exercising, in certain circumstances, elements of the governmental authority. The fifth article (*article 9*) lays down the conditions for attribution to the State of the conduct of organs “placed at its disposal” by another State or by an international organization. The sixth article (*article 10*) deals with the attribution to the State of the conduct of an organ acting outside its competence or contrary to specific instructions received or to the general requirements of the exercise of its activity. The seventh article (*article 11*) rules out in principle, for the purposes of the international responsibility of States, the possibility of attributing to the State under international law the conduct of persons not acting on behalf of the State, i.e., persons acting as private individuals, while reserving the possibility of attributing to the State, as a source of international

responsibility, the attitude adopted by its organs towards the conduct of such persons. The eighth article (*article 12*) of chapter II rules out the possibility of attributing to the State conduct adopted in its territory or in another territory under its jurisdiction by an organ of another State acting in that capacity and not, as in the hypothesis envisaged in article 9, in the exercise of elements of the governmental authority of the territorial State. Article 12 provides, however, that the non-attribution of the acts in question to the territorial State does not rule out the attribution to that State of conduct which is adopted on the occasion of an act of the other State and which is to be considered as an act of the territorial State by virtue of articles 5 to 10. The ninth article (*article 13*) further rules out the possibility of attributing the conduct of an organ of an international organization to the State on the sole grounds that such conduct has taken place in the territory of that State or in another territory under its jurisdiction. The tenth article (*article 14*) rules out the possibility of attributing to the State the conduct of an organ of an insurrectional movement which is established in the territory of that State or in another territory under its administration. The article provides, however, that the non-attribution to the territorial State of an act of an insurrectional movement active in its territory does not rule out the attribution to that State of conduct which is adopted on the occasion of an act of the insurrectional movement and which is to be considered as an act of the territorial State by virtue of articles 5 to 10. Article 14 further provides that the rule which it lays down does not preclude attribution of the conduct of the insurrectional movement to the movement itself in all cases in which the movement possesses, in the matters concerned, an international personality permitting such attribution. The eleventh and last article of chapter II (*article 15*) deals first with the case of an insurrectional movement which becomes the new Government of a State. The article provides that, when this happens, the previous conduct of an organ of the insurrectional movement shall be considered as an act of the State; this does not preclude the attribution to the same State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10. Article 15 goes on to deal with the case in which the action of an insurrectional movement results in the formation of a new State in part of the territory of a pre-existing State or in a territory previously under its administration, and specifies that, in that case, the act of the insurrectional movement shall be attributed to the new State.

(3) *Breach of an international obligation (chapter III)*

49. Having completed its study of the chapter on the subjective element of the internationally wrongful act, the Commission intends to take up at its next session chapter III of the draft, dealing with the various aspects of the objective element of the internationally wrongful act: the breach of an international obligation. In his fifth report, now in preparation, the Special Rapporteur will first examine in a section devoted to preliminary considerations on the lines of chapter II, section 1, the general questions which arise in connexion with the second constituent element of an internationally wrongful act.

³⁶ The text of all these articles is reproduced in section B, sub-section 1, below. For the text of articles 5 and 6 and the commentaries thereon as adopted by the Commission at its twenty-fifth session, see *Yearbook ... 1973*, vol. II, p. 188, document A/9010/Rev. 1, chap. II, sect. B. For the text of articles 7–9 and the commentaries thereon as adopted by the Commission at its twenty-sixth session, see *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev. 1, chap. III, sect. B, sub-sect. 2. For the text of articles 10–15 and the commentaries thereon as adopted at the present session, see sect. B, sub-sect. 2, below.

Following these considerations, the Special Rapporteur will examine in particular the fundamental question whether the source of the international legal obligation breached (customary rule, convention, judgment of the International Court of Justice, arbitral award, decision by an organ empowered by a treaty to issue legal rules binding on the parties, etc.) has any bearing on the decision that the breach is or is not an internationally wrongful act. Next to be examined will be the various problems relating to the determination of different categories of breaches of international obligations. An essential question which will arise in this context is whether it is now necessary to recognize the existence of a distinction based, as was indicated above, on the importance of the obligation breached to the international community and, accordingly, whether contemporary international law should acknowledge a separate and more serious category of internationally wrongful acts which might perhaps be described as international crimes. Consideration will then have to be given to questions arising in relation to what has been called the non-retroactivity of international obligations: i.e., the requirement that the obligation whose breach is complained of must have been in force at the time of the act constituting the breach. Thereafter attention will be turned to the different characteristics of the breach, according to whether the obligation breached is one of those which specifically require a particular act or omission (an obligation of conduct) or one of those which require in general terms that a particular result shall be achieved, without specifying the means to be employed to that end (an obligation of result). In this context, the Special Rapporteur proposes to examine the validity of the rule that local remedies must be exhausted before, for example, the breach of certain obligations relating to the treatment of aliens can be established. Another question which will arise concerns the distinction that should be made between the breach of an obligation requiring specific conduct on the part of the State and the breach of an obligation requiring it only to ensure that a particular event does not occur. Last to be examined will be questions relating to the determination of the *tempus commissi delicti* in various hypothetical cases and, in particular, in those in which the act of the State takes the form of a continuing situation or constitutes the sum of a series of separate and successive actions.

(4) *Participation by other States in the internationally wrongful act of a State (chapter IV)*

50. When the essential questions relating to the subjective element (chapter II) and the objective element (chapter III) of the internationally wrongful act have been settled, some specific problems raised by the possible participation of other States in the internationally wrongful act of a given State will remain to be considered in a subsequent chapter of the draft, chapter IV. In this context it will first be necessary to analyse the possibility of attributing an internationally wrongful act, on the grounds of incitement, assistance or complicity, to more than one State in one and the same specific situation. It will then be necessary to consider questions relating to what is called "indirect responsibility": i.e., the possibility of making a State responsible, in certain

circumstances, for an internationally wrongful act committed by another State.

(5) *Circumstances precluding wrongfulness and attenuating or aggravating circumstances (chapter V)*

51. The first phase of the study of State responsibility for internationally wrongful acts can then be rounded off with a further chapter (chapter V) dealing with circumstances which preclude wrongfulness and with attenuating or aggravating circumstances. In the context of this chapter a detailed study will be made, from the standpoint of codification of the general rules governing international responsibility, both of the general questions arising in relation to the existence of such circumstances and of questions more specifically connected with the various circumstances precluding wrongfulness (*force majeure* and fortuitous event, state of emergency, self-defence, legitimate application of a sanction, consent of the injured State, etc.) which are accepted in international law. In the same chapter an endeavour will be made to define the circumstances which may have the effect either of mitigating the wrongfulness of the State's conduct or, on the contrary, of aggravating it. When this study has been completed, it will be time to embark upon the second phase of the study plan mentioned above: that relating to the content, forms and degrees of international responsibility.

B. Draft articles on State responsibility³⁷

52. The text of articles 1-15 as adopted by the Commission at its twenty-fifth and twenty-sixth sessions and at the present session, and the text of articles 10-15 with the commentaries thereto as adopted by the Commission at the present session, are reproduced below for the information of the General Assembly.

1. TEXT OF ARTICLES 1-15 AS ADOPTED BY THE COMMISSION AT ITS TWENTY-FIFTH, TWENTY-SIXTH AND TWENTY-SEVENTH SESSIONS

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.

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.

³⁷ As stated above (para. 33), the draft articles relate solely 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 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 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.

2. TEXT OF ARTICLES 10-15 AND COMMENTARIES THERETO AS ADOPTED BY THE COMMISSION AT ITS TWENTY-SEVENTH SESSION

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 interval law or contravened instructions concerning its activity.

Commentary

(1) In articles 5 and 7 of the draft articles, provision has been made for the attribution to the State *qua* subject of international law, as a possible source of international responsibility on its part, of the conduct of organs which form part of the State machinery proper, and of the conduct of organs of territorial governmental entities or other entities also empowered by internal law to exercise elements of the governmental authority; these provisions apply, of course, only to conduct which the persons constituting the organs have adopted in performing their functions as members of those organs and not as private individuals. The purpose of the present article is to specify that such conduct is attributed to the State, *qua* subject of international law, even if the perpetrators have contravened the provisions of internal law concerning their activity, as in the case where they have exceeded their competence under internal law or if they have contravened instructions received. There is no exception to this rule even in the case of manifest incompetence of the organ perpetrating the conduct complained of, and even if other organs of the State have disowned the conduct of the offending organ.

(2) It follows that, under the system adopted by the Commission, no conduct of State organs or of the other entities mentioned in article 7 is excluded from attribution to the State *qua* subject of international law. Only the actions of the human beings constituting the organs in question, performed in their capacity as private individuals, are not regarded as acts of the State capable, as such, of incurring its international responsibility. On the contrary, such actions are never attributable to the State even if their perpetrators have used, in the case in question, the means—including weapons—placed at their disposal by the State for the exercise of their functions. Acts of commission and omission performed in a purely private capacity by persons who happen to possess the status of organs of the State, organs of a territorial governmental entity, or organs of another entity empowered to exercise elements of the governmental authority, are on exactly the same footing as the acts of commission and omission of the private individuals dealt with in article 11.

(3) The attribution or non-attribution to the State of the conduct of organs which acted in their official capacity but outside their competence under internal law, or

contrary to instructions received or, more generally, in breach of the provisions of internal law which they were required to obey in their activity, had been one of the questions most keenly debated among international lawyers. However, the Commission wished to avoid involvement in theoretical discussion and, more particularly, to avoid being influenced by certain theses based on a mistaken assimilation of the situation under international law to the situation existing under internal law. It is true that international law presupposes the internal organization of the State to be as the State establishes it; it presupposes, in particular, the existence of rules of internal law which determine the position of the various organs in the State machinery proper or in the machinery of the other entities which share with the State the exercise of elements of the governmental authority. But that is all. On the basis of this presupposition, it is international law alone that established the conditions under which the conduct of those organs is attributed to the State *qua* subject of international law and can give rise to an international responsibility of the State. The characterization of certain conduct of organs as acts of the State for the purpose of determining its international responsibility is completely independent of the characterization of the same conduct as acts of the State liable to incur administrative responsibility under internal law. Once again, therefore, it is on the basis of the data provided by State practice and international judicial decisions, and also bearing in mind the requirements of modern international life, that the Commission has formulated the rule laid down in the present article.

(4) As regards the data provided by State practice and international judicial decisions, however, the Commission considers it necessary to clarify a number of points at the outset in order to avoid the errors of interpretation which some writers have committed, and which are often the cause of differences of opinion in evaluating the data provided by such practice and decisions. In this connexion the Commission wishes to emphasize that in order to be able to assert that, in a given case, the conduct of an organ which has contravened the provisions of internal law concerning its activity has been attributed to the State, it is not sufficient to argue that the State ultimately had to make reparation at the international level for the damage actually caused by the organ in question. It is also necessary to be sure, in such a case, that it is in fact the conduct of the organ in question which was considered the source of the international responsibility of the State, and that the act attributed to the State as the source of responsibility was not, rather, the conduct of other organs accused, for example, of not preventing the injurious act or of not punishing its perpetrator. Moreover, it is essential that the conduct of the organ which has acted outside its competence or contrary to instructions received should not have been subsequently approved or endorsed by other organs possessing the authority to redress the initial wrong. Otherwise there is no doubt that in such a situation the State should be held responsible, but it is doubtful whether it is then possible to speak of responsibility for acts of commission and omission which are "unauthorized" or contrary to internal law. The conduct in question,

albeit *ex post facto*, has been legitimized. It is accordingly on the same footing as conduct which was *ab initio* consistent with internal law. On the other hand, in order to deny that conduct has been attributed to the State, it is not sufficient to observe that the State has not ultimately been held responsible for the conduct of the organ under international law. In order that the international responsibility of a State may be incurred, it is not sufficient that a particular item of conduct should be attributable to it; it is necessary that this conduct should also represent a completed breach of an international obligation. However, certain international obligations of the State, particularly with regard to the treatment of aliens, cannot be regarded as having been finally breached so long as the possibility of obtaining redress in accordance with those obligations still exists under the internal legal system. Therefore the fact that a State or an international tribunal rejects an application for compensation, submitted by a State on behalf of a national who has suffered damage by the act of an incompetent organ, on the ground that that person has not availed himself of such a possibility, in no way implies that there has been any intention to rule out, on principle, the idea that the State should assume international responsibility for the acts or omissions of an incompetent organ. All the State or tribunal in question wanted to show is that, because of the failure of the injured individual to take action, the existence of a breach by the State of an international obligation was not finally established.³⁸

(5) That being said, it must be acknowledged that State practice in the matter under consideration has changed in the course of time. The practice followed before the end of the nineteenth century was not such as to allow any final conclusions to be reached on the point which concerns us. Different theses were advanced not only by different States but sometimes by the same State on different occasions.³⁹ It has also happened that a State has used partly contradictory arguments during a particular case or, having laid down a criterion, has failed to apply it fully.⁴⁰ At times the legal departments of States give the impression of groping in the dark for a definition of principles, and not of having always had clear and distinct criteria in view. Moreover the language used

sometimes creates superficial impressions from which it would be rash to draw conclusions too readily.⁴¹

(6) There are, however, statements of position to which special importance must be attached. This applies, so far as the practice of the United States of America is concerned, to the position taken by Mr. Bayard, the Secretary of State, in a note addressed to Mr. Clark on 17 August 1885 in connexion with the *American Bible Society case*. The following is an extract:

... it is a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but of their apparent authority.⁴²

Shortly afterwards, on 14 August 1900, Secretary of State Adee used the same formula in his letter to the Ambassador of Italy at Washington, but linked it to the case of subordinate organs.⁴³ In the following paragraphs, frequent reference will be made to these two statements of position.

(7) In European practice during the second half of the nineteenth century, the case which appears to be the most significant, since a number of Governments were called upon to express their opinion on it, is the Italian-Peruvian dispute concerning reparation for damage sustained by Italian nationals in Peru at the hands of the Peruvian civil and military authorities during the civil war of 1894-1895. In a note of 26 October 1897 addressed to the representatives of several foreign Governments, including the Italian Government, Mr. de la Riva-Agüero, the Peruvian Minister for Foreign Affairs, had denied the existence of international responsibility of the State

... for damage caused by agents of the authority by virtue of acts unrelated to their legal functions, if the Government disapproves of and censures their conduct and subjects the offending official to appropriate proceedings to give effect, in accordance with the law, to the civil and criminal responsibility he has incurred ... All the principles which I regard as established serve to show that the State incurs responsibility and a diplomatic claim is justified only in cases

³⁸ It should also be borne in mind that there are State legal systems which provide for recourse against the administration itself, whereas there are other systems which admit the possibility of personal recourse against the individual-cum-organ that is accused of having acted outside his competence or in breach of internal law. There too, however, the assertion that the injured individual should have applied to the courts and demanded redress from the offending organ does not imply any intention to establish a parallel between the conduct of the organ which acted outside its competence and the conduct of an individual.

³⁹ For instance, the attitude of the Italian Government at that time, as revealed in the *Bartolozzi case* and the case of the damage inflicted on certain *Italian nationals in Chile*, shows some vacillation. On these cases, see S.I.O.I. (Società Italiana per l'Organizzazione Internazionale)—C.N.R. (Consiglio Nazionale delle Ricerche), *La prassi italiana di diritto internazionale* (Dobbs Ferry, N.Y., Oceana, 1970), 1st series (1861-1887), vol. II, pp. 862-864.

⁴⁰ The case of the *Star and Herald* (United States v. Colombia) may be cited in support of these considerations. On this case, see J. B. Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. VI, pp. 775 *et seq.*

⁴¹ For example, the letter sent on 11 October 1893 by Mr. Tripp, the United States Minister to Austria, to a Mr. Mix, a United States national who, it seems, complained that he had been the victim of an "outrage" committed by Austrian officials, would appear at first sight to contain a clear rejection of attribution to the State, as a source of responsibility, of the acts of organs which violate internal law (United States of America, Department of State, *Foreign Relations of the United States* (Washington, D.C., U.S. Government Printing Office, 1894), p. 25). On reflection, however, it becomes clear that this case constitutes a precedent for affirming that international responsibility of the State cannot be claimed until it has been determined that fulfilment of the international obligation cannot be secured by recourse to available local remedies. This being so, however, it is far less certain that this case proves that the State would by no means be responsible for actions or omissions on the part of its officials acting outside their competence or contrary to instructions concerning their activity.

⁴² J. B. Moore, *A Digest ...* (op. cit.), vol. VI, p. 743. See also the position taken by the same Secretary of State in connexion with the *Tunstall case* in 1885 (*ibid.*, p. 664). In this case the attribution of responsibility to the United States of America was rejected, the injurious act having in practice been performed by an organ acting in a purely private capacity.

⁴³ *Ibid.*, p. 743.

⁴⁴ Italy, *Archivio del Ministero degli Affari esteri italiano*, serie politica P., No. 43 (translation from Spanish).

where damage and injuries are inflicted on aliens by acts contrary to the provisions of treaties or, in the absence of these, to the law of nations, which are committed by the Government or its civil and military agents in the performance of their functions, on the orders or with the approval of the Government and, as I have said elsewhere, by an absolute denial of justice.⁴⁴

The Italian Government expressed reservations regarding the principles set forth by Mr. de la Riva-Agüero, and asked the British and Spanish Governments for their opinions. The British Government agreed with the Italian Government in considering

... the theory that officials of the State are not responsible for acts which are not the consequence of orders directly given them by their Government to be inadmissible ... hence all Governments should always be held responsible for all acts committed by their agents by virtue of their official capacity.⁴⁵

The Spanish Government expressed the same opinion:

His Majesty's Government is of the opinion that the agents of a government, whenever they are acting in the performance of their functions, commit the government as a whole, since there is no way to resist the action of these officials, because this action is based on the authority they exercise. Consequently, His Majesty's Government believes that compensation should be paid for unjustifiable damage caused by agents of a government in the performance of their functions, whether or not they were acting on orders of that government. If this were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received.⁴⁶

The Italian Minister for Foreign Affairs endorsed the opinions of the Governments consulted,⁴⁷ and consequently instructed the Italian representative at Lima to support the claims of the injured Italian nationals.⁴⁸

(8) The further we advance into the twentieth century, the more manifest is the recognition of the basic principle that the State must acknowledge as its own, at the international level, the acts of organs which have exceeded their competence or contravened instructions concerning their activity. In this respect, the attitude taken by the Government of the United States of America, on the one hand, and by the Guatemalan Government in the *Shine and Milligen case* in 1907⁴⁹ and the Cuban Government in the *Miller case* in 1910,⁵⁰ on the other, are significant.

(9) It was more especially at the time of the 1930 Codification Conference, held at The Hague, that Governments found an opportunity to express their views on the subject with which we are concerned. Mr. Guerrero, the Chairman of the Committee of Experts for the Progressive Codification of International Law appointed by the League of Nations, in the report of the Sub-Committee on the Responsibility of States he prepared in 1926, still sup-

ported the theory that the State is not responsible for the "acts contrary to international law" of organs acting outside their competence as defined by municipal law. Such acts could not, in his view, be attributed to the State. However, these conclusions were to be rejected by most Governments. This is apparent, in the first place, from the replies of Governments to the request for information addressed to them by the Preparatory Committee of the Conference in 1928. In point V, No. 2 (b), they were asked whether the State became responsible in the case of "Acts of officials in the national territory in their public capacity (*actes de fonction*) but exceeding their authority". Of the 19 States which submitted written replies on this point, only three took a negative view, five failed to take a clear position, while 11 were clearly in favour of State responsibility.⁵¹ Similar replies were given to point V, No. 2(c), which dealt with "Acts of officials in a foreign country, such as diplomatic agents or consuls acting within the apparent scope of, but in fact exceeding, their authority".⁵² The bases of discussion prepared by the Committee reflected these views. Basis No. 13 stated that:

A State is responsible for damage suffered by a foreigner as the result of acts of its officials, even if they were not authorized to perform them, if the officials purported to act within the scope of their authority...

and basis No. 14 stated that:

Acts performed in a foreign country by officials of a State... acting within the apparent scope of their authority are to be deemed to be acts of the State and, as such, may involve the responsibility of the State.

In the discussion which took place in the Third Committee of the Hague Conference, some delegates proposed the deletion of basis No. 14.⁵³ Others spoke in support of it. At the end of the discussion, a proposal to delete basis No. 13 was rejected by 19 votes to 13; Mr. Guerrero withdrew his proposal, which reverted to the idea of non-responsibility; and the proposal to adopt basis No. 13, with a few amendments submitted by the Swiss delegation, was adopted by 20 votes to 6, with a few abstentions.⁵⁴ Basis No. 13, having thus been adopted, was sent to the Drafting Committee; the latter prepared the following text, which became article 8, paragraph 2, first sub-paragraph, of the articles adopted in first reading by the Third Committee of the Conference:

⁵¹ See 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* (document C.75.M.69.1929.V), pp. 75 *et seq.*; and *Supplement to vol. III* (document C.75(a).M.69(a).1929.V), pp. 3 and 16-17.

⁵² *Bases of Discussion ... (op. cit.)*, vol. III, p. 78 *et seq.*; and *Supplement to vol. III (op. cit.)*, pp. 3 and 17.

⁵³ The Conference was unable to consider basis No. 14, owing to lack of time.

⁵⁴ For the discussions at the Conference, see League of Nations, *Acts of the Conference for the Codification of International Law*, held at The Hague from 13 March to 12 April 1930, vol. IV, *Minutes of the Third Committee* (document C.351(c).M.145(c).1930.V), pp. 85 *et seq.*

⁴⁴ Mr. Ferrero, Italian Ambassador in London, to Mr. Visconti Venosta, Italian Minister for Foreign Affairs, 1 March 1898 (*ibid.*) (translation from Italian).

⁴⁵ Note verbale by Duke Almodóvar del Rio, 4 July 1898 (*ibid.*) (translation from Italian).

⁴⁷ See the opinion rendered on 19 February 1899 by the Diplomatic Disputes Board of the Italian Ministry of Foreign Affairs (*ibid.*).

⁴⁸ Mr. Canevaro to Mr. Pirrone, 11 April 1899 (*ibid.*).

⁴⁹ G.H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1943), vol. V, p. 575.

⁵⁰ *Ibid.*, pp. 570-571.

International responsibility is likewise incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.⁵⁵

(10) The criteria which prevailed at the Hague Codification Conference of 1930 have not undergone any subsequent changes. One of the clearest and most frequently quoted statements of position is to be found in the opinion delivered in 1931 by the United States Court of Claims in the *Royal Holland Lloyd v. the United States case*.⁵⁶ The principle of the attribution to the State of the conduct of its organs which have acted contrary to the provisions of internal law has in fact been constantly invoked by claimant States (for example by the United States of America in 1933 in the *Colom y Piris case*⁵⁷ and by Belgium in 1936 in the *Baron de Borchgrave case*⁵⁸) and has been accepted even by respondent States (cf. the position of Bulgaria in the *aerial incident of 27 July 1955 case*⁵⁹ and of Italy in 1965 in connexion with the *Mantovani case*.⁶⁰

(11) To an even greater extent than diplomatic practice, the decisions of international tribunals, viewed as a whole and, above all, in the perspective of their historical development, unquestionably confirm, in the opinion of the Commission, the basic principle that the acts of State organs which have acted outside their competence or contravened the instructions received should be attributed to the State, as a source of international responsibility. Indeed, there are many decisions confirming this principle. It is true that neither the Permanent Court of International Justice nor the International Court of Justice has had occasion to pronounce on this question, but arbitral tribunals and commissions have had many opportunities to do so and arbitral awards are not lacking. The same observation applies in this connexion as was made with regard to State practice: as we pass from earlier eras to times nearer the present day, we can detect an unmistakable progression in the clarity of ideas and the definition of principles.

(12) In the period covering the entire second half of the nineteenth century, we find that a number of arbitral awards, though handed down in cases in which organs

had probably acted in breach of the provisions of internal law concerning their activity, fail to refer to the question with which we are concerned; in these decisions, international responsibility is attributed to the State for the conduct of the officials in question without making it clear whether or not those officials had exceeded their competence or contravened provisions they should have obeyed, and without inquiring what attitude higher authority might have adopted towards the case.⁶¹ In cases in which the question was expressly raised and examined, the criteria adopted vary from case to case⁶² and the reasons given for the decisions sometimes reveal a confusion of thought which does not make for easy interpretation.⁶³

(13) The awards rendered by the various mixed commissions in the "Venezuelan arbitrations" of 1903 form a link, as it were, between the arbitral decisions of the nineteenth century, which were characterized by a great deal of uncertainty, and those of the twentieth century, where there is a uniform trend towards attributing to the State the conduct of its organs acting in that capacity but in contravention of the rules of internal law. None of the latter decisions any longer contain the idea that the action of an official, even if subordinate, who has acted as an organ but has exceeded his competence or contravened the instructions received is to be identified with the action of a private individual. It is true that, in order to establish the responsibility of the State, the arbitrator may at times fall back in a particular case on the argument that the Government implicitly approved, if it did not expressly authorize the conduct of the organ under its authority. That is what occurred in the award handed down in the *Compagnie générale des asphaltes de France case*.⁶⁴ In other awards,

⁶¹ See, for example, the decisions handed down in the *Only Son case* (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. IV, pp. 3404-3405), the *William Lee case* (*ibid.*, pp. 3405 *et seq.*) and the *Donougho case* (*ibid.*, vol. III, pp. 3012 *et seq.*).

⁶² For example, in the decision relating to the *case of the Matilda A. Lewis*, handed down by the American-British Claims Commission set up by the Treaty of 8 May 1871, the principle applied is that the State must bear responsibility for the decisions of subordinate officials even if they contravene or erroneously interpret the rules of municipal law (J. B. Moore, *History and Digest ... (op. cit.)*, vol. III., pp. 3019 *et seq.*). On the other hand, in the award delivered in the *Gadino case* on 30 September 1901 by the Italian-Peruvian Arbitration Tribunal established under the Convention of 25 November 1899, the arbitrator completely assimilated actions illegally committed by subordinate officials to the actions of private individuals and affirmed that the responsibility of the State could be involved only if the State had not used the means within its power to prevent the illegal action or had not punished the offenders (*United Nations, Reports of International Arbitral Awards*, vol. XXV (United Nations publication, Sales No. 66.V.3), p. 415).

⁶³ See for example the decision handed down on 19 March 1864 by the Arbitral Commission set up in 1863 by France and Argentina to adjudicate the *Lacaze case* (A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Paris, Pédone, 1923), vol. II, pp. 297-298), and the decision of the United States-Venezuelan Mixed Commission set up under the Convention of 5 December 1885 concerning the *William Yeaton case* (Moore, *History and Digest ... (op. cit.)*, vol. III, pp. 2946-2947).

⁶⁴ Award rendered by the British-Venezuelan Mixed Claims Commission, constituted under the Protocols of 13 February and 7 May 1903 (*United Nations, Reports of International Arbitral Awards*, vol. IX (United Nations publication, Sales No. 59.V.5), p. 396).

⁵⁵ *Ibid.*, p. 238.

⁵⁶ "... the United States bears what has been described as a 'wide, unlimited, unrestricted and vicarious responsibility' for the acts of its administrative officials and its military and naval forces ... Governments are responsible, in their international intercourse, for the acts of their authorized agents, and if such acts were mistaken, or wrongful, liability arises against the government itself for the consequences of the error or the wrong." (*American Journal of International Law* (Washington, D.C.), vol. 26, No. 2 (April 1932), p. 410).

⁵⁷ G. H. Hackwoth, *op. cit.*, p. 570.

⁵⁸ *P.C.I.J.*, series C, No. 83, p. 26 (*The Borchgrave case*, Memorial of the Belgian Government).

⁵⁹ See in particular the text of the Bulgarian note of 4 August 1955 to the Government of Israel in I.C.J., *Memorials, Aerial Incident of 27 July 1955* (Israel v. Bulgaria; United States v. Bulgaria; United Kingdom v. Bulgaria), p. 14; and the text of an identical note, bearing the same date, to the United States Government, in M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1967), vol. VIII, p. 892.

⁶⁰ *Revue générale de droit international public* (Paris), vol. XXXVI, No. 3 (July-September 1965), p. 835.

however, a different position is taken. This is so in the decision in the *Maal case*. In ordering Venezuela to pay compensation for the maltreatment inflicted on Maal, a Netherlands national, by the police, Umpire Plumley stated that he had no difficulty in acknowledging that such treatment had occurred without the knowledge of the high authorities of the Government, but that:

... the acts of their subordinates in the line of their authority, however odious their acts may be, the Government must stand sponsor for.⁶⁵

Lastly, there are some awards, such as that rendered in the *Metzger case*,⁶⁶ where the State was required to pay a pecuniary indemnity although it had already punished the offending organ. A few years later, the award relating to the *La Masica case*, delivered on 7 December 1916 by Alfonso XIII, King of Spain, explicitly stated the principle that the State must bear responsibility for the acts of its organs even if they had acted in violation of the provisions of municipal law.⁶⁷

(14) The truly important and significant decisions, however, which represent, as it were, the culminating point of the evolution and progressive refinement of legal thinking on the problem we are considering, occur in the 1920s. Two awards especially, one rendered on 23 November 1926 by the United States-Mexican General Claims Commission constituted under the Convention of 8 September 1923 relating to the *Youmans case*, and the other on 7 June 1929 by the French-Mexican Claims Commission set up under the Convention of 25 September 1924 relating to the *Caire case*, provide a precise, detailed and virtually definitive formulation of the principles applicable.

In the first of these two cases, the Commission had to establish whether the Mexican Government should assume international responsibility for the action of a detachment of 10 soldiers and their commanding officer, who were sent to Angangueo with instructions to protect some United States nationals threatened by disturbances, but who, instead of carrying out the orders given them, shot one of the aliens dead and then took part, with the rioting mob, in the massacre of two others. The Commission, presided over by van Vollenhoven, ordered the respondent Government to make good the injury and gave the following reasons for its decision:

... we do not consider that the participation of the soldiers in the murder at Angangueo can be regarded as acts of soldiers committed in their private capacity when it is clear that at the time of the commission of these acts the men were on duty under the immediate supervision and in the presence of a commanding officer. Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in

contravention of instructions must always be considered as personal acts.⁶⁸

The *Caire case* concerned the murder of a French national by two Mexican officers. After the victim had refused to give them a sum of money which they demanded, the officers took Mr. Caire to the local barracks and shot him. The Commission found:

... that the two officers, even if they are deemed to have acted outside their competence... and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status.

This decision was preceded by a long statement of reasons by the Presiding Commissioner, Verzijl, in the course of which he declared:

I consider ... to be perfectly correct ... [those theories which] tend to impose on the State, in matters of international concern, responsibility for all acts committed by its officials or organs and constituting delinquencies from the standpoint of the law of nations, irrespective of whether the official or organ in question has acted within or beyond the limits of his or its competence...

... whenever an official has availed himself of his official status, the fact that he acted outside his competence does not exempt the State from international responsibility, and that non-responsibility of the State is restricted to cases where the act had no connexion with the official function and was, in fact, merely the act of a private individual.⁶⁹

(15) The views of writers on international law have followed a course parallel to that observed in the case of State practice and the decisions of international arbitration bodies. Owing mainly to the theoretical difficulties they found in attributing to the State, under international law, conduct which was not attributable to it under internal law, the earliest writers placed the conduct of organs acting in their official capacity but outside their competence on the same footing as the conduct of private individuals. According to those writers no responsibility of the State for such conduct was conceivable except in cases where higher authorities had as it were been "accomplices" in the injurious acts or at least had not done all they could to prevent them, had not disavowed them and had not punished those who committed them.⁷⁰ Subsequent clarification regarding the need to draw a clear distinction according to whether the actions and omissions of organs are attributed to the State under

⁶⁸ *Ibid.*, vol. IV (United Nations publication, Sales No. 1951.V.1), p. 116. The Commission was subsequently to apply on many occasions the principles defined in the *Youmans case*. See, in particular, the awards relating to the *Mallén case* (*Ibid.*, pp. 176 *et seq.*), the *Stephens case* (*ibid.*, pp. 267-268), and the *Way case* (*ibid.*, pp. 400-401).

⁶⁹ *Ibid.*, vol. V (United Nations publication, Sales No. 1952.V.3), pp. 529 *et seq.* (Translation from French.)

⁷⁰ See, for example, C. Calvo, *Le droit international théorique et pratique*, 5th ed. (Paris, Guillaumin), vol. 3, pp. 135-136; F. Despagne, *Cours de droit international public*, 3rd ed. (Paris, Larose et Tenin, 1905), p. 564. L. Oppenheim (*International Law: A Treatise*), 8th ed. [Lauterpacht] (London, Longmans, Green, 1955), vol. I, pp. 337-338, 362-363, also treated private individuals and incompetent organs alike, and spoke in both cases of the "vicarious" responsibility of the State. In the case of incompetent organs, however, he conceived of that responsibility as "broad and not limited", i.e. as always existing, whatever the attitude of other organs of the State might have been.

⁶⁵ Decision delivered by the Netherlands-Venezuelan Mixed Claims Commission, established under the Protocol of 28 February 1903 (*ibid.*, vol. X (United Nations publication, Sales No. 60.V.5), pp. 732-733).

⁶⁶ Decision rendered by the German-Venezuelan Mixed Claims Commission, established under the Protocols of 13 February and 7 May 1903 (*ibid.*, pp. 417-418).

⁶⁷ *Ibid.*, vol. XI (United Nations publication, Sales No. 61.V.4), p. 560.

municipal law or under international law eliminated the opposition to the idea of considering the actions or omissions in question as "acts of the State". At the same time, as practice and international decisions become clearer and more consistent, modern international jurists have almost unanimously⁷¹ come to consider it as established that actions or omissions of organs of the State, irrespective of whether they conform or are contrary to the legal provisions governing their conduct, must be considered as acts of the State from the standpoint of juridical relations between States.⁷²

⁷¹ Among the few modern writers on international law who hold that the State is not responsible for the acts committed by organs acting outside their competence, see R. Quadri, *La sudditanza nel diritto internazionale* (Padua, CEDAM, 1935), pp. 199 *et seq.*; and D. B. Levin, *Otvestvennost gosudarstv v sovremennom mezhdunarodnom prave* (Moscow, Izdatelstvo Mezhdunarodnye Otnosheniya, 1966) pp. 75 *et seq.* According to E. M. Borchard (*The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (New York, Banks Law Publishing Co., 1928), pp. 185 *et seq.*, 189 *et seq.*), the State is responsible for the wrongful acts of its "superior" organs acting outside their competence, but not of its "minor" ones. Other writers, while subscribing to the view that the State is internationally responsible for the conduct of its organs in violation of internal law, do not express themselves clearly or doubt the possibility of attributing such conduct to the State. See in particular C. de Visscher, "Notes sur la responsabilité internationale des Etats et la protection diplomatique d'après quelques documents récents", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. VIII, No. 3, 1927, pp. 253-254; L. Strisower, report on "La responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne ou aux biens des étrangers", *Annuaire de l'Institut de droit international, 1927-I* (Paris), vol. 33, pp. 457, 460 and 461; A. V. Freeman, "Responsibility of States for unlawful acts of their armed forces", *Recueil des cours de l'Académie de droit international de La Haye, 1955-II* (Leyden, Sijthoff, 1956), vol. 88, p. 290; I. von Münch, *Das völkerrechtliche Delikt in der modernen Entwicklung der Völkerrechtsgemeinschaft* (Frankfurt-am-Main, Keppler, 1963), pp. 181-182 (and also pp. 150-151); D. W. Greig, *International Law* (London, Butterworth, 1970), pp. 434 *et seq.*

⁷² Among the many writers who subscribe to this principle, see C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), p. 57; D. Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM, 1955), vol. I, pp. 387-388; J. G. Starke, "Imputability of international delinquencies", *The British Year Book of International Law, 1938* (London), vol. 19, pp. 109 *et seq.*; R. Ago, "Le délit international", *Recueil des cours ... 1939-II* (Paris, Sirey, 1947), vol. 68, pp. 469 *et seq.*; R. Monaco, "La responsabilità internazionale dello Stato per fatti degli individui", *Revista di diritto internazionale*, (Rome), XXXIst year, 3rd series, vol. XVIII, fasc. 1 and 2-3 (1939), pp. 22 *et seq.*; K. Furgler, *Grundprobleme der völkerrechtlichen Verantwortlichkeit der Staaten unter besonderer Berücksichtigung der Haager Kodifikationskonferenz, sowie der Praxis der Vereinigten Staaten und der Schweiz* (Zurich, Polygraphischer Verlag, 1948), pp. 25-26; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), pp. 201 *et seq.*; P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1954), vol. II, pp. 5 *et seq.*; P. Reuter, "La responsabilité internationale", *Droit international public* (Paris, Les Nouvelles Institutes, 1955-1956), pp. 87 *et seq.*; G. Dahm, *Völkerrecht* (Stuttgart, Kohlhammer, 1961), vol. III, p. 182; T. Meron, "International responsibility of States for unauthorized acts of their officials", *The British Year Book of International Law, 1957*, (London), vol. 33, (1958), pp. 88, 93 *et seq.*, 113 and 114; G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957), vol. I, pp. 615 *et seq.*; H. Accioly, "Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence", *Recueil des cours ... 1959-I* (Leyden, Sijthoff, 1960), vol. 96, pp. 360 *et seq.*; J. P. Quéneudec, *La responsabilité internationale de l'Etat pour les fautes personnelles de ses agents* (Paris, Librairie générale de droit et de jurisprudence, 1966), pp. 119-120; C. F. Amerasinghe, "Imputability in the law of State responsibility for injuries to aliens", *Revue égyptienne de droit*

(16) With regard to codification drafts, only the conclusions of the 1926 Guerrero report exclude the possibility of making the State responsible for acts of its organs which have exceeded the limits of their competence according to municipal law. We have seen that bases of discussion Nos. 13 and 14, prepared in 1929 by the Preparatory Committee of the Hague Conference for the Codification of International Law, and article 8, paragraph 2, first sub-paragraph, of the draft articles adopted in 1930 in first reading by the Third Committee of the Conference, clearly stated the opposite principle. Article 12 of the 1961 revised draft by F. V. García-Amador provided that

an act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity.⁷³

As to the drafts prepared by private institutions, the one prepared by the International Law Association of Japan in 1926 and the one prepared by the Harvard Law School in 1929, contain provisions that are not entirely clear.⁷⁴ All the other drafts expressly accept as a basic principle the possibility of attributing the conduct of its organs to the State as a source of international responsibility when they have acted in their official capacity, even if in the case in question they were not competent according to municipal law, had disobeyed their instructions, and so on: see the second and third paragraphs of article I of the draft prepared by the Institute of International Law;⁷⁵ article 2 of the draft prepared by K. Strupp in 1927;⁷⁶ article 1, paragraph 4, of the draft prepared by the German International Law Association in 1930;⁷⁷ article 1 of the draft prepared by A. Roth in 1932;⁷⁸ article 15 of the draft prepared by the Harvard Law School in 1961;⁷⁹ para-

international (Cairo), vol. 22, 1966; pp. 104 *et seq.*; E. Jiménez de Aréchaga, "International Responsibility", in M. Sørensen ed., *Manual of Public International Law* (London, Macmillan, 1968), pp. 548 *et seq.*; C. G. Ténékidès, "Responsabilité internationale", *Répertoire de droit international* (Paris, Dalloz, 1969), vol. II, pp. 786-787; P. Kouris, *Mezhdunarodnye pravonarusheniya i otvetstvennost gosudarstva*, (Vilnius, Mintis, 1973), pp. 190 *et seq.*; P. A. Steiniger, "Die allgemeinen Voraussetzungen der völkerrechtlichen Verantwortlichkeit der Staaten", *Wissenschaftliche Zeitschrift der Humboldt-Universität zu Berlin, Gesellschafts und Sprachwissenschaftliche Reihe* (Berlin), vol. XXII, No. 6 (1973), pp. 447-448.

⁷³ *Yearbook ... 1961*, vol. II, p. 53, document A/CN.4/134 and Add.1.

⁷⁴ Article 1 of the Japanese draft provides that the State is responsible for the conduct of its organs acting "in the discharge of their official functions" and thus seems to imply such responsibility even for conduct contrary to the provisions of municipal law. Article 7, paragraph (a), of the second draft provides that the State is responsible for the acts of high officials "within the scope of [their] office or function".

⁷⁵ According to this text, the responsibility of the State "... exists even when its organizations act contrary to the law or to the order of a superior authority".

"It exists likewise when these organs act outside their competence under cover of their status as organs of the State and making use of means placed at their disposal as such organs" (*Yearbook ... 1956*, vol. II, p. 228, document A/AC.4/96, annex 8).

⁷⁶ *Yearbook ... 1969*, vol. II, p. 151, document A/CN.4/217 and Add.1, annex IX.

⁷⁷ *Ibid.*, p. 149, document A/CN.4/217 and Add.1, annex VIII.

⁷⁸ *Ibid.*, p. 152, annex X.

⁷⁹ *Ibid.*, p. 145, annex VII.

graph 169 of the *Restatement of the Law* prepared in 1965 by the American Law Institute;⁸⁰ and article 3 of the draft prepared by B. Graefrath and P.A. Steiniger in 1973.⁸¹

(17) In the opinion of the Commission there is no need to reopen the discussion on the basic criterion which has been affirmed in diplomatic practice and in the decisions of international tribunals in this century, i.e. the criterion of the attribution to the State, as a subject of international law, of the acts and omissions of its organs which have acted in that capacity, even when they have contravened the provisions of municipal law concerning their activity. This criterion is based on the need for clarity and security in international relations which seems to be the dominant theme in modern international life. In international law, the State must recognize that it acts whenever persons or groups of persons whom it has instructed to act in its name in a given area of activity appear to be acting effectively in its name. Even when in so doing those persons or groups exceed the formal limits of their competence according to municipal law or contravene the provisions of that law or of administrative ordinances or internal instructions issued by their superiors, they are nevertheless acting, even though improperly, within the scope of the discharge of their functions. The State cannot take refuge behind the notion that, according to the provisions of its legal system, those actions or omissions ought not to have occurred or ought to have taken a different form. They have nevertheless occurred and the State is therefore obliged to assume responsibility for them and to bear the consequences provided for in international law.

(18) In the opinion of the Commission, there is another important reason why the principle in question must be accepted. If the opposite principle were accepted, the principle that only conduct of its organs which is in conformity with the provisions of its municipal law is to be attributed to the State, that would make it all too easy for the State to evade its international responsibility. It would often be very difficult, if not almost impossible, for the claimant State to prove that the organ of the defendant State had not contravened the municipal law of that State, and particularly to prove that the organ was not acting on superior orders or that, although officially disavowed, the conduct was in fact encouraged by the other organs of the State.

(19) The Commission considered the reasons why States had in the past opposed the application of the principle enunciated in the present article. It noted that certain States, particularly the Latin American States, had opposed the principle because they thought they were not treated on an equal footing by other States and were continually subjected to interference in their domestic affairs by foreign powers. It had then occurred to those States that a means of avoiding such situations might be to reduce the number of cases in which international responsibility might be attributed to them. In the view of the Commission, however, these reasons are no longer valid.

First, the situation as regards relations between States has changed considerably, while secondly, and especially, States realized that the way to achieve greater true equality among States was not to try to reduce the number of cases in which a claim of State responsibility could be successfully prosecuted because that would only reduce the number of cases in which the responsibility of powerful States could be invoked, at the same time as the number of cases in which the responsibility of weaker States could be invoked. The better course was to try to change the "primary" rules which establish the obligations of States, the breach of which entails international responsibility.

(20) Another reason why, in the past, certain States opposed the principle enunciated was the fear of being held responsible under international law whenever an organ (particularly a subordinate organ) caused injury to an alien in breach only of the municipal law of the State. In the view of the Commission, this fear also is unfounded. It in no way follows from the principle enunciated by the Commission that conduct of that kind constitutes an internationally wrongful act of the State, which is a source of international responsibility. For international responsibility to be incurred, it is necessary for the conduct attributable to the State to constitute a breach of an international obligation of the State. If only municipal law is affected, the conduct in question will be an act of the State, but not an "internationally wrongful" act of the State. The situation takes on a different aspect if the injured alien tries to obtain reparation for the damage he has suffered by having recourse to the means available to him under the domestic law of the State and is then faced with, say, a "denial of justice". But it is then the breach by its judicial organs of the international obligation to allow aliens access to its courts, rather than the original injurious conduct of another organ in breach only of its municipal law, that constitutes the internationally wrongful act of the State.

(21) Having thus established that there is no longer any valid reason for not adopting the basic principle in the matter, the Commission considered the question whether or not any limitations should be placed on that principle. It noted that, although some writers and draft codifications supported the principle, they suggested different ways of restricting the scope of the principle in borderline cases. Suggestions of this kind are also, but more rarely, to be found in diplomatic correspondence and international arbitral awards.

(22) Certain authors of learned works or draft codifications have suggested using for this purpose the notion of *general competence*:⁸² they consider that the conduct of

⁸⁰ *Yearbook ... 1971*, vol. II (Part One), p. 194, document A/CN.4/217/Add.2.

⁸¹ *Wissenschaftliche Zeitschrift der Humboldt-Universität zu Berlin (op. cit.)*, p. 467.

⁸² Article 2 of the draft prepared by Karl Strupp in 1927 stated that responsibility of the State was not relieved or avoided by the fact that the organ had "exceeded ... its authority", provided it had "general jurisdiction to undertake the act or action in question". According to article 1 of the draft prepared by A. Roth in 1932, the State was considered responsible for the acts "of any individuals whom or corporations which it entrusts with the performance of public functions, provided that such acts are within the general scope of their jurisdiction". According to the commentary on article 7, paragraph (a) of the draft prepared by the Harvard Law School in 1929, the formulation used in this clause should be understood as meaning that the State is responsible for an injury to an alien caused

(Continued on next page.)

an organ is internationally attributable to the State only if the organ acted within the "general scope of its competence" or within the "general scope of its functions". In the opinion of the Commission such a notion is not only vague, but inaccurate. Either the organ is competent under the legal system to which it belongs, or it is not: there is no such thing as "general" or "genetic" competence, as opposed to "special" or "specific" competence. And it would be even more erroneous to envisage a "general competence" attributed by international law in cases where municipal law denied its existence. A limitation thus formulated should therefore not be accepted.

(23) Other international jurists and other draft codifications have applied the criterion of the *use of means derived from function*.⁸³ This criterion has sometimes been mentioned even in positions taken by the Governments⁸⁴ and in international arbitral awards.⁸⁵ If we applied this criterion, the conduct of the organ which had acted in that capacity, but contrary to the provisions of the municipal law concerning its activity, would be internationally attributable to the State only if the organ had used the means placed at its disposal by the State for the performance of its functions. Application of this criterion could, however,

lead to unacceptable conclusions. For instance, the State which would have to assume responsibility for the act of a police officer who, disobeying his instructions, killed an alien placed in his custody by using a weapon provided by the State, would escape responsibility if the same act was committed by the same police officer using a weapon provided by a private individual, or even if the same officer allowed the murder to be committed by a private individual.⁸⁶

(24) Among other endeavours to limit the scope of the principle, several internationalists and draft codifications have adopted the notion of *manifest lack of competence*⁸⁷ or, conversely, to that of *apparent competence*.⁸⁸ It has been seen that these notions have been used both in the

(Foot-note 82 continued.)

by one of its higher authorities in so far as that authority acted "within the general scope" of its office or function (see Harvard Law School, *Research in International Law* (Cambridge, Mass. 1929), pp. 162-163). With regard to the authors of learned works, it may be recalled that Starke (*loc. cit.*, p. 110) speaks of "general competence"; and C. Fenwick (*International Law*, 3rd ed., rev. and enl., (New York, Appleton-Century-Crofts, 1948), p. 291), of "general scope of authority". Dahm (*op. cit.*, p. 182) mentions the acts of State organs which are contrary to municipal law but which nevertheless fall within the "general sphere of the competence attributed to the organ" or which are objectively related to the functional activities of the organ.

⁸³ The formulation "under cover of their status as organs of the State and making use of means placed at their disposal as such organs" was used in the third paragraph of rule I of the resolution adopted by the Institute of International Law in 1927. Article I, paragraph 4, of the draft prepared by the German International Law Association in 1930 used the wording "provided that [the authority acting beyond its competence] purports to be acting in its official capacity and is employing the official machinery". The wording proposed by de Visscher (*loc. cit.*, p. 253) is somewhat different. According to the Belgian international jurist, State responsibility "is generally acknowledged, at least ... when the injurious act was committed by means of the authority or the physical force that the guilty agent possessed by virtue of his functions" [translation from French]. Other international jurists, such as P. Reuter, (*loc. cit.*, p. 88) use the same formulation.

⁸⁴ The replies of Belgium and Finland to the question put in point V, No. 2 (b) of the request for information prepared by the Preparatory Committee of the 1930 Conference were clearly based on this model. The Belgian reply read as follows:

"The State is responsible if an official has used the means at his disposal in his capacity as an organ of the State." (League of Nations, *Bases of Discussion ...* (*op. cit.*), pp. 75-76.)

⁸⁵ In the decision relating to the *Caire* case, referred to above in paragraph 14, it was indicated that the action of two officers who were incompetent according to the municipal law had involved the responsibility of the State because they had "acted under cover of their status as officers and used means placed at their disposal on account of that status". It was added that "... in order for this responsibility ... of the State for acts of its officials or organs committed outside the limits of their competence to be acknowledged, the officials or organs concerned must have acted, apparently at least, as competent officials or organs or else, when acting, have used authority or means pertaining to their official status".

⁸⁶ It should be noted that, in some of the positions of Governments referred to in the foot-notes above, it is not clear whether the reference to the notion of the use of means derived from function is intended to establish a distinction between conducts of organs of the State in their capacity as organs or whether it is intended to distinguish the conduct of organs in the performance of their functions as organs from their conduct in a purely private capacity, quite unconnected with their association with the machinery of the State. In the opinion of the Commission, in any case, the notion of the use of means derived from function cannot be used even for this second purpose. On the one hand, the use of means derived from function is certainly an indication, but it is not a sufficient indication, because the organ acted in its official capacity. Take the case of a police officer who, while off duty and after a personal altercation with an alien, kills the alien with the weapon supplied to him. The act is still a private act of the police officer. On the other hand, the fact that the organ did not use means derived from function does not constitute sufficient proof that the organ acted in the capacity of a mere private individual. If an organ fails to perform an action which it was required to perform (say, for example, it omits to protect the life of a foreign Head of State on an official visit to the country), it is obviously not using means derived from function, but its passive conduct is nevertheless related to its official activity.

⁸⁷ As has been pointed out, the first paragraph of article VIII, approved at first reading by the Third Committee of the Hague Conference, laid down the principle of the responsibility of the State for acts performed by officials acting outside their competence, but "under cover of their official character". The second paragraph went on:

"International responsibility is, however, not incurred by a State if the official's lack of authority was so apparent that the foreigner should have been aware of it and could, in consequence, have avoided the damage" (*Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3).

A text based on similar criteria was inserted by García Amador in article 12, paragraph 4, of his revised draft of 1961, and by Gräfrath and Steiniger in article 3 of their draft. Formulations which are in part similar are to be found in the works of several writers. See, among others, Guggenheim (*op. cit.*, p. 6), Jiménez de Aréchaga (*loc. cit.*, p. 550), Ténékidès (*loc. cit.*, p. 787).

⁸⁸ Strisower (*loc. cit.*, p. 461) insists that the organ must have acted "in a manner at least apparently related to its functions"; Freeman says that the State is responsible when the organ has acted "under the apparent authority of his position" (*loc. cit.*, p. 290); according to Greig (*op. cit.*, p. 435), the State is not responsible unless the acts of organs are "within the apparent scope of their authority"; Furgler (*op. cit.*, p. 26) is of the view that the State is responsible for acts committed by organs outside their competence "in so far as those acts appear to be the acts of organs". According to Meron (*loc. cit.*, p. 113) and Quéneudec (*op. cit.*, p. 120), the State is responsible for the *ultra vires* acts of its organs if those acts were performed: (a) within the apparent scope of their competence, or (b) outside the apparent scope of their competence, but using means pertaining to its functions, unless the injured party could have avoided the damage by reason of the organ's apparent lack of competence. Amerasinghe (*loc. cit.*, p. 106 *et seq.*) agrees with this view.

practice of States and in international jurisprudence.⁸⁹ The logical conclusion of the application of these notions is that the conduct of an organ acting within the scope of its function, but in breach of the provisions of municipal law, is not attributable to the State where the breach is "manifest" or, conversely, that the conduct is attributable to the State provided it is not manifest that the organ has contravened those provisions.

(25) In justification of this conclusion it has been argued that if the lack of competence of the organ was manifest at the time when the organ acted, the injured party could and should have been aware of it and, in consequence, been able to prevent the illicit act from taking place. The situation is very similar to the one provided for in article 46 of the Vienna Convention on the Law of Treaties,⁹⁰ which lays down that the manifestation of the will of an organ of the State expressing the State's consent to be bound by a treaty may not be attributed to the State if it is manifest that this consent was expressed in violation of the provisions of its internal law concerning the competence of the organ. However, in the view of the Commission, the exception cannot be transferred just as it stands from attribution to the State of a declaration of will to attribution to the State of action liable to be the source of international responsibility. At the time of the conclusion of a treaty, if one party realizes that the organ of the other party is not competent to express the State's consent, it can always protect itself by refusing to agree to the conclusion of the treaty in such conditions. On the other hand, in the majority of cases at least, the fact of knowing that the organ engaging in unlawful conduct is either exceeding its competence, or contravening its instructions, will not enable the victim of such conduct to escape its harmful consequences.⁹¹ We are, then, faced with a dilemma. Either we simply include the limitation ruling out attribution to the State of the conduct of organs acting in situations "manifestly" outside their competence, in which case we run the unpardonable risk of presenting the State with an easy loophole in particularly serious cases where its international responsibility ought to be affirmed;⁹² we formulate the limitation in question in the

way proposed by several writers, who maintain that conduct of an organ acting outside its competence should not be attributable to the State if the organ's lack of competence was so manifest that the injured party ought to have been aware of it and could, *ipso facto*, have avoided the injury.⁹³ But then we finish up by reducing the applicability of the limitation to such a small number of cases that, in the end, it would only weaken unnecessarily the force of the basic rule which it is essential to confirm in the most positive fashion. In conclusion, the Commission is of the opinion that, however worded, the limitation to exclude from qualification as acts of the State the actions of organs in situations of "manifest" lack of competence has no place in the rule defined in the present article.

(26) On the other hand, with regard to actions or omissions which persons with the status of State organs may have committed in their capacity as private individuals, the Commission considered that they had no connexion whatsoever with the fact that the persons in question were part of the machinery of the State and accordingly could not be attributed to the State under international law. The Commission first considered this question when it was preparing article 5 of the draft. As is mentioned in paragraphs 8 and 9 of the commentary to that article, State practice, international jurisprudence and theory are unanimous on that point. The cases which have just been considered confirm this rule. It is no doubt true that it is not always easy to establish in a specific case whether the person acted as an organ or as an individual. But the fact that difficulties are sometimes encountered in the application of the rule does not mean that it is not well-founded.⁹⁴ That naturally does not prevent States from sometimes assuming responsibility for such actions by treaty, as is the case for instance, of the Convention IV respecting the laws and customs of war on land (The Hague, 1907), article 3 of which attributes to the State responsibility for "all acts committed by persons forming part of its armed forces" in violation of the Regulations annexed to the Convention, whether they acted as organs or as individuals.⁹⁵ But in the absence of treaty provisions of this nature, States cannot be held responsible for such conduct. Some members of the Commission questioned whether it might not be desirable none the less to provide for the attribution to the State of the conduct of individuals having the status of organs, acting in a private capacity, in cases where they use means supplied to them by the State for the performance of their official duties, including certain means of coercion. The Commission, however, considered that even in these cases the conduct in question is not attributable to the State. If a policeman off duty uses the weapon supplied to him by the State for the purpose of killing an alien of whom he is jealous, that is not sufficient, in the eyes of the Commission, to justify

⁸⁹ The notes from Secretaries of State Bayard and Adee dated, respectively, 17 August 1885 and 14 August 1900 (see para. 6 above) referred to the notion of appearance which constituted the basis of the question put in point V, No. 2 (c), of the request for information addressed to Governments by the Preparatory Committee of The Hague Conference, and for the replies of some Governments (League of Nations, *Bases of Discussion ... (op. cit.)*, p. 78 *et seq.*). As regards international jurisprudence, it may be recalled that in the award in the *Caire case* (see para. 14 above), it is stated that in order for the responsibility of the State for acts of its organs committed outside the limits of their competence to be acknowledged, "they must have acted, apparently at least, as competent ... organs".

⁹⁰ 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.

⁹¹ To give one example only, it would have been of no help to Mr. Youmans and the other American nationals killed at Anganguco by Mexican soldiers (see para. 14 above) to have known that the latter were acting in violation of their orders.

⁹² Say, for example, a head of State started a war of aggression, and in so doing "manifestly" violated provisions of the municipal law concerning his functions, it would be absurd not to consider such an action as an act of the State and, as such, a source of international responsibility.

⁹³ See, in particular, article VIII, para. 2, of the draft adopted at first reading by the Third Committee of the 1930 Hague Conference; article 12, para. 4, of F.V. García Amador's revised draft; the studies of T. Meron (*op. cit.*, p. 113) and of J.P. Quéneudec (*op. cit.*, p. 120).

⁹⁴ See in this connexion point (10) of the commentary on article 5 of the draft.

⁹⁵ J.B. Scott, *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed., (New York, Oxford University Press, 1918), p. 103.

attributing such action to the State under international law. That does not mean, of course, that the State cannot, in certain circumstances, incur international responsibility in situations of this kind; but then the responsibility must be incurred through the act of organs other than the organ which committed the wrongful act. In other words, the conduct of organs acting in a purely personal capacity is entirely assimilable to the conduct of private persons, which is dealt with in article 11 of the draft.

(27) With regard to the drafting of the rule, the Commission considered that the conduct of State organs (referred to in article 5 of the draft) and the conduct of organs of territorial governmental entities or other entities empowered to exercise elements of the governmental authority (referred to in article 7) should be dealt with together. These latter organs may also act in a manner inconsistent with the instructions concerning their activities or engage in activities which do not fall within their competence. In many federal States, for instance, the police are organs of the member States; if, contrary to their instructions, they do not protect the offices of a foreign consulate effectively, all that can be done is to apply the same rule as would be applied if the guilty organ were an organ of the federal State. And the same rule can only be applied if the police were organs not of a territorial governmental entity but of another entity empowered to exercise elements of the governmental authority, for example, a railway company to which certain police powers have been entrusted. If one of these company officials, in carrying out his duties, searches the luggage of a foreign diplomat, this act will be attributable to the State even though the official, in so doing, was acting contrary to his instructions.

(28) The expression "even if, in the particular case, the organ exceeded its competence under internal law or contravened instructions concerning its activity" was preferred to other more general expressions (for instance "even if . . . the organ acted inconsistently with the provisions of internal law concerning its activity"), because it covers the most frequent and typical cases of violation of the provisions of internal law concerning the organ's activity. In speaking of an organ which has exceeded its competence, the intention is to refer particularly to the case of an organ which acts in the performance of duties other than those which were entrusted to it. In speaking of an organ which has contravened instructions concerning its activity, the intention is to refer to the case of an organ which, while acting in the performance of the functions which it was empowered to carry out, acts in a manner inconsistent with the instructions, whether general or specific, which had been given to it. It is true that there may be other less frequent cases of violation of the provisions of internal law concerning the activity of the organ: when, for instance, the organ contravenes general rules relating to public administration, which cannot be described strictly speaking as instructions. But no inference can be drawn from this fact. Article 10, in fact, only confirms, even with regard to the cases which have been most discussed, the principle of the attribution to the State of *all* the conduct of organs acting in that capacity. No exception to this principle can therefore be admitted.

(29) Lastly, the expression "such organ having acted in that capacity" has been introduced to indicate that the conduct referred to comprises only the actions and omissions of organs in carrying out their official functions and not the actions and omissions of individuals having the status of organs in their private life. Some members of the Commission wondered whether it might not be desirable to state explicitly that the last type of conduct was not attributable to the State under international law. The majority of the members of the Commission were, however, of the opinion that such a clarification was unnecessary. The non-attribution of such conduct to the State follows clearly from the fact that articles 5, 7 and 10 only attribute to the State the conduct of organs acting in that capacity. The proposed clarification would therefore only be an unnecessary repetition.

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.

Commentary

(1) In the preceding articles of this chapter (articles 5 to 10), a positive presentation has been given of the conduct which is to be considered as acts of the State under international law. The present article confirms the rules laid down in the preceding articles by making the negative statement that certain kinds of conduct which have not been mentioned in the articles in question are not to be considered as acts of the State under international law.

(2) The conduct referred to in the present article, which excludes the attribution of that conduct to the State, consists primarily of the actions of private natural or legal persons in so far as—and this is most often the case—such persons are not acting on the State's behalf either *de jure* or *de facto*. It was indicated in article 7, paragraph 2, that the State could by law entrust the exercise of elements of the governmental authority to legal persons even where these were private persons. Where a private legal person has been empowered to exercise such authority and is acting in the exercise of that authority, his conduct will therefore be attributable to the State. It was further indicated in article 8 that the organs of the State (or of one of the entities referred to in article 7) could as an exceptional measure instruct private natural or legal persons to perform certain activities on behalf of the State, without formally conferring on such persons the status of organs of the State or organs of one of the entities referred to in article 7. Private natural or legal persons may also, in exceptional circumstances, be in the position of having to assume the exercise of certain elements of the governmental authority of their own accord. In those cases also, therefore, the conduct of private persons will be attributable to the State. In all other cases, however—in short,

in all cases not expressly provided for in articles 7 and 8—the acts of private natural and legal persons come under the present article, which provides that they cannot be considered as acts of the State. The acts of legal persons which cannot be classified as private legal persons under the State's internal law (for example "parastatal" or quasi-public legal persons and also other entities which are public but which have not been empowered to exercise elements of the governmental authority, or which have been so empowered only in a sector of activity other than that in which they have acted) also fall within the category of acts covered by the present article. Lastly, the acts covered by the present article must also be taken to include the acts of natural persons who have the status of organs of the State or organs of one of the entities referred to in article 7 (or organs of a foreign State, an international organization or an insurrectional movement) but who, in the case in point, act in their capacity as private individuals, i.e. perform acts which relate to their private life and have no connexion with the machinery of the State.

(3) The acts of private persons or of persons acting, in the case under consideration, in a private capacity are in no circumstances attributable to the State. It is irrelevant for this purpose whether there is, between the person acting and the State, a link other than those referred to in articles 7 and 8: for example, if the person has the nationality of the State in question or has acted on the territory of that State. It is also irrelevant whether the person acts alone or in a group, in a normal situation or on the occasion of popular unrest, demonstrations, riots or disturbances in general, in time of peace or of war, etc. It is also irrelevant whether his acts cause damage to a foreign State or to its organs or nationals.

(4) The strictly negative conclusion reached regarding the attribution to the State of the acts of private natural and legal persons and of the other persons mentioned above in paragraph 2 of the present commentary does not imply, however, that the State cannot incur international responsibility for such acts on other grounds. Hence, the purpose of article 11, paragraph 2, is to make it clear that all the items of conduct which are covered by the provisions of articles 5 to 10 of the draft and which have been adopted in relation to the acts of private persons are to be considered as acts of the State under international law. That applies, of course, where the very fact that these acts could take place makes it clear that in the circumstances there has been a breach of an international obligation on the part of organs of the State or organs of another entity exercising elements of the governmental authority. It is not, of course, within the ambit of the present draft to determine the content and scope of the international obligations of States which may be breached by acts or, more often, omissions on the part of organs of the State in relation to the acts of individuals. It is enough to point out that such obligations exist. For example there is no doubt that, to an extent which varies from case to case, the State must afford protection to foreign States, their official representatives and their ordinary nationals against any attack by individuals. If, in a particular situation, the State or the entities mentioned in article 7 failed to take adequate protective measures and an attack by individuals took place, there would be an act of the State related to

the acts of individuals—an act of the State constituting a breach of an international obligation of that State. The same would be true if an individual made an attack and the organs of the State failed, for example, to discharge an international obligation to punish or extradite that individual. Again, the possibility cannot be ruled out that, in a given situation, organs of the State may be found to have taken a complaisant attitude to the individual's action and shown a kind of complicity with it; the very fact of that complaisance or complicity might then represent the breach of an international obligation of the State. In conclusion, the purpose of paragraph 2 of the present article is to make it clear that the State can sometimes incur an international responsibility on the occasion of acts of a private person or of persons referred to in paragraph 1 of the present article, but to specify at the same time that this responsibility derives, not from some kind of endorsement by the State of the acts of individuals, but from separate conduct attributable to the State under articles 5 to 10 of the draft—conduct which is merely related to the acts in question. The acts of private persons or of persons acting in a private capacity then constitute—and it is important to emphasize this—an external event which serves as a catalyst for the wrongfulness of the State's conduct.

(5) The rule whose content has just been explored was established by the Commission on the basis of data furnished by State practice and international judicial decisions. The point of departure for its analysis was the discovery that a State has often been held internationally responsible on the occasion of acts or omissions whose material perpetrator was a private natural or legal person who, on that occasion, was not acting on the State's behalf. The Commission therefore investigated whether the explanation for that responsibility lay in the fact that, for the purposes of international law, the acts of private persons not acting on the State's behalf (for example, any person on its territory or possessing its nationality) would also be attributed to the State as an element constituting an internationally wrongful act of the State, or whether that responsibility had some other basis.

(6) In the opinion of the Commission it would not really be impossible, from a strictly theoretical point of view, to hold that even the conduct of private persons not acting on the State's behalf constituted "acts of the State" under international law. Such a conclusion, however, would only be acceptable on one specific condition. The study of what happens in the practice of international relations would have to establish beyond doubt: (a) that, in the cases under consideration, the State as a subject of international law was held responsible for the act of a private person acting as such and, consequently, (b) that any international responsibility incurred by the State was the result of a breach of an international obligation caused by that same act.⁹⁶ If that were the case, it would

⁹⁶ Let us imagine, for example, that an individual has managed to enter the premises of a foreign embassy and has destroyed objects or purloined documents. In order to be able to conclude that the individual's act should be attributed to the State as a source of responsibility, it would have to be established that, in the case in question, the State had been specifically accused of having breached, by its own action, the obligation to respect the inviolability of the embassy premises and archives.

only be necessary to take note of that finding and to draw the inferences, however surprising they might appear.⁹⁷

(7) However, the study of international practice might show that the acts of private persons acting as such were never taken into account in determining the international responsibility of the State unless they were accompanied by certain actions or omissions on the part of organs of the State. This should not automatically rule out the idea that the person's action could be attributed to the State. It might be thought that it could be so attributed, but only in cases where it was specifically characterized by a measure of participation or complicity on the part of State organs.⁹⁸ It is important to keep in mind, however, that this conclusion would always include the idea that the State endorsed the act of the private person as such, in cases where certain State organs had in some way connived at that act. The action of the private person would be at the heart of the internationally wrongful conduct of the State, and the State would breach an international obligation through the action of that person, in which certain organs would merely be accomplices. The condition laid down in the preceding paragraph for attributing the individual's action to the State would thus remain unchanged: the examination of specific cases would always have to lead to the same conclusion, namely that the internationally wrongful act with which the State was charged was the breach of an international obligation perpetrated through the action of the private person concerned and not, for example, some other delinquency committed by someone else.

(8) On the other hand, if the situations examined indicated that, in fact, the State had been accused of a breach of international obligations, other than that which could have been breached by the action of the private person, a different conclusion would have to be drawn. The condition required for acknowledging attribution of the act of the private person to the State would be manifestly lacking. It would no longer be a question of maintaining that the State had committed the breach of an international obligation complained of through the action of that person, which the State has endorsed. Nor could

there be any question of describing the organs which had committed actions or omissions on that occasion as "accomplices" in the breach of an international obligation brought about by the action of the person concerned, even if the person and his conduct had been treated with leniency. On the contrary, it would have to be concluded that, if there was a breach of an international obligation, it was committed directly and solely by those same organs of the State, and that the "act of the State" which might incur international responsibility could only have been the action or omission of those organs.⁹⁹ The act of the private person would merely be an external event distinct from the act of the State, this latter act having simply been committed in relation to that event.¹⁰⁰

(9) Hence the determining criterion, in establishing whether the conduct attributed to the State as a source of international responsibility is the conduct of the private person or that of an organ, is the nature of the delinquency of which the State is held to be guilty under international law. On the other hand, the amount of reparation which, in a given situation, is requested by the claimant State or fixed by an international tribunal will not, in the opinion of the Commission, provide any clarification of the problem before us. In the Commission's view, writers have erred in allowing themselves to be influenced by the fact that, in certain cases, the amount of the reparation that the State has had to pay has been calculated on the basis of the damage actually caused by the action of the private person, and in concluding from this that the State, in the situation envisaged, would be answerable, not for the act of its organs, but for the act of the private person. The findings of these writers in no way support such an inference. If, in the consideration of a particular case, it was concluded, on the basis of the elements indicated in the previous paragraphs, that the act attributed to the State as the source of international responsibility was not the action committed by the private person but the conduct of the organ, there would be no reason to call this conclu-

⁹⁷ It would be useless to object, as writers have often done, that only States are subjects of international law and that therefore only States can breach the obligations imposed by that law. That would be merely begging the question; furthermore the cases referred to here are not cases of alleged international responsibility of individuals, but cases of international responsibility of the State. Since the action of the private individual would be attributed to the State, it would be the State, acting through the individual, which breached an international obligation.

⁹⁸ The participation or complicity would of course have to be genuine. It would be otherwise if the term "complicity" was used wholly incorrectly, as is sometimes the case, and was no more than a euphemism for something else. For example, it is obvious that a court cannot be correctly described as an "accomplice" in an individual's crime because it has not imposed an appropriate penalty on him.

It need hardly be pointed out that, in the cases envisaged here, the action of the individual can in no sense be considered as the action of an organ. Any "participation" or "complicity" of organs of the State in the individual's action does not have the effect of making the perpetrator a member—even a casual or *de facto* member—of the machinery of the State. This is therefore a totally different field from that of actions committed by certain individuals at the instigation and on behalf of the State, which are dealt with in article 8, subparagraph (a), of the draft.

⁹⁹ Let us return to the example of the individual who succeeds in entering the premises of a foreign embassy and causing damage or committing burglary. There is no doubt that if the offender was, for example, a police officer acting in his official capacity, the State would have been specifically accused of having breached its obligations to respect the inviolability of the embassy premises and archives. If it was established that, where the offender was a private individual, the State was not accused of having violated the inviolability of the embassy but of having breached a totally different obligation—namely to ensure, with due diligence, that such crimes do not occur—the inferences from that finding would have to be coherently drawn. The State would be held responsible, not for the action of the individual, but for the omission committed in connexion with that action by the organs responsible for surveillance.

¹⁰⁰ This does not mean that such an event would not affect the determination of the State's responsibility. On the contrary, as has been noted above, it could be a condition for the existence of such responsibility by acting from outside as a catalyst for the wrongfulness of the conduct of the State organs in the case under consideration. For example, if the international obligation of the State consists of seeing to it that foreign States or their nationals are not attacked by private persons, a breach of that obligation occurs only if an attack is actually committed. But it would not, in any case, constitute a condition for attributing to the State the conduct of its organs; there would be no doubt about such attribution even without the external event. What would depend on the external event in question would be the possibility of considering the act of the State, in the case in point, as constituting a completed breach of an international obligation, and hence as being a source of international responsibility.

sion into question at a later stage. There is no reason why a State which, through its organs, has failed, for example, in its obligation to provide the representative of a foreign State with effective protection should not be called upon to discharge its responsibility by paying an indemnity commensurate with the damage caused to that representative by the private person. It has already been pointed out that the action of the private person, even if it were regarded merely as an external event in relation to the act for which the State assumed responsibility, could constitute a necessary condition for proving, in a specific case, the wrongfulness of the conduct of the State organs and for incurring the State's responsibility. It would therefore be normal for the injurious consequences resulting from that action to constitute, at the very least in certain cases, a criterion for determining the amount of the reparation owed by the State for the delinquency committed on that occasion by its organs.

(10) The idea that the answer to the question of attribution or non-attribution of the conduct of private persons to the State depends on the criteria which would be used to determine the amount of reparation owed by the State is linked to the idea, which the Commission rejected on examining article 3 of the draft, that one of the conditions for the existence of an internationally wrongful act of the State is the existence of "damage" caused by the breach of the obligation. It is understandable that those who hold damage to be one of the constituent elements of an internationally wrongful act should identify the responsibility deriving from such an act with the obligation to make reparation for such damage. It is also understandable that they should find it difficult to agree that the amount of the reparation claimed from a State which is only held responsible for having failed to prevent or, more particularly, to punish the action of the individual should be calculated on the basis of the "damage" caused by the action of the private person rather than that resulting from the failure on the part of the State. In the Commission's opinion, however, the damage, and especially the financial damage, should be seen not as an element of the internationally wrongful act of the State but as a material effect of that act, and one which is not automatic, especially in so far as it is an effect measurable in terms of financial loss. When the responsibility resulting from an internationally wrongful act entails an obligation to make reparation, the State incurring the responsibility must make reparation for the breach of its own international obligations, that is, for the disturbance which it has caused in international legal relations. However, the amount of reparation is not necessarily determined solely by the economic consequences of the breach itself. It is perfectly understandable that in certain cases, when the breach has in fact caused damage, the extent of the damage may be taken into account on fixing the amount of the reparation. But this does not mean that the amount of the reparation must necessarily be tied to the assessment of the financial damage resulting from the delinquency. In some cases it may indeed be pointless to seek to determine how much financial "damage" the State has caused through the breach committed by its organs, for example in a case where a State has not punished, or has punished inadequately, the person who caused damage to an alien.

In many cases this will not provide a firm basis for determining the amount of reparation due for a delinquency committed by the State. Even if the financial harm actually caused is to be used as a yardstick and taken into account in determining the amount of reparation for the breach in question, such harm will not necessarily be that caused by the conduct adopted by the State organs on that occasion. As already indicated, it is not unusual for a State, if it has failed in its duty to protect the nationals of another State against the acts of private persons, to be required to make good its breach by paying an indemnity calculated on the basis of the financial loss actually incurred by those foreign nationals as a result of the action committed in its territory by a private individual. In many cases this would be more logical than taking as a yardstick the damage caused by the State organs themselves, which is difficult to assess. But, in conclusion, let us repeat that the adoption of this solution in no way compels us to infer that, in this particular case, the State has endorsed the action of the individual.

(11) Two additional points: firstly, the responsibility of the State on the occasion of acts committed by private persons can in no case be described as an "indirect" or "vicarious" responsibility. In any legal system, the responsibility defined as "indirect" or "vicarious" is the responsibility which a subject of that juridical order incurs for the wrongful act of another subject of the same juridical order. This anomalous form of responsibility entails separating the subject that commits an internationally wrongful act from the subject that bears the responsibility for that act. However, in cases where the State is held internationally responsible on the occasion of actions of private persons, those persons cannot be regarded as separate subjects of international law. The conditions for indirect responsibility are therefore entirely lacking.

(12) The second point is that, if it were to be established that in certain situations, particularly in the event of public disturbances, the State was answerable in all cases for acts detrimental to foreign States or their nationals, irrespective of whether such acts, committed either by private persons or by organs, were attributable to the State or not, something entirely foreign to the sphere of responsibility for internationally wrongful acts would be involved, something which would no longer bear any relationship to the determination of the conditions for the existence of an act of the State at the international level. What would be involved would be a guarantee given by the State at the international level against the danger of actions committed in its territory, under certain conditions, by private persons.

(13) Bearing in mind the foregoing considerations of principle, the Commission proceeded to study some specific cases which have actually occurred in international relations, and began by examining the decisions of arbitration bodies. In this connexion the Commission noted that, in the last century, the principle was already being advanced that the conduct of a private person could never, by itself, justify holding the State responsible in international law. For such responsibility to be incurred, that conduct must in every case be accompanied by

wrongful conduct on the part of organs of the State.¹⁰¹ That having been said, it should be recognized that some of these decisions seem to support the argument for attributing to the State, as a source of responsibility, the act of the individual himself, characterized by the approval or sanction of the State.¹⁰²

(14) On the other hand, the principle that the act of an individual cannot be attributed to the State as a source of the State's responsibility is clearly proclaimed in the awards rendered at the beginning of the twentieth century (on 30 September 1901, to be precise) by the arbitrator Ramiro Gil de Urbarri who, under the Italian-Peruvian Convention of 25 November 1899, was entrusted with the task of ruling on the claims of Italian nationals residing in Peru.¹⁰³ In the complex *Poggioli case*, which was decided by Umpire Ralston of the Italian-Venezuelan Commission established under the Protocols of 13 February and 7 May 1903, one of the claims considered was concerned with actions of four individuals who, among other things, had attempted to murder one of the Poggioli brothers. In the decision, reference was again made to acts of individuals which had become the acts of the Government because the authorities of the country had not punished those individuals; but at the same time it was affirmed that "some of the instrumentalities of government had failed to exercise properly their functions, and for this lack the Government of Venezuela must be held responsible".¹⁰⁴ The wording used in the decision was not very specific, but the award as a whole shows quite clearly that the umpire in no way intended to accept the idea that the actions of individuals could as such be attributed to the State.¹⁰⁵

¹⁰¹ See for example the award rendered in the Ruden case by the United States-Peru Mixed Commission established under the Convention of 4 December 1868 (Moore, *History and Digest ... (op. cit.)*, vol. II, pp. 1654-1655); the awards relating to Glenn's case rendered by an umpire appointed under the Convention of 4 July 1868 between the United States and Mexico (*ibid.*, vol. III, p. 3138); the award relating to the Cotesworth and Powell case, rendered on 5 November 1875 by the British-Colombian Mixed Commission established under the Convention of 14 December 1872 (*ibid.*, vol. II, p. 2082); and the award relating to the De Brissot and others case, rendered in 1890 by the United States-Venezuelan Claims Commission established by the Convention of 5 December 1885 (*ibid.*, vol. III, p. 2968).

¹⁰² Thus, in the award relating to the Cotesworth and Powell case, referred to in the preceding foot-note, the Commission indicated that it based the responsibility of Colombia solely on the consequences of the amnesty granted by that country to the guilty parties, thus adhering "to the well-established principle in international policy, that, by pardoning a criminal, a nation assumes responsibility for his past acts". This statement of position shows the influence of ideas that were still widely held at the time the award was made.

¹⁰³ See, for example, the awards relating to the Capelleti case (United Nations, *Reports of International Arbitral Awards*, vol. XV (United Nations publication, Sales No. 66.V.3), p. 439) and the Serra case (*ibid.*, p. 410).

¹⁰⁴ *Ibid.*, vol. X (United Nations publication, Sales No. 60.V.4), p. 689.

¹⁰⁵ Some apparent uncertainties were probably due quite as much to the complexity of the *de facto* situation considered as to the persistent influence of certain theories which were still current at the time. It was probably the umpire's intention to bring out two different aspects of the actions of the local Government. Firstly, he denounced the complicity of the local Government in the acts of the individuals who had committed the crimes. However, in the case in question, it was not a legal fiction to speak of "complicity"; the term

(15) Ideas on this subject became clearer and more precise in the second half of the 1920s. On 1 May 1925 Max Huber, who had been appointed arbitrator under the Anglo-Spanish Agreement of 29 May 1923, rendered the well-known award concerning the various claims comprised in the *British Property in Spanish Morocco case*. It is apparent from the arguments of the arbitrator¹⁰⁶ that: (a) in cases involving acts by individuals injurious to aliens, he regarded as an act of the State and a potential source of international responsibility only the possible failure on the part of State organs to prevent such acts; (b) he flatly ruled out the possibility that the act of an individual could in any way be a source of State responsibility; (c) he regarded the act of the individual as an injurious act distinct from the conduct which could be attributed to the State in the case in question; and (d) even for the purpose of determining the amount of reparation, he was concerned to emphasize that the responsibility of the State derived solely from its breach of an international obligation in the case in question and not from the circumstances and effects of the acts of individuals.

(16) After this case, it was decisions of the Claims Commissions established between various countries and Mexico which provided the principal opportunity for a fresh and more comprehensive analysis of the problems of State responsibility for acts of individuals. The Mexico-United States General Claims Commission established by the Convention of 8 September 1923 on several occasions made an important contribution to the definitive affirmation of the principle that the responsibility of the State for acts of individuals, where established, is based solely on the conduct of the State in failing to prevent or punish such acts. In this connexion, the most noteworthy award is the one rendered by that Commission, presided over by van Vollenhoven, on 16 November 1925 in the *Janes case*. The Commission was called upon to decide a claim presented to Mexico by the United States following the murder of a United States national by a discharged employee of Mexican nationality. The claim was based on the fact that the Mexican authorities had failed to take proper steps to apprehend the culprit, who had gone unpunished. The United States agent stressed the "complicity" of the Mexican State in the case. He argued that the State, by failing to apprehend and punish the culprit, had condoned and ratified his crime, thereby making it its own. However, the Commission, having established to its satisfaction that the Mexican authorities had been guilty of negligence, did not

was not used merely to stigmatize an attitude adopted *ex post facto* in failing to mete out appropriate punishment to the perpetrators of a crime. It would even have been justifiable to ask whether, in such circumstances, the local authorities had not gone beyond "complicity" and mere participation in the acts of individuals, and whether those individuals were not in fact government agents, persons acting at the instigation of the Government. The umpire went on to emphasize that one fact at any rate was certain: the local government authorities were guilty of failing either to punish or to attempt to punish the perpetrators of the crimes. The umpires saw in that omission a denial of justice, a delinquency undoubtedly committed by the Government, the indisputable source of the international responsibility of the State.

¹⁰⁶ United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.1), pp. 636, 709 and 710.

hesitate to state its opinion;¹⁰⁷ (a) that the act of the individual is attributed to him alone and that the only acts which can be attributed to the State are those of its organs; (b) that the two kinds of acts should be considered at two quite different levels—the first at the level of municipal law and the second alone at the level of international law; and (c) that the notion of complicity inherent in the failure to take punitive action was purely fictitious and in any event could not be used as a basis for reversing the conclusions and attributing to the State responsibility for the acts of the individual. For the purpose of determining the damages payable by Mexico in respect of the omissions attributed to it, the Commission also deemed it necessary to take into account the distinction which it had drawn between the delinquency committed by the individual and the delinquency charged to the State. It emphasized that the two delinquencies were different “in their origin, character and effect”.¹⁰⁸ It therefore believed that the State was bound to remedy its internationally wrongful omission by compensating the foreign nationals injured by that omission. The damage caused by the omission could not, in the Commission’s view, be assessed on the basis of the damage caused by the murderer, which was different and inflicted on different individuals. The Commission thus wished to emphasize that, even as far as the amount of reparation was concerned, it was taking into account only the omission of the State organs and not the act of the individual.¹⁰⁹ In other cases and, in particular, the *Kennedy case*, decided on 6 May 1927,¹¹⁰ the *Venable case*, decided on 8 July 1927,¹¹¹ and the *Canahl case*, decided on 15 October 1928,¹¹² the Mexico-United States General Claims Commission again applied the principles set forth in the *Janes case*.

(17) After the beginning of the 1930s, there are no further international arbitral decisions of an interest comparable to that of the *Janes case*. However, it is evident that, after that date, the principle of the non-attribution to the State of the acts of individuals was finally accepted, and it was also accepted that the negative conclusion embodied in that principle was not susceptible of modification by the attitude of the public authorities with regard to such acts. Subsequent arbitral commissions have therefore confined themselves to establishing whether, in a particular situation, the State could be held guilty of a breach of its international obligations to ensure prevention and punishment and to deciding, on the basis of that finding, whether an internationally wrongful act constituted solely by such breach has been committed by

the State. Thus, in the decision relating to the case of the *Finnish Shipowners against Great Britain in respect of the Use of Certain Finnish Vessels during the War*, rendered on 9 May 1934 on the basis of the Great Britain-Finland Agreement of 30 September 1932, the arbitrator, referring to the application of the rule of prior exhaustion of local remedies, indicated that the two parties agreed in recognizing that there might be cases where it could be said that a breach of international law resulted from the very acts committed and had consequently existed before any recourse was had to the municipal tribunal. He went on to state that these acts must have been committed by the respondent Government or its officials, since there was no direct responsibility under international law for the acts of private individuals.¹¹³

(18) Among arbitral awards relevant to the question under consideration, decisions relating to injuries inflicted upon aliens by individuals in the course of riots, revolts and disturbances in general which the public authorities were unable to prevent or control have often been regarded as a separate category. The principle of the non-attribution to the State, as a source of responsibility of the acts of the individual perpetrators of such injuries is once again brought out clearly in these decisions. The Great Britain-United States Mixed Commission established under the Agreement of 18 August 1910 observed, for example, in its decisions of 18 December 1920 relating to the case of the *Home Frontier and Foreign Missionary Society of the United Brethren in Christ*, that no Government could be held responsible for the act of rebels committed in violation of its authority “where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection”.¹¹⁴ The fundamental principle of the non-responsibility of the State for damage caused in its territory in connexion with events such as riots, revolts, civil wars or international wars was also reaffirmed by the arbitrator Max Huber in his decision of 1 May 1925 in the *British Property in Spanish Morocco case*, already mentioned. This decision states that “responsibility for the action or inaction of the public authorities

¹⁰⁷ *Ibid.*, vol. IV (United Nations publication, Sales No. 1951.V.1), pp. 86 *et seq.*

¹⁰⁸ *Ibid.*, p. 89.

¹⁰⁹ The United States member of the Commission, Nielsen, dissenting from the majority opinion with respect to the criteria to be applied in determining the damages to be paid. He maintained that a State whose authorities had failed to take prompt and effective measures to apprehend and punish the guilty individuals was in fact obliged to make reparation for the damage caused by the acts of such individuals (*ibid.*, pp. 90 *et seq.*).

¹¹⁰ *Ibid.*, pp. 194 *et seq.*

¹¹¹ *Ibid.*, pp. 219 *et seq.*

¹¹² *Ibid.*, pp. 389 *et seq.*

¹¹³ *Ibid.*, vol. III (United Nations publication, Sales No. 1949.V.2), p. 1051. See, in the same connexion, the *Kidd case*, decided on 23 April 1931 by the British-Mexican Commission established under the Special Agreement of 19 November 1926 (*ibid.*, vol. V (United Nations publication, Sales No. 1952.V.3), pp. 142 *et seq.*); the *Noyes case*, decided on 22 May 1933 by the United States-Panama General Claims Commission established under the Convention of 28 July 1926 (*ibid.*, vol. VI (United Nations publication, Sales No. 1955.V.3), p. 311); and the *Denham and Adams cases*, decided by the same Commission on 22 May 1933 (*ibid.*, pp. 312 and 313) and 21 June 1933 (*ibid.*, pp. 322 and 323), respectively. Authoritative confirmation of the principle that the State is not necessarily answerable for all wrongful acts perpetrated in its territory may be found in the Judgment rendered by the International Court of Justice on 9 April 1949 in the *Corfu Channel case (Merits) (I.C.J. Reports 1949, p. 18)*.

¹¹⁴ United Nations, *Reports of International Arbitral Awards*, vol. VI (United Nations publication, Sales No. 1955.V.3), p. 44. See also the award rendered by the United States-Chile Claims Commission established under the Convention of 7 August 1892 in the *Lovett case Moore, History and Digest ... (op. cit.)*, vol. III, pp. 2990 *et seq.* and the decision relating to the *Underhill case* rendered by the United States-Venezuelan Mixed Claims Commission established under the Protocol of 17 February 1903 (United Nations, *Reports of International Arbitral Awards*, vol. IX (United Nations publication, Sales No. 1959.V.5), p. 159).

is quite different from responsibility for acts imputable to individuals outside the influence of or openly hostile to the authorities".¹¹⁵

(19) With regard to State practice, the positions taken by Governments during the preparatory work for the 1930 Codification Conference and at the Conference itself are particularly significant. All the States which participated in this work recognized that acts of private individuals could never be attributed to the State as a source of international responsibility. They agreed that the State incurred responsibility, in certain circumstances, only for the conduct of its own organs in relation to acts of private individuals which constitute as such a violation of its international obligations, even where the said acts take place in special circumstances such as riots, internal disturbances, etc. or cause injury to aliens enjoying special protection, such as diplomatic agents accredited to the State. This is abundantly clear from the replies of Governments to various points of the request for information addressed to them by the Preparatory Committee for the Conference.¹¹⁶ On the basis of the replies received, the Preparatory Committee worked out bases of discussion Nos. 10, 17, 18, 19 and 22 (*d*), which were unfortunately all concerned with the definition of obligations regarding the treatment of foreigners rather than with the determination of acts attributable to the State as a source of international responsibility. The Conference was unable to consider basis of discussion No. 22 (*d*), while basis No. 19 was deleted as an unnecessary amplification of basis No. 18. The other three bases were merged into a single text reading as follows:

A state is responsible for damage caused by a private person to the person or property of a foreigner if it has failed to take such preventive or punitive measures as in the circumstances might properly be expected of it.¹¹⁷

(20) The text gave rise to a long debate during which a clear division appeared between two groups of States: some, which in principle were in favour of the proposed text, believed that in certain circumstances States were required to provide foreigners with greater protection than that which they afforded their own nationals; the others, which were opposed to the text under discussion, were not ready to accept anything more than the possibility of requiring that foreigners be given the same treatment as nationals. The traditional quarrel between

those who, in the question of the treatment of foreigners, supported the so-called minimum standard thesis and those who supported the principle of equal treatment with nationals thus entered into the discussion; and it became impossible to reach a solution which would command a substantial majority. After certain proposals were rejected, the discussion was resumed on the basis of a new text drafted by the delegations of Greece, Italy, Great Britain, France and the United States of America, which read as follows:

As regards damage caused to foreigners or their property by private persons, the State is only responsible where the damage sustained by the foreigners results from the fact that the State has failed to take such measures as in the circumstances should normally have been taken to prevent, make reparation or inflict punishment for the acts causing the damage.¹¹⁸

Even so, this text, which was based on the one adopted by the Institute of International Law at its Lausanne meeting, could not satisfy the proponents of the more restrictive approach to the law relating to foreigners. When it was put to the vote after having been endorsed by the Sub-Committee, there were 21 votes in favour, 17 against and 2 abstentions.¹¹⁹ It then became article 10 of the draft adopted by the Conference in first reading, but in view of the result of the vote there was little hope of its being adopted definitively.

(21) In the light of the foregoing, it may be said of the work of the 1930 Codification Conference that, if it had not run into difficulties completely unconnected with the question of responsibility proper, and if the discussion had centred on a text which remained neutral concerning the definition of the scope of the obligations of States with regard to the protection of foreigners, a very positive result on the question of responsibility could easily have been achieved. This is clear from the fact that all the States which finally voted against the Sub-Committee's proposal had previously voted in favour of a proposal by China which differed from the majority proposal only in that it accepted the principle of equal treatment for foreigners and nationals.¹²⁰

(22) One final point which warrants a brief mention in our consideration of the positions taken by States during the 1930 Conference and the preparatory work concerns the criteria to be applied in determining the amount of reparation due from a State for a breach of its international obligations with regard to the protection of aliens against the acts of individuals. The belief that these criteria should not have any bearing on the solution to the problem of identifying the act which in these circumstances is attributed to the State as a source of international responsibility is confirmed by the position adopted by the majority of States with regard to the question raised by the Preparatory Committee for the Conference in point XIV (*d*) of its request for information.¹²¹ It is interesting to note, furthermore, that Governments finally agreed at

¹¹⁵ *Ibid.*, vol. II (United Nations publication, Sales No. 1949.V.1), pp. 642 *et seq.* [translation from French]. The arbitrator Huber was to apply these principles in a special manner in the *Ziat, Ben Kiran case* (*ibid.*, p. 730).

¹¹⁶ These are the replies to point VII (*a*), concerning failure of a State to fulfil its obligation to protect foreigners from injury by private individuals; point VII (*b*), regarding failure of a State to fulfil its obligation to punish individuals causing injury to foreigners; point VII (*c*), concerning acts of individuals directed against foreigners as such; point IX (*d*), relating to damage caused by persons engaged in insurrections or riots, or through mob violence where the movement is directed against foreigners as such or against persons of a particular nationality; and point V, 1 (*c*) relating to damage caused by individuals to foreigners invested with "a public character recognized by the State" (League of Nations, *Bases of discussion ...* (*op. cit.*), pp. 62 *et seq.*, 93 *et seq.*, 119 *et seq.*) and *Supplement to Volume III* (*op. cit.*), pp. 2, 3, 13, 14, 18, 19 and 21.

¹¹⁷ League of Nations, *Acts of the Conference ...* (*op. cit.*), p. 143.

¹¹⁸ *Ibid.*, p. 175.

¹¹⁹ *Ibid.*, p. 190.

¹²⁰ *Ibid.*, p. 185.

¹²¹ League of Nations, *Bases of discussion ...* (*op. cit.*), pp. 146 *et seq.* and League of Nations, *Supplement to Volume III* (*op. cit.*), p. 26.

the Conference to adopt a formula for reparation, which, while not the more precise one which the Preparatory Committee had proposed in basis of discussion No. 29,¹²² still does not seem to lend itself to an interpretation that would make it possible to take into account, in assessing the amount of reparation, damage other than that incurred in the circumstances under consideration by internationally wrongful omission on the part of State organs.¹²³

(23) The positions taken by Governments in specific situations are also significant. First we shall consider some situations in which injury has been caused by private individuals to private individual aliens. Then we shall consider some special situations, such as injurious acts committed against individual aliens in the course of popular uprisings, demonstrations, riots and disturbances in general. Finally, we shall review the situation in which the victims of attacks are not just private individuals but persons entitled to special protection, such as representatives of foreign States, or even foreign States themselves, in the case of attacks by individuals on their security.

(24) With regard to the first category of situations, the practice of the United States is one of the best known. On various occasions, the United States Government has expressed the opinion that a State can only incur international responsibility in connexion with the acts of individuals if it has failed to fulfil its international obligations to provide protection. An example of this practice is the position taken by the American-Mexican Claims Commission,¹²⁴ established by the Mexican Claims Act of 1942, in relation to the *Texas Cattle claims*¹²⁵ and the *Dexter claims*,¹²⁶ and the opinions given by Assistant Legal Advisers of the State Department on 28 May 1952¹²⁷ and 17 July 1957¹²⁸ respectively. In instructions sent by the State Department to the United States Embassy in San Salvador in 1959, refusing to support a claim of a United States national against El Salvador, it was stated that the policy of the United States Government had long been "based upon the generally accepted principle of international law that a State cannot be held liable to another State without an injury being caused by the

respondent State to the claimant State".¹²⁹ The same principles have been upheld by other Governments—see, for instance, a note by the German Government communicated to the Secretary-General of the League of Nations concerning the acts of German nationals who had abducted three Saar nationals in Saar territory and taken them to Germany to have them arrested;¹³⁰ and the reply given on 11 July 1962 by the United Kingdom Minister of State to a question in Parliament about the *Diboku case*, concerning a citizen of the British Protectorate of Bechuanaland who had been maltreated by his employer in South Africa.¹³¹

(25) With regard to acts causing injury to aliens committed during riots, popular demonstrations or other disturbances, international practice contains many examples of Government statements of position. Not to go too far back, we may start with the positions taken by the Governments of the United States and Italy in the *Cutler case*. During a popular demonstration at Florence in October 1925, a crowd attacked the building where the office of a United States national named Cutler was located and destroyed the office furniture. From their statements of position it is clear that the two Governments agreed in substance to acknowledge that only actions or omissions on the part of the official authorities of the State could be attributed to the latter as internationally wrongful acts involving its international responsibility. Neither Government endeavoured to attribute the individual's act to the State. The difference between the two Governments concerned the criteria to be applied in determining the amount of reparation to be paid in the event of an internationally wrongful omission on the part of the authorities being established.¹³²

(26) During the 1930s and the 1950s, the impossibility of attributing to the State acts committed by individuals during public disturbances or mob demonstrations is twice recognized in the instructions given by the State Department to its embassies on the subject of injuries sustained by United States nationals in Cuba in 1933¹³³ and in Libya in 1956.¹³⁴ In both cases, the State Department refused to support the claims of the United States nationals, on the principle that in such cases State responsibility can arise only as a result of negligence by the government authorities in failing to prevent or punish the injurious acts. Again, the reply by the French Secretary of State for Foreign Affairs to a parliamentary question concerning the assassination of certain French nationals in

¹²² Paragraph 3 of basis of discussion No. 29 was worded as follows:

Where the State's responsibility arises solely from failure to take proper measures after the act causing the damage has occurred, it is only bound to make good the damage due to its having failed, totally or partially, to take such measures. (League of Nations, *Bases of discussion ... (op. cit.)*, p. 152.)

¹²³ The text which the Sub-Committee that considered basis No. 29 submitted to the Third Committee and which, after having been adopted by the latter by 32 votes in favour and undergoing some stylistic changes, became article 3 of the draft approved in first reading by the Conference, mentioned reparation for damage sustained only in so far as it results from failure to comply with an international obligation (League of Nations, *Acts of the Conference ... (op. cit.)*, p. 130).

¹²⁴ A domestic United States agency established to consider the claims of United States nationals in respect of which Mexico had paid a lump sum.

¹²⁵ Whiteman, *op. cit.*, pp. 752-753.

¹²⁶ *Ibid.*, pp. 755-756.

¹²⁷ *Ibid.*, p. 757.

¹²⁸ *Ibid.*, p. 738.

¹²⁹ *Ibid.*, p. 816.

¹³⁰ League of Nations, *Official Journal*, 14th year, No. 8 (August 1933), p. 1050.

¹³¹ E. Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law* (London, The British Institute of International and Comparative Law, 1962), pp. 195-196.

¹³² Hackworth, *op. cit.*, pp. 658 *et seq.*

¹³³ *Ibid.*, p. 658.

¹³⁴ Whiteman, *op. cit.*, pp. 831-832. The fact that three years later the State Department submitted to the Iraqi Government a request for compensation for the families of three United States nationals who were killed at Baghdad in 1958, in a mob attack, should not be interpreted as a negation of the principles stated above. It would seem that the request was made on grounds of equity and humanity rather than of law. In any case, that was how it was interpreted by the Iraqi Government (*ibid.*, pp. 832-833).

Morocco contains one of the most categorical expressions of the opinion of a Government on this question. It states:

On each occasion, we have emphasized the responsibility of the Government, not so much because of any direct complicity on its part as because of the elementary duty of any independent Government to maintain order in its territory.¹³⁵

Lastly, during a debate in the British Parliament on the subject of the injury caused to British subjects following disturbances in Indonesia, the Foreign Secretary was asked whether the Government was bearing in mind in its negotiations with Indonesia the fact that the Indonesian authorities had appeared passively to condone the actions of the mob. Replying in the affirmative, the Foreign Secretary explained that it was precisely because of that fact that the British Government was negotiating in order to make the Indonesian Government admit its responsibility.¹³⁶

(27) Special consideration must be given to cases in which acts of individuals were directed against aliens invested by their State with representative status, for whom that State was therefore entitled to demand special protection.¹³⁷ It is a question whether such cases should not constitute an exception to the general rule which clearly emerges from State practice as well as from arbitration cases, so that the State on whose territory the injurious acts of individuals have been committed shall be held responsible, for those acts, irrespective of the conduct of its organs as regards the fulfilment of the obligation to provide extra protection which lies on the organs of the State with regard to official representatives of foreign States.

(28) Let us consider first an international incident which is of interest because of the positions and the discussions to which it gave rise in the Council of the League of Nations and other international bodies—the *Janina* or *murder of the Italian members of the Tellini mission* incident. On 27 August 1923, General Tellini, the Chairman of the international commission entrusted by the Conference of Ambassadors with the task of delimiting the Greek-Albanian frontier, and the members of the Italian delegation in the commission, were assassinated by unknown persons near Janina, in Greek territory. On 29 August, the Italian Government sent the Greek Government a note which presented a series of demands, ranging from punishment of the culprits to various forms of reparation for the moral and material injury caused to Italy.¹³⁸ The Greek Government replied the next day, denying its responsibility for what had happened and stating that it was prepared to accept only some of the demands of the Rome Government, including the demand concerning the

payment of compensation to the families of the victims.¹³⁹ Italy then proceeded to occupy Corfu, as a pledge for Greece's performance of its obligations, whereupon Greece referred the dispute to the Council of the League of Nations on 1 September.¹⁴⁰ At that stage, the attitude of the Italian Government seemed to indicate that, in view of the nature of the crime and the identity of the victims, it considered that the responsibility of the Greek State arose simply from the fact that the crime had been committed in Greek territory and not from any attitude on the part of the organs of the territorial State in relation to what had occurred. The Italian Government did not refer to any failure by the Greek authorities to perform their duties of vigilance and protection. On the other hand, the Greek Government, though stating that it realized that reparations were due to the Italian Government for the disgraceful crime, protested against the suggestion that it was morally and materially responsible for the crime, since no proof had been forthcoming that it had failed in its own duties.¹⁴¹ The Conference of Ambassadors, which had also intervened, adopted a resolution, on 5 September, which it transmitted to the Council of the League of Nations.¹⁴² This resolution was in some respects contradictory and reservations were expressed during the discussion which ensued in the Council of the League of Nations on the reply to be sent to the communication received from the Conference of Ambassadors.¹⁴³ On the one hand, the resolution accepted the Greek proposal for the establishment of a commission of inquiry, to investigate and try to shed some light on the circumstances surrounding the event and thus on the question of the existence or otherwise of responsibility on the part of Greece. But, on the other hand, it affirmed as a principle of international law the automatic responsibility of States for political crimes and outrages committed within their territory, thus echoing the position adopted at that time by the Italian Government. The incident was settled by the Conference of Ambassadors, which, on 13 September, adopted a resolution taking note of the undertaking of the Greek Government to present apologies and offer other solemn forms of satisfaction and of the payment made by that Government to the Swiss National Bank of a sum as security for any indemnity that might be fixed should the guilty parties not be traced. The resolution also took note of the undertaking of the Italian Government to evacuate the island of Corfu.¹⁴⁴

(29) The Council of the League of Nations took note of the settlement of the case at its meeting on 17 September.¹⁴⁵ On 28 September, however, it decided to refer to a special Committee of Jurists five questions concerning the problems of international law raised by the incident between Italy and Greece.¹⁴⁶ In reply to question 5 asked by the Council, the Committee of Jurists stated that:

¹³⁵ A. Ch. Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, C.N.R.S., 1965), vol. III, p. 636 [translation from French].

¹³⁶ E. Lauterpacht, *British Practice in International Law* (London, The British Institute of International and Comparative Law, 1963), p. 120.

¹³⁷ From this view-point, acts committed by individuals against the property of a foreign State, such as an embassy building or consulate premises, may be considered as acts directed against foreign government representatives.

¹³⁸ League of Nations, *Official Journal*, 4th Year, No. 11 (November 1923), p. 1413.

¹³⁹ *Ibid.*, pp. 1413–1414.

¹⁴⁰ *Ibid.*, pp. 1412–1413.

¹⁴¹ *Ibid.*, pp. 1288–1289.

¹⁴² *Ibid.*, p. 1294.

¹⁴³ *Ibid.*, pp. 1294 *et seq.*

¹⁴⁴ *Ibid.*, pp. 1305–1306.

¹⁴⁵ *Ibid.*, pp. 1306 *et seq.*

¹⁴⁶ *Ibid.*, pp. 1349 *et seq.*

The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.

The recognized public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance on his behalf.¹⁴⁷

The opinion of the Committee of Jurists thus clearly departed from that of the Conference of Ambassadors in 1923. The responsibility of the State arises, according to the Committee, only if the organs of the State fail in their duty to give special protection to the persons injured by an attack committed by individuals. The Council of the League of Nations considered the reply of the Committee of Jurists, and its members, including Italy, approved it unanimously on 13 March 1924.¹⁴⁸ In displaying agreement with the conclusions of the jurists the injured State, once the emotion aroused by the event had subsided, joined the other countries in general recognition of the principle that, even in the special cases envisaged, the State is finally responsible only for the actions or omissions of its organs.

(30) The incident in question had given rise to discussions in the most important international organization of the time. A number of more recent incidents have also provoked interesting discussions at the bilateral diplomatic level. Generally speaking, these discussions confirm the principle that acts of individuals directed against aliens or the property of aliens that States are obliged to provide with special protection do not give rise to an exception to the general rule regarding the determination of the State's international responsibility for the acts of private individuals. In those cases too, the principle that the State is responsible only for the conduct of its organs with respect to acts committed by private individuals seems to be well established in the practice of international relations. The fact that in such cases the international responsibility of the territorial State is more frequently alleged by claimant Governments and even more frequently acknowledged by the respondent Governments, arises simply from the much more compelling obligation of the State to protect the persons or property in question.

(31) For example, in the case of *Worowski*, the Soviet Government envoy to the Lausanne Peace Conference who was killed on 10 May 1923 by a certain Conradi, which led to the breaking off of all trade and other relations between the Soviet Union and Switzerland, the dispute between the two countries, when reduced to essentials, related not to the principles but to the facts.¹⁴⁹

¹⁴⁷ *Ibid.*, 5th Year, No. 4 (April 1924), p. 524.

¹⁴⁸ *Ibid.*, pp. 523 *et seq.* The following year, the Council transmitted that reply to the Members of the League and requested their comments. Between November 1925 and February 1926, it received 21 replies: all the Governments which gave their opinion on this point unanimously expressed the view that the State incurs responsibility only when the constituted authority was negligent in the performance of its duties (*ibid.*, 7th Year, No. 4 (April 1926), pp. 597 *et seq.*).

¹⁴⁹ For the text of the statements, telegrams and notes of the parties relating to this case see: K. Furgler, *op. cit.*, pp. 58 *et seq.*; League of Nations, *Official Journal*, 7th Year, No. 5 (May 1926), p. 661; Institute of the State and of Law of the Academy of Sciences of the

The real question at issue was whether or not, in the particular case, the organs of the Swiss State had failed to fulfil its obligation to provide protection, for the two parties were clearly of the opinion that, in the case of injurious actions committed by individuals in law, only the conduct of the organs of the State with regard to such actions may be invoked as a source of State responsibility. This principle seems also to be confirmed in official statements of position in connexion with other cases such as, for example, the murder of the Belgian diplomat, *Baron de Borchgrave*,¹⁵⁰ and the attack on the Italian consul at *Chambéry*,¹⁵¹ as well as the protests addressed by the Secretary-General of the United Nations to Israel in connexion with the *Bernadotte case*,¹⁵² to Jordan in the case of the staff member *Bakke*,¹⁵³ and to Egypt in the case of Lieutenant-Colonel *Quéru* and Captain *Jeannel*.¹⁵⁴ The international world has seen many cases recently involving attacks on diplomatic or consular missions or foreign official establishments. It may be noted that in those cases where the problems of concern to us specifically arose, the parties either affirmed or denied international responsibility of the receiving State on the basis of the conduct of the organs of that State.¹⁵⁵

(32) It might also be asked whether acts committed in the territory of a State by persons, especially by groups or bands, having prepared their activity in the territory of a neighbouring State, should not be viewed as constituting a special category of acts of individuals which may give rise to questions of international responsibility. History is replete with examples of incidents provoked by such activities and we need not cite specific cases.¹⁵⁶

Soviet Union, *Kurs mezhdunarodnogo prava* [Course in international law], edited by F.I. Kozhevnikov *et al.* (Moscow, Nauka, 1969), vol. V, p. 430, foot-notes 62 and 63, and p. 438, foot-note 81.

¹⁵⁰ See the Memorandum of the Belgian Government of 15 May 1937, in *P.C.I.J.*, Series C, No. 83, pp. 23 *et seq.*, and particularly pp. 28-32; the Memorandum introducing preliminary objections submitted by the Spanish Government on 29 June 1937 (*ibid.*, pp. 55 *et seq.*). See also the notes annexed to the two memoranda.

¹⁵¹ Kiss, *op. cit.*, p. 615.

¹⁵² Whiteman, *op. cit.*, pp. 742 *et seq.*

¹⁵³ *Ibid.*, pp. 744 *et seq.*

¹⁵⁴ *Ibid.*, pp. 746-747.

¹⁵⁵ For example, in connexion with the attack on the *Romanian Legation at Berne* (1954) (G. Perrin, "L'aggression contre la Légation de Roumanie à Berne et le fondement de la responsabilité internationale dans les délits d'omission", *Revue générale de droit international public* (Paris), 3rd series, vol. XXVIII, No. 3 (July-September 1957), pp. 414 and 415; and *Annuaire suisse de droit international, 1959* (Zurich, 1960), p. 225); the attack on the *Hungarian Legation at Berne* (1958) (*Revue générale de droit international public* (Paris), 3rd series, vol. XXX, No. 1 (January-March 1959), pp. 115 *et seq.*); the destruction of the *Soviet pavilion at the Izmir fair* (1964) (*Pravda*, 31 August 1964; Institute of the State and of Law of the Academy of Sciences of the Soviet Union, *op. cit.*, p. 438); the demonstrations against the *United States Embassy in Moscow* (1964 and 1965) (*The New York Times*, 11 February and 5, 6, 7 and 8 March 1965; *Revue générale de droit international public* (Paris), 3rd series, vol. XXX, No. 1 (January-March 1965), pp. 159 *et seq.*); and the demonstrations against the *USSR Embassy at Peking* (1966) [*Revue générale de droit international public* (Paris), 3rd series, vol. XXXVIII, No. 1 (January-March 1967), pp. 182 *et seq.*].

¹⁵⁶ A detailed analysis of State practice with respect to disputes provoked by the activities of armed bands organized in foreign countries is provided in I. Brownlie, "International law and the activities of armed bands", *International and Comparative Law Quarterly* (London), vol. 7, No. 4 (October 1958), pp. 724 *et seq.*

There are doubtless situations involving actions by groups which are and remain private entities, or which at least are entirely outside the machinery of the State in whose territory they reside. If that is the case, the actions which such groups may carry out in the territory of another State do not constitute a separate category distinct from other acts of individuals. That State may incur international responsibility with respect to such actions, but always for one of the reasons already noted which entail responsibility in similar circumstances. The Government of that State will be accused of having failed to fulfil its international obligations with respect to vigilance, protection and control, or of having failed in its specific duty not to tolerate the preparation in its territory of actions which are directed against a foreign Government or which might endanger the latter's security, and so on. In other words, it will always be a question of the same internationally wrongful acts of omission—of which we have seen numerous examples—which are habitually attributed to States with respect to the acts of individuals.¹⁵⁷ In order for the State to incur responsibility arising from other causes—responsibility arising directly from actions by the bands or groups in question—the situation must be different. These groups must maintain different and closer relations with the Government of the country in which they are based. Where that Government is known to encourage and even promote the organization of such groups, to provide them with financial assistance, training and weapons, and to co-ordinate their activities with those of its own forces for the purpose of possible operations, and so on, the groups in question cease to be individuals from the standpoint of international law. They become formations which act in concert with, and at the instigation of, the State, and perform missions authorized by or even entrusted to them by that State. They then fall into the category of persons or groups which are linked, in fact if not formally, with the State machinery and are frequently called “*de facto* organs”, and which were dealt with in article 8 (a) of this draft.¹⁵⁸ When they carry out their planned activities, those activities are attributed to the State and constitute internationally

¹⁵⁷ For example, accusations of having violated, by omission, the obligation to exercise due control and vigilance, were contained in the remonstrances which the French Government addressed to the Tunisian Government early in 1958 in order to underscore the latter's responsibility with regard to the traffic in men and supplies at the Algerian-Tunisian frontier (Kiss, *op. cit.*, p. 558). The remonstrances addressed to the United States by Spain with regard to the attack on the Spanish cargo vessel *Sierra Aranzazu* by anti-Castro motor-boats in the Caribbean Sea on 14 September 1964 (*Revue générale de droit international public* (Paris), 3rd series, vol. XXXVI, No. 1 (January-March 1965), pp. 126 *et seq.*), fall into the same category.

¹⁵⁸ In this connexion, it is enlightening to read the note of 21 February 1934 by the Legal Division of the French Ministry of Foreign Affairs (Kiss, *op. cit.*, p. 585) concerning the debate between the German and Austrian Governments regarding the establishment in Germany of the *Kampfring der Deutschösterreicher im Reiche* and the activities of the *Kampfring*. Furthermore, the records of complaints regarding cases of this type show that discussions between the countries concerned have focused primarily on the existence and proof of links between the Government and the supposedly private bodies which carry out activities injurious to neighbouring States. Regarding cases of “indirect aggression” through “private” armed groups, see the recent article by S. G. Kahn, “Private Armed Groups and World Order”, *Netherlands Yearbook of International Law*, 1970 (Leyden), vol. I (1971), pp. 32 *et seq.*

wrongful acts of the State: wrongful acts of commission rather than omission, which by virtue of that fact render the State concerned internationally responsible. It is thus clear that such situations are far from being simple cases involving State responsibility for the acts of individuals.

(33) The opinions expressed by the writers who have dealt with the subject can broadly be grouped into three basic schools of thought according to which solution to the problems in question they favour in principle among those that are theoretically possible. First we may mention the view that, on the basis of the concepts of “solidarity of the social group” or “guarantee”, the acts of individuals are attributable to the State as a source of international responsibility quite regardless of the attitude which organs of the State may take towards those acts. The first concept has tempted some modern writers¹⁵⁹ but it has no true adherents at present. The second has rarely received any great support as a generally applicable criterion.¹⁶⁰ It has, however, had adherents, particularly in the past, who have defended it as being applicable to special situations, ranging from the case of acts committed during riots, civil wars or xenophobic demonstrations¹⁶¹ to the case of acts directed against persons or property entitled to special protection.¹⁶² The second school of

¹⁵⁹ G. Arangio-Ruiz at one point appears to take up this idea in a new form in “Stati e altri enti (Soggettività Internazionale)”, *Novissimo Digesto Italiano* (Turin), vol. XVIII (1971), p. 154, note 9.

¹⁶⁰ A. Soldati, *La Responsabilité des Etats dans le droit international* (Paris, Librairie de jurisprudence ancienne et moderne, 1934), pp. 83–84, is the only writer to maintain that the State, in order to guarantee that it will fulfil its obligations, must generally assume responsibility for the conduct of any person whomsoever.

¹⁶¹ See E. Brusa, “Responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute ou de guerre civile”, *Annuaire de l'Institut de droit international*, 1898 (Paris), vol. 17, pp. 96 *et seq.*; Fauchille, *ibid.*, 1900, vol. 18, pp. 234–235. A new report prepared jointly by E. Brusa and L. von Bar (“Nouvelles thèses”, *ibid.*, pp. 47 *et seq.*) and taking the same view was approved by the majority of the Institute (*ibid.*, pp. 254 *et seq.*). Nevertheless, these ideas were not well received by writers. Only J. Goebel, (“The international responsibility of States for injuries sustained by aliens on account of mob violence, insurrections and civil wars”, *American Journal of International Law* (Washington, D.C.), vol. 8, No. 4 (October 1914), pp. 802 *et seq.*), sought to defend Brusa's ideas, a few years later. More recently, other writers have advocated the adoption of a rule making the State responsible for all damage to aliens resulting from the movements of xenophobic mobs, although they do not claim that this rule was previously applied in international relations. See, for example, J. W. Garner, “Responsibility of States for injuries suffered by foreigners within their territories on account of mob violence, riots and insurrection”, *Proceedings of the American Society of International Law (at its twenty-first annual meeting)*, Washington, D.C., April 28–30, 1927 (Washington, D.C., 1927), pp. 57–58 and 62.

¹⁶² The responsibility of the State for all acts perpetrated by individuals in such circumstances has been advocated by A. Decencière-Ferrandière, (*La responsabilité internationale des Etats à raison des dommages subis par des étrangers* (Paris, Rousseau, 1925), p. 128), C. Eagleton, (*op. cit.*, pp. 80–81 and 93), J. Dumas (“La responsabilité des Etats à raison des crimes et délits commis sur leur territoire au préjudice d'étrangers”, *Recueil des Cours* ..., 1931-II (Paris, Sirey, 1932), vol. 36, p. 254; L. Cavaré (*Le droit international public positif*, 2nd ed. (Paris, Pédone, 1962), vol. II, pp. 496–497); D. W. Greig (*op. cit.*, p. 444). In the same connexion it might be noted that M. R. García-Mora (*International Responsibility for Hostile Acts of Private Persons against Foreign States* (The Hague, Nijhoff, 1962), pp. 28–29 and 35), favours the adoption of a

(Continued on next page.)

thought is represented by those who, while differing on many other aspects, are more or less in agreement on one basic point. In their view, an act committed by a private person is attributable to the State as a source of international responsibility provided that other factors were involved in its commission, particularly failure to prevent the act or to react *a posteriori*, and provided that such omissions were omissions of the State directly, i.e. of its organs. This theory, known as the "theory of complicity",¹⁶³ prevailed in the writings of nineteenth-century international jurists; its influence was also discernible in certain arbitral decisions of the same period. Generally abandoned after the first decade of the twentieth century, it nevertheless received further support from some writers at a later date.¹⁶⁴ In certain aspects, theories maintained by more recent writers, who base their views on specific concepts of the organization and nature of the State as a subject of international law, also resemble the argument just described.¹⁶⁵ Their common feature is that they place less emphasis on, or indeed abolish, the distinction between acts of private persons and acts of organs for the purpose of establishing individual conduct as an act of the State. The third school of thought is the one to which the very large majority of modern writers belong. The empirical finding advanced in various forms by these different writers is the following: acts and omissions by private individuals who are and remain private individuals are not attributable to the State under international law and do not become "acts of the State" which, as such, may involve its responsibility towards other States. The acts of private individuals or private companies which cause injury to foreign States, their representatives or their subjects are often the occasion of an internationally wrongful act of the State, but this is a wrongful act which is the conduct of State organs. They frequently constitute an external event which acts as a catalyst in setting in motion the wrongful conduct of those organs with respect to the actual situation. But the State is internationally responsible only for the action,

and more often the omission, of its organs where they are guilty of not having done everything within their power to prevent the injurious act of the private individual or to punish it suitably if it has occurred despite everything. The State is responsible for having breached not the international obligation with which the individual's act might be in conflict, but the general or special obligation imposing on its organs a duty to provide protection.¹⁶⁶ Lastly, it should be noted that the large majority of international jurists who have devoted their attention to the specific problems of acts committed by individuals in special situations, such as riots, mob demonstrations and xenophobic disturbances, or acts constituting attacks on persons or property enjoying special protection, have reaffirmed in this context as well the validity of the general rule that these acts are not attributable to the State as a source of international responsibility.¹⁶⁷

(Foot-note 162 continued.)

rule which would replace the one at present in force and would make the State automatically responsible for all acts committed by individuals in its territory where such acts constituted a threat to international peace and security.

¹⁶³ This theory, which derives from H. Grotius, *De Jure Belli ac Pacis Libri Tres* (Amsterdam MDCXLVI), lib. II, pp. 366 *et seq.*, was developed by E. de Vattel, *Le droit des gens, ou Principes de la loi naturelle* (Lyons, Robert et Gauthier, 1802), vol. II, p. 72.

¹⁶⁴ See, for instance, Borchard, *op. cit.*, p. 217; C. C. Hyde, "Concerning damages arising from neglect to prosecute", *American Journal of International Law* (Washington, D.C.), vol. 22, No. 1 (January 1928), pp. 140 *et seq.*; and J. L. Brierly, "The Theory of implied State Complicity in International Claims", *The British Year Book of International Law, 1928* (London), vol. 9, pp. 42 *et seq.* The last two writers substituted the term "condonation" for the term "complicity", which they considered too strong. Their primary intention, which is in keeping with Nielsen's position in the *Janes case*, was to facilitate the calculation of compensation in cases of "non-punishment" on the basis of the injury caused by the individual's action.

¹⁶⁵ G. Biscottini, "Volontà ed attività dello Stato nell'ordinamento internazionale", *Rivista diritto internazionale* (Padua), XXXIVth year, 4th series, vol. XXI, fasc. I-II (1942), pp. 19 *et seq.* and pp. 31 *et seq.*; Arangio-Ruiz, *op. cit.*, pp. 153-154; and L. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, Sirey, 1938), p. 206.

¹⁶⁶ See, for example, H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Mohr (Siebeck), 1899), pp. 333-334; D. Anzilotti, "La responsabilité internationale des États à raison des dommages soufferts par des étrangers", *Revue générale de droit international public* (Paris), vol. XIII, Nos. 1 and 3 (1906), reprinted in *Scritti di diritto internazionale pubblico* (Padua, CEDAM, 1956), vol. I, p. 195; P. Schoen, "Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", *Zeitschrift für Völkerrecht* (Breslau, Kern's), supplement 2 to vol. X (1917), pp. 36 *et seq.* and pp. 63 *et seq.*; A. Jess, *Politische Handlungen Privater gegen das Ausland und das Völkerrecht* (Breslau, Marcus, 1923), pp. 22 *et seq.*; K. Strupp, "Die völkerrechtliche Haftung des Staates, insbesondere bei Handlungen Privater", *Abhandlungen zur fortschreitenden Kodifikation des internationalen Rechts* (Kiel, Verlag des Instituts für Internationales Recht an der Universität Kiel, 1927), vol. I, pp. 8 *et seq.* and pp. 23 *et seq.*; Ch de Visscher, "La responsabilité des États", *Bibliotheca Visseriana* (Leyden, Brill, 1924), vol. II, pp. 102 *et seq.*; Decencière-Ferrandière, *op. cit.*, pp. 62-63 and 118; Strisower, *loc. cit.*, pp. 472 *et seq.*, 481 *et seq.* and 491; Eagleton, *op. cit.*, pp. 77 and 79; A. Roth, *Schadenersatz für Verletzungen Privater bei völkerrechtlichen Delikten* (Berlin, Heymann, 1934), pp. 28 *et seq.*; A. V. Freeman, *The International Responsibility of States for Denial of Justice* (London, Longmans, Green, 1938), pp. 20, 27, 367 *et seq.*; Starke, *loc. cit.*, pp. 112 *et seq.*; Ago, *loc. cit.*, pp. 473 *et seq.*; Monaco, *loc. cit.*, pp. 225 *et seq.*; Accioly, *loc. cit.*, pp. 395 *et seq.* and 404 *et seq.*; A. Schüle, "Völkerrechtliches Delikt", *Wörterbuch des Völkerrechts*, 2nd ed. (Berlin, de Gruyter, 1960, vol. I, p. 333; von Münch, *op. cit.*, pp. 224 *et seq.*; Levin, *op. cit.*, pp. 81 *et seq.*; Amerasinghe, *loc. cit.*, pp. 92 *et seq.*; Jiménez de Aréchaga, *loc. cit.*, pp. 558 *et seq.*; Ténékidès, *loc. cit.*, p. 788; Kuris, *op. cit.*, pp. 196 *et seq.* This theory is also advanced in many general works by writers such as Ross, Redlob, Rousseau, Verdross, Cheng, Guggenheim, Quadri, Morelli, Dahm, Sørensen, Sereni, Delbez and Akehurst and by the State Law Institute of the Academy of Sciences of the Soviet Union.

¹⁶⁷ See, for instance, H. Arias, "The non-liability of States for Damages suffered by Foreigners in the Course of a Riot, an Insurrection or a Civil War", *American Journal of International Law* (Washington, D.C.), vol. 7, No. 4 (October 1913), pp. 724 *et seq.*; K. Strupp, "Responsabilité internationale de l'Etat en cas de dommages causés aux ressortissants d'un Etat étranger en cas de troubles, d'émeutes ou de guerres civiles", *International Law Association, Report of the Thirty-first Conference, held at the Palace of Justice, Buenos Aires, 24 August-30 August, 1922* (London, Sweet and Maxwell, 1923), vol. I, pp. 133 *et seq.*; V. M. Maúrtua and J. B. Scott, *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (New York, Oxford University Press, 1930), pp. 60-61; L. A. Podestá Costa, "La responsabilidad del Estado por daños irrogados a la persona o a los bienes de extranjeros en luchas civiles", *Revista de derecho internacional* (Havana), vol. 34, No. 67 (September 1938) and No. 68 (December 1938), pp. 220 *et seq.*; L. Delbez, "La responsabilité internationale pour crimes commis sur le territoire d'un Etat et dirigés contre la sûreté d'un Etat étranger", *Revue générale de droit international public*

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(34) The codification drafts—whether the work of academic associations or private authors or prepared under the auspices and on behalf of official bodies—all provide that, in the case of acts of private persons which cause injury to aliens, the responsibility of the State can exist only if organs of the State have been guilty of internationally wrongful omissions in the prevention or punishment of such acts or if they have denied to the injured person the appropriate means to establish his claim. Yet these drafts are often unclear on essential points or go into matters other than the one in question here. They seek at the same time to define the international obligations of the State with regard to the protection of aliens against injury by private persons. For that reason they cannot be used as a basis for the drafting of this article.

(35) As a result of the Commission's consideration of international jurisprudence, State practice and the opinions of the authors of academic works, it is able to reach the following conclusions: (a) in accordance with the criteria which have gradually been affirmed in international legal relations, the act of a private person not acting on behalf of the State cannot be attributed to the State and cannot as such involve the responsibility of the State. This conclusion is valid irrespective of the circumstances in which the private person acts and of the interests affected by his conduct; (b) although the international responsibility of the State is sometimes held to exist in connexion with acts of private persons its sole basis is the internationally wrongful conduct of organs of the State in relation to the acts of the private person concerned. In the view of the Commission, the rule which emerges from the application of the criteria outlined above fully meets the needs of contemporary international life and does not require to be altered. The Commission considers in particular that it would certainly be inadvisable to introduce an exception to this rule as regards acts affecting certain specific interests, for example the security of foreign States, or conduct in special circumstances, such as a riot or other form of internal public disturbance. The Commission also considers that there would be no point in endorsing the suggestion by certain authors that a proper guarantee against the consequences of the acts of private persons where those consequences are detrimental to foreign States, their representatives or their nationals should be imposed on the State; such a guarantee would be deemed to operate even where the State could not be accused of any breach of its international obligations in connexion with the acts in question. A guarantee of this kind might find a place in a special convention intended to prevent or punish the acts of certain specific categories of persons. It could not, however, be made a general rule without upsetting the balance of international legal relations. The Commission therefore considers that the rule which it proposes to establish should not depart in substance from the one now in force in customary international law.

(36) As regards the wording adopted by the Commission to express the rule in question, a few brief comments are called for on the expression "a person or a group of persons not acting on behalf of the State" in *paragraph 1* of the article. The term "person" was preferred to other terms because it comprises both natural persons and legal persons. Reference is made to a "group of persons" as well as to individual persons because the acts envisaged in this article are in most cases committed by groups. It was considered unnecessary to qualify these terms by the adjective "private", although obviously in the very great majority of cases the present article will apply to acts of private persons, for two reasons. Firstly, as regards artificial persons, the rule must also apply to those persons who are not regarded as "private" according to internal law, for example "parastatal" or quasi-public legal persons. The non-attribution to the State of the acts and omissions of such persons is just as certain as in the case of the acts and omissions of a private company, provided of course that the persons in question are not empowered by the internal law of the State to exercise elements of the governmental authority, or at least that the acts and omissions in question do not come within their exercise of it. The second reason is that, particularly in the case of natural persons, the rule must also apply to persons who possess the status of organs of the State or of another of the entities referred to in article 7 of the draft, provided that these persons act in their capacity as private persons independently of the official functions which they perform on other occasions. Finally, the words "not acting on behalf of the State" were inserted to exclude from the scope of the rule acts committed in any of the circumstances which, under articles 7 and 8, justify as an exception the attribution to the State of the conduct of natural or legal persons who do not form part of the State machinery proper.

(37) *Paragraph 2* of the article constitutes a saving clause. It is intended, in the case of acts which are injurious to foreign States or to their representatives or nationals but are not attributable to the State because they were committed by the persons envisaged in *paragraph 1*, to prevent attempts by the State also to evade the international responsibility which might be incurred as a result of conduct adopted by organs of the State in relation to the said acts. As regards the wording of this provision, the Commission considered that it was necessary to take account of two requirements. First, it wished to avoid touching, even indirectly, on the determination of the content of the obligations which bind a State to foreign States in respect of the protection of the latter, and of their representatives and nationals, against injurious acts by persons not acting on behalf of the State. Secondly, it wished to emphasize that there must be a relationship or link between the acts of the State envisaged in this paragraph and the injurious acts of persons referred to in paragraph 1. With regard to the first requirement, the Commission considered that it was necessary to be particularly strict in the application of the criterion selected, and that it should not be forgotten that the first attempt at codification of the question of State responsibility, undertaken by the League of Nations in 1930, had failed precisely in the attempt to establish both the content of the rules of responsibility and the

(Foot-note 167 continued.)

(Paris), 3rd series, vol. IV (1930), pp. 469 *et seq.*; Q. Wright, "Responsibility for injuries to United Nations officials", *American Journal of International Law* (Washington, D.C.), vol. 43, No. 1 (January 1949), pp. 98-99.

content of the "primary" obligations of States with regard to the rights of aliens. The Commission therefore preferred not to adopt a formulation to the effect that the rule enunciated in paragraph 1 would be without prejudice to the attribution to the State of the failure to use all reasonable means at its disposal to prevent or punish the injurious conduct of the persons in question. It also rejected another formulation to the effect that the rule would be without prejudice to the attribution to the State of the possible omission by its organs in a case in which the latter should have taken action to prevent or punish such acts (by private persons) and did not do so. With regard to the second requirement, the expression "conduct which is related to that of the persons or groups of persons" referred to in paragraph 1 appeared to be the most appropriate means of expressing the link, which must exist in the cases considered here, between conduct attributable to the State and acts of the persons envisaged in paragraph 1 of the article. The term "conduct" was chosen in preference to the term "omission", because the breach by a State of its international obligations in regard to the acts of the persons in question may also take the form of an action, although this rarely occurs. Finally, the expression "any . . . conduct . . . which is to be considered as an act of the State by virtue of articles 5 to 10" was preferred to the expression "any conduct of an organ of the State", since the breach of the obligation may be effected by any conduct which is attributable to the State by virtue of the articles mentioned, and not only by conduct of organs of the State in accordance with the provisions of articles 5 and 6.

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.

Commentary

(1) International life provides abundant examples of activities carried on in the territory of a State by organs of another State acting on the latter's behalf, i.e. in the exercise of elements of the governmental authority of the State to which the organs belong—and not, therefore, in the exercise of elements of the governmental authority of the territorial State, as in the case provided for in article 9. There is nothing abnormal in this. Some organs of the State, such as diplomatic or consular officials, are specially appointed to carry on activities in foreign territory. In other cases, organs which normally carry on their activities in the State to which they belong are called upon as an exceptional measure to engage in activities in the territory of another State with its consent, as in the case of official visits by dignitaries of a foreign State, the opera-

tion of foreign military bases established by agreement, and so on. On some occasions, activities of organs of a State are performed in the territory of a foreign State without the consent of the territorial State or even against its wishes: for instance, military operations against the territorial State, the operations of intelligence services in foreign territory, and so forth. In these various cases, the conduct of such organs of a foreign State can in no way be attributed to the territorial State, possibly entailing its responsibility, solely because it has taken place in the latter State's territory. Such conduct is and remains an act of the State to which the organ belongs, by virtue of draft articles 5 *et seq.*, which set no territorial limitation on the attribution to the State of the acts of its organs. Therefore no exception should be seen in the present article to the principles laid down in the preceding articles in chapter II of the draft, which govern the attribution of an act to the State.

(2) In the light of these considerations, a doubt may be raised—and some members of the Commission have raised it—whether it is really essential to specify in the present article that there can be no question of attributing to the territorial State the conduct, as envisaged in this article, of organs of foreign States. In the Commission's opinion, however, there are several reasons for including such a statement in the draft. The old idea is still rooted in some minds, and at times reappears in practice, that the State is somehow responsible for everything that happens in the territory under its jurisdiction. Furthermore some of the "primary" rules whose breach may entail international responsibility are delimited in scope and content by the notions of territory and territorial jurisdiction: first and foremost, the rules concerning treatment of aliens. Thus it is customary to speak in this connexion of the responsibility of the State for damage caused *in its territory* to foreign persons or property, an expression which would seem to include damage caused to foreigners by organs, acting in the territory of the State, which are themselves foreign. Therefore the draft articles should explicitly rule out any idea that the territorial State is in some way responsible solely because the specified conduct of organs of a foreign State took place in its territory.

(3) Secondly, such a statement clarifies the rule laid down in draft article 9 to the effect that acts committed by organs of a State which have been "placed at the disposal" of another State are attributable as a possible source of responsibility to the latter State as a subject of international law. As was pointed out in the commentary to article 9, the essential condition that the organ in question shall have been "placed at the disposal" of a State does not mean only that the "lent" organ must act in the exercise of elements of the governmental authority of the beneficiary State. It requires above all that, in performing the functions entrusted to it by the beneficiary State, the "lent" organ shall act under the exclusive direction and control of that State. In the cases contemplated in the present article, on the other hand, the organ in question remains under the orders and exclusive authority of the State to which it belongs. It is clear that, in a case of this kind, the acts or omissions of the organ are not conduct of an organ "placed at the disposal of a State

by another State" within the meaning of draft article 9. Thus the present article usefully complements the rule expressed in the earlier article by specifying that the rule remains valid even if, in the specific situation in question, the organ concerned acted in the territory of another State.

(4) Lastly, if the draft is not to be criticized for omissions it is important to remember that, although the conduct of organs of a State acting in the territory of another State can in no event be attributed *as such* to the territorial State, the latter could nevertheless incur international responsibility for acts committed on the occasion of and in connexion with the conduct of such foreign organs. Those would not, of course, be acts of the organs of the foreign State, but acts of the organs of the territorial State, for example if they were unduly passive in their conduct in the face of acts prejudicial to a third State committed within the frontiers of the territorial State by an organ of a foreign State. In other words, the actions of foreign organs in the territory of a State, while not attributable to that State, may in certain cases afford a material opportunity for the territorial State to engage in conduct which might entail its international responsibility. For example, the organs of the territorial State might be guilty, in connexion with the actions of organs of a foreign State in the national territory, of failing to discharge an international obligation towards a third State to protect that State, its representatives or its nationals. Provision must therefore be made for cases in which the territorial State might be required to adopt a certain attitude in relation to the attitude of the foreign organ in question, but failed to do so. If that point was not covered, the conclusion might be drawn that, since the conduct of the foreign organ was attributable to the State to which it belonged, the territorial State was free of all responsibility even where its own conduct on the occasion of the action of a foreign organ exhibited internationally wrongful aspects.

(5) It would be dangerous, however, to draw too close a parallel between that situation and the situation contemplated in article 11, paragraph 2, with regard to the conduct of private persons not acting on behalf of the State. In the case of ordinary private individuals it is natural to postulate the existence of a set of obligations incumbent on the State with regard to the prevention and punishment of acts committed by such persons to the prejudice of foreign States or their nationals. It is therefore natural to contemplate the attribution to the State, as a source of international responsibility, of a breach of those obligations. It is less natural to imagine that the State could fail in an international obligation of that kind in the case envisaged in the present article, since organs of a foreign State are not subject in foreign territory to the same authority as private individuals. What is more, where organs of a State acting in that capacity commit in the territory of another State actions which are detrimental to a third State, it seems clear above all that the responsibility lies with the State to which the organ belongs, since as pointed out above, the acts or omissions of organs of the State are attributable to the State as a possible source of responsibility regardless of whether they have been perpetrated in national or in foreign ter-

ritory. The responsibility of the State to which the organ belongs therefore tends to outweigh any responsibility which the territorial State might exceptionally incur, on such grounds as that its organs had neglected to prevent such actions. This perhaps explains why, in State practice, the territorial State has seldom been held responsible in such situations. It would nevertheless be wrong to conclude from this that the territorial State can never incur international responsibility in connexion with acts committed in its territory by organs of a foreign State. The very fact that the responsibility of the territorial State appears less significant in the exceptional cases envisaged here is yet another reason for providing for such a possibility in the present article, especially since specific cases have proved that such a provision is of practical value to States.

(6) On 6 February 1956 the Government of the Soviet Union addressed a protest note to the Government of the Federal Republic of Germany concerning the fact that the United States armed forces stationed in Germany had launched sounding balloons, equipped with automatic cameras and radio transmitters, from the territory of the Federal Republic. The balloons had been intercepted in Soviet air space. Two days earlier, on 4 February, a Soviet protest concerning similar activities had been addressed to the Government of Turkey. The Government of the Federal Republic of Germany and the Government of Turkey were accused of having allowed their territory to be used by United States organs for the purpose of committing wrongful acts. On the other hand, in a separate note addressed to the United States Government, that Government was held responsible for the activities of its own military organs, which had carried out the launching operations. In its reply of 6 March 1956 the Government of the Federal Republic referred to a note received on 8 February from the United States Government, in which the latter gave its assurance that it would try for the time being to avoid launching any more balloons, even though their purpose had been only to gather meteorological information. The Government of the Federal Republic accordingly considered the question closed. Its note added that investigations had been carried out and had shown that no balloons had been launched from the territory of the Federal Republic for the purpose of dropping political propaganda leaflets. But the Soviet Government replied, in a further note dated 24 March 1956, contesting the truth of the statements contained in the reply to its first note and again blaming the Government of the Federal Republic for allowing wrongful acts to be committed by United States forces stationed in Germany.¹⁶⁸ Quite apart from the substantive issue involved, it is perfectly plain from this exchange of notes that the protests addressed to the territorial State were quite different from the principal protests addressed to the State of origin of the organs which perpetrated the acts complained of. The territorial State was blamed only for a breach of its own obligations.

(7) In the same context, we may recall an incident which occurred during the visit of Mr. N. Khrushchev, the

¹⁶⁸ The details of this case are to be found in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart), vol. 18 (1957-1958), pp. 723-724.

Chairman of the Council of Ministers of the USSR, to Austria from 30 June to 8 July 1960. The Soviet Premier made a number of speeches in which he accused the United States Government of seeking to torpedo the planned summit conference by organizing flights of U-2 "pirate planes". He also violently attacked the militarism of the Western countries, and particularly West German revanchism. At a press conference he went so far as to compare Chancellor Adenauer to Hitler. The Government of the Federal Republic considered those remarks to be an affront to its honour. But at the same time the Ambassador of the Federal Republic in Vienna made representations to the Austrian Government, stressing the unusual nature of the situation in that the words directed against the Government of the Federal Republic had been uttered in the presence of the Austrian Minister for Foreign Affairs. On the same day the United States Ambassador protested at the fact that the Austrian Government had not deemed it necessary to dissociate itself from the "slandering attack" on his country. Dr. Raab, the Austrian Chancellor, then took the opportunity to indicate such dissociation in the course of his farewell speech. A note appeared simultaneously in the *Wiener Zeitung* stating that the Austrian Government had no connexion whatsoever with the remarks that had been made, and pointing out that a Government could only be responsible for what was said at a press conference if that Government itself held the conference. The note also stated that the speech by the Soviet Premier had been delivered at the headquarters of the Austro-Soviet Association, which was a private institution, and that the presence of the Austrian Minister for Foreign Affairs had merely been intended as a courtesy to the guest.¹⁶⁹ Here, too, there is no need to enter into the substance of the case. We need only note that it provides further confirmation of the fact that what is alleged in such cases to be a source of responsibility of the territorial State is of course not the acts committed by foreign organs but the passive or negligent attitude considered to have been adopted by the organs of that State when the acts were committed.

(8) The principle that, in the cases envisaged, the international responsibility of the territorial State can be incurred only by some conduct engaged in by its own organs in connexion with the actions of the foreign organ and, as such, constituting a breach of an international obligation is also supported by the literature. It has been incorporated in certain draft codifications, such as that prepared by the Harvard Law School in 1929¹⁷⁰ and the preliminary draft submitted to the International Law Commission by F. V. García Amador in 1961.¹⁷¹ To be sure, it has sometimes been contended that a whole series

of cases, largely dating from the last century, were cases of indirect responsibility on the part of the territorial State¹⁷² but, as certain writers¹⁷³ have pointed out since then, the responsibility of the territorial State was not invoked in the cases in question except in so far as its own organs had failed to perform their duty to protect foreign States or foreign nationals. In all these cases, what was considered as an act entailing the responsibility of the territorial State was not an action committed in the territory of that State by a foreign organ, but the negligence or lack of reaction of the organs of that State in relation to such an action. Furthermore, such responsibility had sometimes been invoked in situations where the perpetrator of the injurious action committed in the territory of the State, although an organ of a foreign State, had acted only in a private capacity.¹⁷⁴

(9) The practice of States and the writers thus confirm the considerations and conclusions developed in the opening paragraphs of the present commentary. It seems well established: (a) that the conduct of an organ of a State is not attributable in international law to another State, as a possible source of international responsibility, in virtue of the mere fact that such conduct has taken place in the territory of the latter State; (b) that, as in the case of activities of private individuals, the responsibility of the territorial State is incurred on such occasions only by some conduct engaged in by its own organs in relation to the conduct of organs of the foreign State and constituting as such a breach of an international obligation borne by the territorial State.

(10) That having been said, it will be well to add two clarifications. The first is that, in the cases envisaged in the present article, the conduct of foreign organs in the territory of the State must be conduct engaged in by those organs acting in that capacity. If that is not the case, their conduct can only be regarded as the activity of private individuals, in relation both to the State to which the organ belongs and to the territorial State, and neither State can be held responsible except possibly for failing in its duty of protection as specified in article 11, paragraph 2, of the draft. In such a case it would remain to be determined, in the light of the circumstances, which of the two States was in fact under an obligation to act to prevent or punish such conduct on the part of individuals, and would thus bear responsibility for a failure in that respect.

(11) The second clarification repeats what has already been stated above:¹⁷⁵ namely that, in the case of conduct

¹⁶⁹ *Ibid.*, vol. 23 (1963), pp. 348-349.

¹⁷⁰ Article 14 of the draft reads: "A State is responsible if an injury to an alien results from an act, committed within its territory which is attributable to another State, only if it has failed to use due diligence to prevent such injury" (*Yearbook... 1956*, vol. II, p. 229, document A/CN.4/96, annex 9).

¹⁷¹ Article 15 of the preliminary draft reads as follows: "Acts and omissions of a third State or of an international organization shall be imputable to the State in whose territory they were committed only if the latter could have avoided the injurious act and did not exercise such diligence as was possible in the circumstances" (*Yearbook... 1961*, vol. II, p. 48, document A/CN.4/134 and Add.1, addendum).

¹⁷² F. Klein, *Die mittelbare Haftung im Völkerrecht* (Frankfurt-am-Main, Klostermann, 1941), pp. 265 *et seq.* and 299 *et seq.*

¹⁷³ A. Verdross, "Theorie der mittelbaren Staatenhaftung", *Oesterreichische Zeitschrift für öffentliches Recht* (Vienna), vol. I, No. 4 (new series) (May 1948), pp. 405 *et seq.* In connexion with these cases, see also R. Quadri, *Diritto internazionale pubblico*, 5th ed. (Naples, Liguori, 1968), pp. 602-603. Both writers dispute Klein's contention.

¹⁷⁴ This was the situation regarding the claim presented by Great Britain to the Tuscan Government in 1852 as a result of the ill-treatment inflicted on a British national named *Mather* by an Austrian officer who was stationed in Tuscany and who had acted in a private capacity.

¹⁷⁵ See para. 5.

of organs of a foreign State in the territory of a State, the analogies with a case concerning the conduct of private individuals are more apparent than real. In the final analysis, the similarity between the two cases is merely a matter of recognizing that in either circumstance the territorial State may be faced with an international obligation to protect third States or their nationals and may be guilty of failing to meet that obligation. It stands to reason, however, that such an obligation may vary sharply in content and extent, and that the ways in which the territorial State has to discharge such an obligation may vary widely from case to case. In that connexion it will be necessary to take into account the incidence of the privileges and immunities enjoyed by the organs of the foreign State, any special status which they may possess, the possibility that the foreign State concerned has reserved for itself the exclusive performance of certain supervisory or punitive functions, etc. For instance, it is obvious that a State cannot punish a foreign ambassador who, in its territory, has insulted the head of a third State. However, this does not mean that the territorial State has no means of reacting against such conduct. The territorial State can at least be expected to dissociate itself from the conduct of the ambassador or to address a protest to the sending State. In the case of extremely serious incidents, the territorial State might conceivably be expected to request the recall of the ambassador concerned or to declare him *persona non grata*. If the territorial State took no action, the injured State could then accuse it of an internationally wrongful act in relation to the conduct of the ambassador in question.

(12) Other examples may also be mentioned. A head of State visiting a foreign country might be kidnapped by an armed commando under the orders of a third State. In such a case the territorial State would seem bound to incur an international responsibility if it had failed to take the necessary precautions or if, having taken such precautions, it did not try to catch the culprits, or if, having caught them, it failed to punish them. Even when the organs of a State acting in or from the territory of another State enjoy certain privileges and immunities or a special status, the territorial State is not thereby deprived of all means of reacting against acts committed in its territory by such organs and, in certain circumstances, it may even be bound to react against such acts if it is not to incur international responsibility through its own passivity in the face of events.

(13) In the light of the various considerations set out above, *paragraph 1* of article 12 provides that 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. By adopting the extremely broad phrase "in the territory of another State or in any other territory under its jurisdiction", the Commission intends to cover not only acts committed in the "territory" proper of another State, including the territorial waters and air space adjacent thereto, but also acts committed in any other territory, space, zone, place or thing under the jurisdiction of such other State, for instance in a dependent territory, in an occupied foreign territory, on the continental shelf, at a

base abroad, on board a ship or an aircraft flying the flag of that State, etc.

(14) The basic principle of non-attribution to the State of conduct of organs of another State in its territory by organs of another State being thus affirmed, *paragraph 2* of article 12 lays down the rule that this principle is without prejudice to the attribution to the State of any other conduct which is related to that referred to in *paragraph 1* and which is to be considered as an act of that State by virtue of articles 5 to 10 of the draft. Framed as a safeguard clause, the rule laid down in *paragraph 2* provides only for the possibility of attributing to the territorial State, as a potential source of its responsibility, any failure to comply with its own obligations incurred in relation to conduct of organs of another State in its territory, or in any other territory under its jurisdiction.

(15) For the purposes which draft article 12 has to serve, the provisions laid down in its *paragraphs 1* and *2* would appear to suffice. The situations envisaged in the article would certainly take on a different aspect if, in the individual case, it were established that there had been assistance or complicity, in the true meaning of these terms, on the part of organs of the territorial State, in the wrongful acts committed by organs of the foreign State. The case might then exhibit either participation by a State in an internationally wrongful situation created by another State, or an internationally wrongful act committed jointly by two States.¹⁷⁶ The act committed by organs of the territorial State and attributed to it as a source of responsibility—independently of the acts concurrently attributed to the State to which the foreign organs belong—would then be something other than a mere failure in the duty to protect third States. A case of this kind would present, rather, one of the situations which the Commission proposes to examine under chapter IV of part I of the draft, dealing with the special problems raised by the participation of several States in the same internationally wrongful act.¹⁷⁷ Similarly it is not the intention of the Commission that article 12 should deal with the question whether the presence of a foreign organ in the territory of a State constitutes in itself a lawful or a wrongful situation. In a specific case in which that presence as such constituted an internationally wrongful act on the part of the foreign State, the territorial State or both States, the problems of attribution raised by such an act would come under draft article 5 and should be settled in accordance with the rule laid down in that article.

¹⁷⁶ For instance, article 3 of the definition of aggression approved by the General Assembly in its resolution 3314 (XXIX) of 14 December 1974 lists among the acts which qualify 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", and the Convention on the Prevention and Punishment of the Crime of Genocide adopted under General Assembly resolution 260 A (III) of 9 December 1948 declares not only "genocide" but also "conspiracy to commit genocide" and "complicity in genocide" to be punishable acts.

¹⁷⁷ See para. 50 above.

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.

Commentary

(1) This article states the rule that the conduct of organs of an international organization acting on the organization's behalf in the territory of a State, or in any other territory under the jurisdiction of that State, shall not, by reason of that fact—or more precisely by reason only of that fact—be considered as an act of that State. This rule springs from considerations of principle which resemble *mutatis mutandis* those stated in the commentary to article 12 in connexion with the conduct adopted in the territory of a State by organs of another State acting in that capacity. Because, however, of the difference in nature between an international organization and a State, the problem takes a different form, at least in some respects.

(2) It should be noted first of all that the case in which the act of an organ of a State takes place in the territory of another State is the exception. The acts of an organ of an international organization, on the other hand, are invariably and necessarily carried out in the territory of a State, and hence of another subject of international law.¹⁷⁸ Having no territory of their own, international organizations are obliged to act in the territory of a State, or in a territory under the jurisdiction or control of a State.¹⁷⁹ As a general rule, an international organization acts in the territory of a particular State under an agreement concluded between that State and the international organization concerned. Thus the activities of organs at the organization's headquarters or permanent offices are carried on under a headquarters agreement concluded

¹⁷⁸ This situation has been described in the following terms by C. Eagleton:

"Whereas a State agent is most frequently operating within the State, the United Nations has no territory under its sovereign control within which its agents operate; and whereas cases are comparatively rare in which a State agent contracts liability for his State through actions outside his State, the injurious acts of agents of the United Nations would much more often occur within the territory of some State ..."

C. Eagleton, "International Organization and the Law of Responsibility", *Recueil des Cours ... 1950-I* (Paris, Sirey, 1951), vol. 76, p. 387.

¹⁷⁹ The Case can occur of an international organization being entrusted with the administration of a particular territory for a certain time. For example, in the course of the duties entrusted to it by Indonesia and the Netherlands and approved by the General Assembly, the United Nations performed temporary executive functions in the Territory of West New Guinea (West Irian) from 21 September 1962 to 31 March 1963 through a United Nations Temporary Executive Authority (UNTEA) headed by an Administrator appointed by the Secretary-General. Similarly, pursuant to the relevant resolutions of the General Assembly, the United Nations Council, for Namibia has been entrusted with certain functions and responsibilities to be discharged "Within the Territory". The fact, however, that the administration of a particular territory is entrusted to an international organization certainly does not mean that the territory in question becomes the "territory of the organization".

between the organization and the host State. Similarly the activities of organs of the organization away from its headquarters or permanent offices are normally subject to an agreement concluded between the organization and the State in whose territory those activities are expected to be carried on. For example, when an organ of the organization or a conference convened under the auspices of the organization holds a meeting away from the headquarters or permanent offices of the organization, it is customary to conclude an agreement between the organization and the host State specifying the privileges, immunities and facilities applicable to the meeting, including the right of access to the meeting for all persons entitled to attend it. Agreements between the organization and the territorial State are also concluded for a whole series of activities which international organizations carry on away from their headquarters and permanent offices, whatever the nature of the activity concerned: peace-keeping, political, diplomatic or economic activity, technical assistance, disaster relief, information, education and so on.¹⁸⁰ The case of activities carried on by organs of an international organization in the territory of a State without that State's consent is somewhat exceptional, but cannot be ruled out. Situations of that kind may, for example, arise as a result of decisions taken by the United Nations Security Council under Chapter VII of the Charter after determining the existence of a threat to the peace, a breach of the peace or an act of aggression.

(3) Secondly, a distinction should be drawn between the case covered by the present article and that envisaged in the preceding article in that the action of an organ of a State acting in that capacity in the territory of another State is always considered as an act of the State to which the organ belongs. On the other hand, it is not always sure that the action of an organ of an international organization acting in that capacity will always be purely and simply attributed to the international organization as such rather than, in appropriate circumstances, to the States members of the organization, if it is a collective organ, or otherwise to the State of nationality of the person or persons constituting the organ in question. That being said, it would be a mistake to draw hasty conclusions from the fact that there are but few examples of international organizations being called to account at the international level for acts committed by their organs in the territory of a State. International organizations having an international personality of their own, separate from that of their member States, are a comparatively new category of subjects of international law. Furthermore it must not be forgotten that, by their very nature, international organizations normally behave in such a manner as not to commit internationally wrongful acts. Nevertheless, there have already been some specific cases in international practice in which the act of one of its organs has been attributed to an international organization as a source of international responsibility of the organization. Among the most instructive examples, mention may be made of the agreements concluded by the United Nations in 1965, 1966 and

¹⁸⁰ These agreements may take a great variety of forms, ranging from a formal agreement to an agreement in simplified form; they may even result from the acceptance of an invitation extended by a State to an organ or agent of the organization to go to its territory.

1967 with Belgium,¹⁸¹ Greece,¹⁸² Italy,¹⁸³ Luxembourg¹⁸⁴ and Switzerland¹⁸⁵ relating to compensation for damage to the persons and property of nationals of those countries arising from the operations of the United Nations Force in the Congo. In these agreements, each of which constitutes a lump-sum settlement for the claims lodged by nationals of the State concerned, it is stated that the United Nations has agreed that the claims of nationals of the country in question who "may have suffered damage as a result of harmful acts committed by UNOC personnel, and not arising from military necessity, should be dealt with in an equitable manner" and that the United Nations "would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties".¹⁸⁶ The point which must be stressed here, in any event, is not so much the positive determination of the subject of international law to which the conduct of United Nations agents is attributed in a specific case as the fact that the conduct of the Organization's agents in the territory of a State cannot be attributed to that State.

(4) The principle ruling out the attribution to the State of conduct adopted in its territory by organs of an international organization is expressly recognized in certain agreements concluded between international organizations and the States in which those organizations carry on operations. These agreements provide for the attribution of such conduct to the organization as such and, at the same time, institute procedures for settlement between the organization concerned and third parties who put forward claims arising out of conduct adopted by organs or agents of the organization.¹⁸⁷ For example, the agreements concluded by the United Nations with regard to peace-keeping operations contain provisions under which claims may be lodged directly with the Organization for certain acts or omissions on the part of members of the United Nations forces engaged in such operations. Thus paragraph 10 (b) of the Agreement of 27 November 1961 between the United Nations and the Congo (Leopoldville) relating to the legal status, facilities, privileges and immu-

nities of the United Nations Organization in the Congo provides that:

If as a result of any act performed by a member of the Force or an official in the course of his official duties, it is alleged that loss or damage that may give rise to civil proceedings has been caused to a citizen or resident of the Congo, the United Nations shall settle the dispute by negotiation or any other method agreed between the Parties; if it is not found possible to arrive at an agreement in this manner, the matter shall be submitted to arbitration at the request of either Party.¹⁸⁸

The Exchange of letters of 31 March 1964 between the United Nations and Cyprus constituting an agreement concerning the status of the United Nations Peace-Keeping Force in Cyprus provides that a Claims Commission established for the purpose shall deal, among other things, with any claim made by:

A Cypriot citizen in respect of any damages relating to an act or omission of a member of the Force relating to his official duties.¹⁸⁹

(5) The fact that acts of organs of an international organization involving a breach of an international obligation assumed by the organization are likely to be attributed to that organization, as a potential source of international responsibility, and not to the State in whose territory the act took place, goes far to explain why international organizations sometimes have reservations concerning proposals for their accession to multilateral conventions which contain obligations that they do not feel equipped to discharge.¹⁹⁰

(6) The rule of non-attribution to the State of conduct adopted in its territory by organs of an international organization is sustained, at least in principle, both by those writers who consider the question from the point of view of State responsibility and by those fewer writers who have studied the problems presented by the responsibility of international organizations.¹⁹¹ Article 15 of

¹⁸¹ United Nations, *Treaty Series*, vol. 535, p. 197.

¹⁸² *Ibid.*, vol. 565, p. 3.

¹⁸³ *Ibid.*, vol. 588, p. 197.

¹⁸⁴ *Ibid.*, vol. 585, p. 147.

¹⁸⁵ *Ibid.*, vol. 564, p. 193.

¹⁸⁶ See, for example, the Exchange of letters of 20 February 1965 constituting an agreement between the United Nations and Belgium relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals (*ibid.*, vol. 535, p. 197). When the USSR saw fit to protest against the payment of compensation to Belgian claimants, the Secretary-General of the United Nations declared: "It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable." (United Nations, *Juridical Yearbook*, 1965 (United Nations publication, Sales No. E.67.V.3), p. 41).

¹⁸⁷ In most cases, the conduct in question will involve only a breach of obligations under internal law and will therefore give rise to responsibility under that law alone. The formula used in the agreements mentioned here, however, is such as to cover also the less frequent case in which the conduct adopted by the organ or an international organization constitutes a breach of an international obligation and, as such, entails a responsibility of the organization at international law.

¹⁸⁸ United Nations, *Treaty Series*, vol. 414, p. 235.

¹⁸⁹ *Ibid.*, vol. 492, p. 78. A similar provision appears in the Exchange of letters of 8 February 1957 constituting an agreement between the United Nations and the Government of Egypt concerning the status of the United Nations Emergency Force in Egypt (*ibid.*, vol. 260, p. 61). An Exchange of letters constituting an agreement between the United Nations and the Government of the United Arab Republic concerning the settlement of claims between the United Nations Emergency Force (UNEF) and the Government arising out of traffic accidents (dated 14 October 1959 and 15 September and 17 October 1960) provides for the reciprocal elimination of certain claims for compensation which UNEF and the Government may have against each other in connexion with traffic accidents (*ibid.*, vol. 388, p. 144).

¹⁹⁰ For example, in connexion with the question of the possible accession of intergovernmental organizations to the Geneva Conventions for the protection of war victims. See on this subject the legal opinion issued by the Office of Legal Affairs of the Secretariat of the United Nations (*United Nations Juridical Yearbook*, 1972 (United Nations publication, Sales No. E.74.V.1), pp. 153-154).

¹⁹¹ Among the latter, see for example: C. Eagleton, "International organization and the law of responsibility" (*loc. cit.*), p. 319, F.V. Garcia Amador, "La responsabilité internationale de l'Etat: La responsabilité des organisations internationales", *Revue de droit international, de sciences diplomatiques et politiques* (Geneva), XXXIVth year, No. 2 (April-June, 1956), pp. 149 *et seq.*; A.P. Sereni, *Diritto internazionale*, (Milan, Giuffrè, 1960), vol. II.2, p. 844; I. Seidl-Hohenveldern, "Die völkerrechtliche Haftung für Handlungen internationaler Organisationen im Verhältnis

(Continued on next page.)

the preliminary draft submitted to the International Law Commission by F.V. García Amador in 1961 provides expressly that acts and omissions of an international organization shall not be imputable to the State within whose territory they are committed.¹⁹²

(7) Should an exception of some kind to the rule laid down by the present article be seen in technical or other assistance agreements, which often contain clauses¹⁹³ to the effect that the State receiving the assistance assumes responsibility in the event of claims by third parties against the international organization or its agents? For example, article I, paragraph 6, of the Agreement of 21 May 1968 between the United Nations, the ILO, FAO, UNESCO, ICAO, WHO, ITU, WMO, IAEA, UPU, IMCO and UNIDO, on the one hand, and Australia, on the other, for the provision of technical assistance to the Territory of Papua and the Trust Territory of New Guinea provides that:

The Government shall be responsible for dealing with any claims resulting from operations in the Territories under this Agreement which may be brought by third parties against the Organizations jointly or separately and their experts, agents and employees and shall hold harmless the Organizations and their experts, agents and employees in case of any claims or liabilities resulting from such operations, except where it is agreed by the Government and the Administrator of the United Nations Development Programme and the Organization concerned that such claims or liabilities arise from the gross negligence or wilful misconduct of such experts, agents or employees.¹⁹⁴

Independently of the questions which may arise as to the scope of such clauses,¹⁹⁵ which seem to be concerned with possible instances of responsibility under internal rather than under international law, it is at all events clear that they are provisions relieving the organization of responsibility for conduct engaged in by its agents in the execution of the plans of operations covered by the agreement, and not clauses under which the conduct of agents of the organization would be attributed to the territorial

State. In other words, it is not at all a matter of attributing the conduct of others to the territorial State, but simply of that State assuming, by virtue of a special agreement, the consequences of conduct which is not its own but that of the organization. That this is indeed the case is apparent from the very wording of such clauses, which provide for the possibility that the organization may nevertheless assume responsibility in the event that the claims in question result from gross negligence or wilful misconduct on the part of the organization's agents. In so far as they are concerned with cases of international responsibility, such clauses are no more than an application of what is called "indirect responsibility", or responsibility for the acts of another, a question which the Commission intends to study in another chapter of the draft.¹⁹⁶ Hence their inclusion in the above-mentioned agreements merely confirms the validity of the principle, laid down in article 13, of non-attribution to the territorial State of the conduct of organs of an international organization.

(8) In formulating the rule laid down in this article, the Commission is not required to give a definition of the notion of an international organization; to establish how an international organization may become a subject of international law distinct from its constituent States; to indicate when the responsibility of the international organization or of its member States may be incurred, or in what cases there may be joint, concurrent or alternative responsibility; or to resolve a whole series of questions which may be highly pertinent to the formulation of rules governing the international responsibility of international organizations but which clearly exceed the scope of the present draft. The international personality of certain intergovernmental international organizations such as, for example, the United Nations, the specialized agencies and other bodies of the United Nations system does not seem to give rise to any problems.¹⁹⁷ There are, admittedly, other international organizations whose personality at general international law is less well established, but for our present purposes it is sufficient to note that at least certain international organizations are endowed with international personality and that, being therefore competent to assume conventional or other international obligations, they are capable of finding themselves in breach of such obligations, and possibly of incurring international responsibility, as a result of internationally wrongful acts committed by their organs. Suffice it, at all events, to conclude that the cases in which the article now under discussion applies are those where the acts taken into consideration emanate from an international organization possessing an international personality of its own. In other situations, the conduct complained of can only be the conduct either of an organ of a State or of a private person: in either case, another article of the draft would apply.

(9) That having been said, it should be made clear straight away that, in studying the questions which arise

(Foot-note 191 continued.)

zu Nichtmitgliedstaaten", *Oesterreichische Zeitschrift für öffentliches Recht* (Vienna, Springer), vol. XI, 1961, p. 497; J.P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *Annuaire français de droit international*, 1962, Paris, vol. VIII, 1963, pp. 441 *et seq.*; J.J.A. Salmon, "Les accords Spaak-U Thant du 20 février 1965", *Annuaire français de droit international*, 1965, Paris, vol. XI, 1966, pp. 477 *et seq.*; P. de Vischer, "Observations sur le fondement et la mise en œuvre du principe de la responsabilité de l'Organisation des Nations Unies", *Revue de droit international et de droit comparé* (Brussels), vol. XL, Nos. 3-4 (1963), pp. 165 *et seq.*, and "Les conditions d'application des lois de la guerre aux opérations militaires des Nations Unies" (Rapport préliminaire), *Annuaire de l'Institut de droit international*, 1971 (Basle, 1972), vol. 54-I, pp. 46 *et seq.*; M. Bothe, *Streitkräfte internationaler Organisationen* (Cologne, Heymanns, 1968), pp. 166 *et seq.*; A. Di Blase, "Sulla responsabilità internazionale per attività dell'ONU", *Rivista di diritto internazionale* (Milan), vol. LVII, No. 2 (1974), pp. 250 *et seq.*

¹⁹² See foot-note 171 above.

¹⁹³ Frequently such clauses simply reproduce, with a few drafting changes, provisions contained in a standard agreement approved for the activity in question by an organ of the organization.

¹⁹⁴ United Nations, *Juridical Yearbook*, 1968 (United Nations publication, Sales No. E.70.V.2), p. 44.

¹⁹⁵ They may give rise to questions of interpretation concerning, for example, the substantive law involved, the nature of the responsibility envisaged, the third parties covered, etc.

¹⁹⁶ See para. 50 above.

¹⁹⁷ A particularly firm foundation for the international personality of the United Nations is laid in the advisory opinion handed down by the International Court of Justice on 11 April 1949 in the *Reparation for injuries suffered in the service of the United Nations case* (I.C.J. Reports 1949), p. 179.

in the context of this article, care must be taken not to go beyond the scope of the draft under consideration which, as already stated,¹⁹⁸ is limited in respect of international responsibility to the responsibility of States, and does not deal with questions relating to the responsibility of subjects of international law other than States. Accordingly, while it should be stressed that the conduct of an organ of a foreign State acting in that capacity in the territory of a State is attributable to the State of origin by virtue of the draft articles themselves, it would be a mistake to seek in this draft a solution to the problem of attribution to an international organization of the conduct of organs of that organization acting on its behalf in the territory of a State; for the responsibility of international organizations is governed by rules which are not necessarily the same as those governing the responsibility of States.¹⁹⁹ The codification of the rules governing the responsibility of States must not encroach on the rules which govern the international responsibility of international organizations; these latter rules are not required to be spelt out in a draft dealing exclusively with the responsibility of States.

(10) Article 13 presupposes that the organ of the international organization concerned acted in the capacity of an organ of the organization in the exercise of functions of the organization, and not under the control of the territorial State. It does not cover the specific case where the organ of the organization has been "placed at the disposal" of the territorial State and is acting in the exercise of elements of the governmental authority of the territorial State and under its control. The case just mentioned is covered by the rule laid down in article 9. That is the criterion to be applied when a decision must be taken in a particular case. For example, since the above-mentioned United Nations Force in the Congo acted at the request of the Republic of the Congo, it might be wondered whether the members of the Force ought not to have been regarded as agents of that State, to which their conduct would then have been attributable. An answer to this question is found in the report of the Secretary-General of 18 July 1960, which states:

Although the United Nations Force under the resolution [Security Council resolution 143 (1960) of 14 July 1960] is dispatched to the Congo at the request of the Government and will be present in the Congo with its consent, and although it may be considered as serving as an arm of the Government for the maintenance of order and protection of life—tasks which naturally belong to the national authorities and which will pass to such authorities as soon as, in the view of the Government, they are sufficiently firmly established—the Force is necessarily under the exclusive command of the United Nations, vested in the Secretary-General under the control of the Security Council...²⁰⁰

(11) It must also be borne in mind that activities undertaken within, under the auspices of, or through interna-

¹⁹⁸ See para. 32 above.

¹⁹⁹ In this connexion, J. J. A. Salmon (*loc. cit.*, p. 479) states: "The problem of the quasi-criminal or civil responsibility of an international organization is one of those which, on both the scientific and the practical plane, seem among the most abstruse in the law of international organizations" [translation by the Secretariat].

²⁰⁰ *Official Records of the Security Council, Fifteenth Year, Supplement for July, August and September 1960*, document S/4389, para. 7.

tional organizations are not necessarily activities entrusted to organs of the organization. The operations of international organizations are often conducted by very different methods, sometimes in one and the same field of activity.²⁰¹ The legal status of a relief team furnished through the United Nations in the event of a natural disaster may be that of a subsidiary organ of the Organization, that of an entity having a legal status separate from the Organization, or that of a national team of one of the Member States; the legal status of a United Nations peace-keeping force and of its component contingents in relation to the Organization may also vary from case to case,²⁰² etc. Obviously if, in a particular case, the perpetrator of the conduct adopted in the territory of a State is in reality the organ of a State and not the organ of an international organization, the applicable article is article 12, not article 13, of the draft.

(12) In the light of the foregoing considerations, article 13 is not to be taken as defining the responsibility of international organizations or the problems of attribution which such responsibility presents. It merely affirms that the conduct of organs of an international organization acting in that capacity is not attributable to a State by reason only of the fact that such conduct has taken place in the territory of the State in question or in some other territory under its jurisdiction. The meaning of the phrase "or in any other territory under its jurisdiction" has already been explained in the commentary to article 12.²⁰³ It should also be made clear that the expression "international organization" means an "intergovernmental organization" within the meaning of the draft articles prepared by the Commission on other topics. The phrase "acting in that capacity" usefully emphasizes that the organ in question must have acted in the name and on behalf of the organization, in the exercise of the organization's functions and under its exclusive control. Lastly, the phrase "by reason only of the fact" has been introduced so as not to prejudge problems of attribution which may arise for the territorial State by virtue of the rules governing the responsibility of international organizations where, for example, that State is a State member of the organization in question, or has participated in one way or another in the decision of the organization from which the conduct of the organ stemmed, or, again, has made its own facilities available to that organ.

(13) The Commission did not think it necessary to insert in this article, as it has done in articles 11, 12 and 14, a clause expressly providing that the rule stated in the article is without prejudice to the attribution to the territorial State of conduct which would be attributable to that State

²⁰¹ See, for example, F. Seyfersted, "United Nations Forces in the Law of Peace and War", (Leyden, Sijthoff, 1966); D. S. Wijewardane, "Criminal jurisdiction over visiting forces with special reference to international forces", *The British Year Book of International Law*, 1965-66, London, vol. XLI (1968), pp. 179 *et seq.*

²⁰² With regard to the legal status of British troops forming part of the United Nations Peace-Keeping Force in Cyprus, see the decision of the House of Lords of 11 February 1969 in *Nissan v. Attorney-General* (*All England Law Reports*, vol. I, p. 629). For an analysis of that decision, see: J. W. Bridge, "The legal status of British troops forming part of the United Nations Force in Cyprus", *The Modern Law Review*, vol. 34, 1971, pp. 121 *et seq.*

²⁰³ See para. 13 of the commentary.

by virtue of draft articles 5 to 10 and which has taken place in connexion with the conduct of the organ of the organization. In the case of article 13 the formulation of such a provision would pose special problems going beyond the scope of the present draft, for they would be problems connected, to a certain extent, with the status of the relations between the territorial State and the organization in question and with the specific provisions—including those relating to the legal status of the organization and to the privileges and immunities of its organs—laid down in agreements under which international organizations normally act in the territory of a State. The Commission was particularly reluctant to include in the draft any provision which might suggest the idea that the action of an international organization is subject to the controlling authority of the State in whose territory the organization is called upon to function. But the article's silence on that point should not be construed as meaning that, in the cases envisaged in this article, the territorial State could never incur international responsibility by reason of its own conduct adopted in relation to the conduct of the organization in question. Thus, if the territorial State associated itself with the perpetration, by an organ of the organization, of an action constituting an internationally wrongful act, or if it failed to react in the appropriate manner to such an action, it might incur international responsibility by reason of its own conduct which, by virtue of draft articles 5 to 10, would always be attributable to it.²⁰⁴

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.

Commentary

(1) The present article deals with the question of the possibility of attributing to the State, as a possible source of its international responsibility, the conduct of organs of an insurrectional movement which is established in the territory of that State or in another territory under its administration. It should first of all be made clear that the problem of attribution or non-attribution to the State of the acts of organs of an insurrectional movement—the

subject of the present article—cannot arise unless, at the time when the injured State filed with the territorial State a claim relating to the conduct of organs of an insurrectional movement, the movement still existed as such or had ceased to exist but had brought down in its fall its own structure and organization. In other words, the problem arises, for the purposes of the present article, only when both the insurrectional movement and the State in whose territory the movement is established continue to exist or when, after the revolt has been put down, the insurrectional movement has vanished altogether. When an insurrectional movement ceases to exist as such only because it has carried the day and its structures have since become, in whole or in part, the new governmental machinery of the pre-existing State or the structures of a new State set up on the movement's initiative in a part of the territories formerly under the sovereignty or administration of the pre-existing State, the problems of attribution that arise are of an entirely different nature and are accordingly dealt with in article 15.

(2) The question of possible State responsibility in respect of acts committed by organs of an insurrectional movement proper is often dealt with in conjunction with the question of State responsibility concerning acts committed by private individuals in the course of riots, mass demonstrations, or other disturbances and disorders, or in the course of an insurrection which has not yet resulted in the formation of an insurrectional movement endowed with machinery separate from that of the State. There is really not only a simple quantitative difference—determined by the intensity of the disruption—between these latter cases and those in which an insurrectional movement assumes power over a portion of the State's territory or of another territory under the State's administration. There is also a qualitative difference between the two cases mentioned, which justifies dealing with them separately.

(3) It is true that, at the beginning of the insurrection, the conduct of persons or groups of persons who thereafter become organs of an insurrectional movement presents itself as the conduct of private individuals. For the purposes of attribution of an act to the State as a possible source of international responsibility, such conduct can in fact be placed on the same footing as that of persons or groups of persons who participate in a riot or mass demonstration and, like the conduct of such persons, falls within the scope of the provision laid down in article 11. But the situation changes as soon as an insurrectional movement, in the sense which this term has in international law, takes shape. From this time on there is in existence, side by side with the State, an organization which has its own machinery and whose organs may act on behalf of the insurrectional movement itself in a portion of the territory under the sovereignty or administration of the State. The organs which form part of the structures of the insurrectional movement and which act on its behalf are in no sense organs of the State,²⁰⁵ any more than private individuals

²⁰⁴ As to the possibility that the responsibility of the territorial State may be incurred on the grounds of denial of justice following an internationally wrongful act of an international organization, see J.-P. Ritter, *loc. cit.*, pp. 446-447.

²⁰⁵ Nor, of course, can they be likened to "persons in fact acting on behalf of the State", in the sense in which this expression is used in article 8 of the draft. Persons or groups of persons who act as organs of an insurrectional movement directed against a State or

participating in a riot or mass demonstration; but as organs of an insurrectional movement they may engage in conduct liable to bring an international responsibility upon the insurrectional movement itself if that conduct should constitute a breach of an international obligation recognized as incumbent on the insurrectional movement.²⁰⁶

(4) It is not, of course, the purpose of this draft to codify the rules governing the international responsibility, if any, of insurrectional movements but—once again—to proceed from the premise that, as soon as they begin their separate existence on the international scene, such movements may be capable within certain limits of committing internationally wrongful acts of their own. The next step is to draw from this premise the appropriate conclusions regarding the determination of the consequences for the State of the wrongful actions of an insurrectional movement. The first comment to be made in this connexion is that any responsibility that a State might incur by having failed to adopt the requisite measures of vigilance, prevention and punishment when it could have done so would be a much more exceptional responsibility than the responsibility which it might incur by failing in vigilance, prevention or punishment on the occasion of a mere riot or mass demonstration. It will rarely be possible to accuse a State of failing in its own obligations of vigilance and protection in relation to the conduct of organs of an insurrectional movement because, most of the time, the actions in question are entirely beyond its control.²⁰⁷ Even more rarely will such accusations be levelled against the State in cases where, after the insurrectional movement has succeeded in entrenching its authority over a sufficient portion of the State's territory, third States come to hold the movement itself responsible for internationally wrongful acts of its own organs.

(5) The existence of an insurrectional movement *per se* creates certain specific problems which cannot be ignored in a draft codification of the rules of international law governing State responsibility. But taking these problems into consideration certainly does not make it necessary, in the course of the present codification project, to spell out the requirements imposed by international law for a

(Foot-note 205 continued.)

against a particular Government in no way intend to act "in fact on behalf" of that State or Government or to be "in fact exercising elements of the governmental authority" of that State or Government for such time as certain exceptional circumstances persist. On the contrary, their aim is to overthrow the structures of the State in question and take their place as the new Government of that State or as the Government of a new State which has separated from the pre-existing State.

²⁰⁶ See H. Kelsen, *Principles of International Law* (New York, Rinehart, 1952), p. 292: "By the effective control of the insurgent government over part of the territory and people of the State involved in civil war an entity is formed which indeed resembles a state in the sense of international law." See also G. Arangio-Ruiz, *loc. cit.*, p. 165.

²⁰⁷ This is the feature which often distinguishes the situation created as a result of actions of organs of an insurrectional movement from a situation created by actions of organs of a foreign State. In the latter case, the State normally retains its authority over the territory in which the actions occur, whereas it often no longer has any authority over the territory controlled by the insurrectional movement.

given movement to be classified as an "insurrectional movement", or to specify under what conditions, at what time and in relation to whom such a movement can be regarded as endowed with international personality and what is then the scope—which will in any event vary from one case to another and, in any one case, with the passage of time—of its international legal capacity.²⁰⁸ The consideration of all these questions—which, for that matter, should be raised equally, *mutatis mutandis*, in relation to States and in relation to international organizations—does not fall within the topic of the present study but rather within other major branches of international law, namely those dealing with subjects of international law.

(6) For the purpose of the present article, therefore, the existence of an "insurrectional movement" within the meaning of international law should be taken as a presumption of fact. If this presumption is correct, questions of attribution or non-attribution of the conduct of organs of the movement in question to the State fall within the scope of the cases to be considered. On the other hand, if the movement in question cannot be regarded as an "insurrectional movement" under international law, such problems of attribution as may arise should be solved in accordance with the provisions laid down in other articles of the draft, particularly article 11.

(7) In formulating the rules to be laid down in the present article, the Commission is, once again not required to say anything about the various forms which insurrectional movements may take according to whether there is a relatively limited internal struggle, a genuine civil war situation, an anticolonial struggle, the action of a national liberation front, revolutionary or counter-revolutionary movement and so on, or about the questions which may arise in connexion with the problem of the international legitimacy of some of these forms.²⁰⁹ In contrast, what needs to be kept in view here is that insurrectional movements may sometimes be directed against the State itself, as in the case of a secessionist movement or a movement for the decolonization of a former dependent territory. But insurrectional movements may also set themselves the objective of replacing the Government of the State by a new Government. Furthermore—and this is equally important for the purposes of formulating the pertinent rules—an insurrectional movement may be directed against a State or against the government of a State other than that of the State in whose territory the movement is established. This applies, for example, where an insurrectional movement has its headquarters in a third State and operates from that State.

²⁰⁸ At this point, therefore, we must not linger to determine the requirements imposed by international law for a given movement to acquire, as such the international status of an "insurrectional movement", or even to establish whether those requirements should be determined on the basis of objective criteria (effectiveness, duration, scope, organization, etc.) or of subjective factors such as recognition by States or international organizations, and whether the international personality of a movement of this kind is valid *erga omnes* or is rather of a qualified nature, and so on.

²⁰⁹ In the course of discussion, some members of the Commission affirmed the international legitimacy of some forms of insurrectional movements and, in particular, the movements of anticolonial struggle and national liberation which claim the right of self-determination proclaimed by the Charter of the United Nations and developed in a whole series of resolutions of the General Assembly.

(8) The international responsibility of an insurrectional movement is normally more difficult to establish than that of a State proper. Such a movement is provisional by its very nature.²¹⁰ Its duration is limited to the duration of the struggle in which it has engaged. At the end of that struggle, the movement as such is destined to disappear. If it is defeated, it comes to an end and its organization disintegrates. If it wins, it may either hand over the structures of its organization to the State as the new Government of that State, or itself turn into a new State set up in part of the territory formerly under the sovereignty or administration of the pre-existing State. To establish the international responsibility incurred through an internationally wrongful act is an operation which often takes a relatively long time, perhaps a longer time than the insurrectional struggle lasts. Furthermore the insurrectional movement may vary in scope and importance as the struggle waxes and wanes. For example, the territory in which the movement exercises its authority may contract or expand, and the financial or other resources under its control may also fluctuate. All these considerations create a climate of uncertainty regarding the prospect of obtaining from that movement, in the course of the struggle, reparation for an internationally wrongful act. Furthermore, if the State complaining of damage caused by wrongful conduct on the part of organs of the insurrectional movement does not recognize that movement, does not intend to recognize it, and does not maintain relations with it, there may be further difficulties in presenting a claim and bringing home the responsibility.

(9) Although this is not always the case, and there are examples in international practice in which claims have been presented in the course of the struggle,²¹¹ it often happens that, for the reasons given, States which have fallen victim to wrongful conduct on the part of organs of insurrectional movements think it advisable to wait for the situation to be clarified before filing their claims. Thus it often happens that claims are addressed, at the end of the struggle, either to the legitimate Government of the State, where that Government has put down the insurrection and re-established its authority throughout the territory, or to the new government which has replaced the previous Government upon the victorious issue of the insurrection, or again to the government of a new State formed by the secession of part of the territory of the pre-existing State or by decolonization of a former dependent territory of that State.

(10) These situations, however, differ sharply from one another, and the claims presented are not all based on the same grounds. Some of these situations are covered by

article 15 and are outside the scope of the present article, which, as already stated, is concerned only with the problem of attribution or non-attribution to the State, as a possible source of international responsibility, of conduct adopted by organs of an insurrectional movement established in its territory, or in a territory under its administration, in cases in which the movement still exists as such when the claim is presented or has ceased to exist but has in its fall, brought down its own structure and organization.

(11) The scope of the present article having thus been defined, only three questions arise in connexion with its formulation. The first is whether it is possible to attribute to a State, as a source of responsibility, acts committed by organs of an insurrectional movement established in its territory or in another territory under its administration. The second question (which presupposes a negative reply to the first) is whether it is nevertheless possible for a State to incur international responsibility through the conduct adopted by its own organs in relation to actions of organs of an insurrectional movement, either before or after the end of the struggle against that movement and, where applicable, the restoration of the authority of the State over the whole of the territory. The third question is whether the article should include a safeguard clause providing for the possibility of attributing the conduct of the organ of the insurrectional movement to the movement itself.

(12) An analysis of international arbitral cases and of State practice confirms that acts committed by the organs of an insurrectional movement—leaving aside situations in which the movement is transformed into something else after its struggle has succeeded (the case envisaged in article 15)—cannot be attributed to the territorial State. Acts of the organs of the insurrectional movement cannot be attributed to the State as long as the struggle between that movement and constituted authority continues or, *a fortiori*, after the struggle has been decided in favour of the State.²¹² These conclusions are also those of the vast majority of writers who have considered the problem from a doctrinal point of view. Responsibility can be brought home to the territorial State only through some failure by its own organs on that occasion to discharge its obligations of vigilance, prevention or punishment. We may add that it makes no difference whether the alleged failure on the part of the State occurred before or after the active existence of the insurrectional movement came to an end: for example if, after internal peace had been restored, the authorities of the State failed to punish adequately the perpetrators of the injurious acts committed during the struggle. Indeed, it is on those grounds that the responsibility of the State will most often be invoked, since cases in which the “legitimate” Government was materially able, during the struggle, to prevent or punish the injurious acts of a person acting as an organ of an insurrectional movement are rather rare. Moreover,

²¹⁰ G. Arangio-Ruiz, *Sulla dinamica della base sociale nel diritto internazionale* (Milan, Giuffrè, 1954), pp. 129-130; and “Stati e altri enti ...” (*loc. cit.*), pp. 165-166; considers that the fact of being “provisional” is not a “necessary” characteristic of an insurrectional movement as a subject of international law. But, although it is true that the State itself, like the insurgents, can in fact cease to exist, the difference between these two categories of entities from the point of view of the aims which they respectively pursue, must not be forgotten. The aim of the State is to continue indefinitely as such. The insurrectional movement, on the other hand, does not intend to perpetuate itself as such, and its purpose is to become itself a State. Consequently it is a category of entity that is provisional from the institutional standpoint.

²¹¹ See para. 28 below.

²¹² This having been said, there is nothing to prevent the State which has put down the insurrection from agreeing (by a special convention, for example) to assume the responsibility which the insurrectional movement may have incurred and which the third State has been unable to bring home to the movement. However, such a solution is clearly a departure from general international law.

the fact that the source of the State's responsibility lies not in the act of the person who was an organ of the insurrectional movement at the time when the act was committed, but in the conduct adopted by the organs of the State in relation to such an act, does not necessarily decide the choice of the criteria which, in a specific case, are applicable in determining the amount of compensation. There is no reason why the amount of the compensation due for failure of the State to fulfil an obligation to prevent or punish should not be determined on the criterion of the material damage caused by the act of the individual as an organ of the insurrectional movement. Lastly, insurrectional movements are recognized both in the practice of States and by the writers as having their own international responsibility for the acts of their organs.

(13) As far back as the nineteenth century, many mixed commissions affirmed on several occasions—and on the basis of explicit clauses in the treaties under which they had been established—the principle that as a general rule a Government was not responsible for injuries caused to aliens by the members of an armed insurrection which was beyond the control of that Government. The United States-Mexican Claims Commission established under the Convention of 4 July 1868 followed that principle in decisions relating to claims for injuries caused either by insurgents in Mexico or by the organs of the Confederate States in their struggle against the Federal Government in the United States of America.²¹³ The American-British Mixed Claims Commission established under the Treaty of 8 May 1871 applied that principle also in connexion with claims arising out of the acts of the Confederate States during the War of Secession.²¹⁴ The Spanish-American Mixed Claims Commission established in 1871 likewise applied it in connexion with claims concerning injuries caused by the Cuban insurgents.²¹⁵

(14) As regards the twentieth century, international arbitral cases present a series of rulings all relating to the questions dealt with in this article, handed down in the decisions adopted between 1903 and 1905 by the claims commissions established under the Paris (1902) and Washington (1903) Protocols between Venezuela and other Powers. The latter had complained of injuries caused to their nationals, in particular in connexion with acts committed by revolutionary movements. The most significant decision is perhaps that handed down by the Italian-Venezuelan Mixed Claims Commission in the *Sambiaggio case* concerning money extorted and property forcibly requisitioned from an Italian national in 1902 by the revolutionary forces of Colonel Guevara. Umpire Ralston concluded, after examining in detail the precedents provided by earlier cases, the opinions of writers and the clauses of treaties then in force between Italy and Venezuela, that Venezuela could be held responsible only if it had been alleged and proved that the authorities of the country had failed to exercise due diligence to prevent damages from being inflicted by the revolution-

aries. After noting that no want of diligence had been alleged or proved in the case in question, he dismissed the Italian claim.²¹⁶

(15) Umpire Plumley, in the *Aroa Mines case*,²¹⁷ which was submitted to the British-Venezuelan Mixed Claims Commission, in the *Henriquez and Salas cases*,²¹⁸ which were submitted to the Netherlands-Venezuelan Mixed Claims Commission, and in the *French Company of Venezuelan Railroads case*,²¹⁹ which was submitted to the French-Venezuelan Mixed Claims Commission, Umpire Duffield in the *Kummerov, Redler, Fulda, Fischbach and Friedericy cases*,²²⁰ which were submitted to the German-Venezuelan Mixed Claims Commission, Umpire Gutierrez-Otero in the *Padrón*²²¹ and *Mena*²²² cases, which were submitted to the Spanish-Venezuelan Mixed Claims Commission, and Commissioner Paúl in the *Acquatella case*,²²³ which was submitted to the French-Venezuelan Mixed Claims Commission of 1903 applied practically the same principles in their decisions in all these cases and reached similar conclusions. In the *Padrón case*, for example, the umpire affirmed as an accepted principle of international law that States were not responsible to aliens resident in their territory for damages and injuries inflicted upon them by persons in revolt against the constituted authorities, except where there was "negligence of the constituted authorities" in failing to adopt proper measures to provide protection against, or to punish, acts of rebels.

(16) The non-responsibility of the State for damage caused by a person or group of persons acting as organs of an insurrectional movement is also affirmed in the decision handed down on 1 May 1925 by the arbitrator, Huber, in the *British Property in Spanish Morocco case*.

²¹⁶ United Nations, *Reports of International Arbitral Awards*, vol. X (United Nations publication, Sales No. 60.V.4), p. 524. After first examining the question from the standpoint of abstract right, Umpire Ralston concluded that:

"... from the standpoint of general principle ... save under ... exceptional circumstances ..., the Government should not be held responsible for the acts of revolutionists because—

1. Revolutionists are not the agents of government, and a natural responsibility does not exist.

2. Their acts are committed to destroy the government, and no one should be held responsible for the acts of an enemy attempting his life.

3. The revolutionists were beyond governmental control, and the Government cannot be held responsible for injuries committed by those who have escaped its restraint" (*ibid.*, pp. 512–513). The Italian-Venezuelan Claims Commission applied the same principles in the *Revesno et al.* (*ibid.*, pp. 582–583) and in the *Guastini* (*ibid.*, pp. 577 *et seq.*).

²¹⁷ *Ibid.*, vol. IX (United Nations publication, Sales No. 59.V.5), pp. 408 *et seq.* and, especially, pp. 439 *et seq.*

²¹⁸ *Ibid.*, vol. X (*op. cit.*), pp. 714 *et seq.* and 720–721.

²¹⁹ *Ibid.*, p. 354.

²²⁰ *Ibid.*, pp. 397–398.

²²¹ *Ibid.*, pp. 742–743.

²²² *Ibid.*, p. 749.

²²³ Commissioner Paúl observed: "... only when it appears that the Government has failed to make prompt and efficient use of its authority to cause a return of said dissatisfied party to obedience, and to protect, within the measure of its ability, the property and persons threatened by the revolutionary disturbance, may it be considered as liable for the consequences of such abnormal condition." (*Ibid.*, p. 6).

²¹³ See the cases reported in J.B. Moore, *History and Digest ...* (*op. cit.*), vol. III, pp. 2873 *et seq.*, 2881 *et seq.*, 2886 *et seq.*, 2902 *et seq.*, and 2973–2981.

²¹⁴ *Ibid.*, pp. 2900–2901, 2982–2990.

²¹⁵ *Ibid.*, pp. 2981–2982.

The Swiss jurist did not exclude, however, the possibility that the State could have invoked against it, as a source of international responsibility, lack of vigilance by its authorities in the prevention and punishment of injurious acts committed by rebels or organs of insurrectional movements, in so far as prevention and punishment were possible.²²⁴ Another application of the same principle, going back to more or less the same period, can be noted in the decision handed down on 19 November 1925 by the Great Britain-United States Arbitral Tribunal established under the Special Agreement of 18 August 1910 in connexion with the *Several British Subjects (Iloilo Claims) case*. The Tribunal rejected the British claims, having been unable to establish any negligence attributable to the United States forces.²²⁵

(17) At about the same time, a further series of interesting decisions was handed down by various Claims Commissions established under the agreements concluded between Mexico and various Powers following the events which took place in Mexico between 1910 and the middle of the 1920s. For example, in the *Home Insurance Company case*, decided on 31 March 1926, the Mexico-United States General Claims Commission found that the Mexican Government was not responsible for an act committed at Puerto México, to the detriment of a United States firm, by the local commander of the de la Huerta revolutionary forces.²²⁶ The decision handed down on 3 October 1928 in the *Solis case* and written for the Commission by Commissioner Nielsen, found insufficient the evidence of alleged failure to protect of which the Mexican Government's forces were accused by the claimant. The decision cites as a "well-established principle of international law" that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection. Only failure on the part of the lawful authorities of the State to discharge that duty to protect could constitute the source of State responsibility.²²⁷ The principle that States are not responsible for wrongful acts committed by insurrectional movements is also evident in the opinion of the Presiding Commissioner Verzijl in the *Georges Pinson case*, decided on 19 October 1928 by the French-Mexican Claims Commission.²²⁸

²²⁴ *Ibid.*, vol. II (United Nations publication, Sales No. 1949.V.1), p. 642.

²²⁵ *Ibid.*, vol. V (United Nations publication, Sales No. 1955.V.3), pp. 159-160.

²²⁶ *Ibid.*, vol. IV (United Nations publication, Sales No. 1951.V.1), pp. 48 *et seq.*, and especially p. 52.

²²⁷ *Ibid.*, pp. 358 *et seq.*, Commissioner Nielsen noted that, irrespective of the facts of any given case, "the character and extent of an insurrectionary movement must be an important factor in relation to the question of power to give protection" (*ibid.*, p. 362). Similar criteria were subsequently applied, by the same Commission, in the decision in the *Bond Coleman case* (*ibid.*, pp. 364 *et seq.*) and referred to by Commissioner Nielsen in his opinion in the *Russel case*, decided by the Commission established under the Mexico-United States Special Convention of 10 September 1923 (*ibid.*, p. 831).

²²⁸ *Ibid.*, vol. V (United Nations publication, sales No. 1952.V.3), pp. 352-353. See also in this connexion the criteria set forth in the decision of 19 May 1931 in the *John Gill case* (*ibid.*, p. 159).

(18) Some of the decisions of the British-Mexican Claims Commission established under the Convention of 19 November 1926 are of particular interest, in that they take special account of possible failure to suppress insurrection or to punish the guilty parties. They even attempt to provide criteria for evidencing such failure. For example, in its ruling of 15 February 1930 in the *Mexico City Bombardment Claims case*, the Commission stated:

In a great many cases it will be extremely difficult to establish beyond any doubt the omission or the absence of suppressive or punitive measures. The Commission realizes that the evidence of negative facts can hardly ever be given in an absolutely convincing manner. But a strong *prima facie* evidence can be assumed to exist in these cases in which first the British Agent will be able to make it acceptable that the facts were known to the competent authorities, either because they were of public notoriety or because they were brought to their knowledge in due time, and *second* the Mexican Agent does not show any evidence as to action taken by the authorities.²²⁹

For these reasons, the majority of the Commissioners held the Mexican Government responsible, noting in particular that the Mexican Agent had failed to produce any evidence as to action taken by the authorities to investigate, suppress or prosecute, despite the fact that, having been duly informed of the facts, they could have taken such action. In the *John Gill case*, the majority of the Commissioners held the Mexican Government responsible, for the same reasons as those set out in the decision in the *Mexico City Bombardment Claims case*.

(19). International arbitration bodies thus show remarkable uniformity in their opinions. The same may be said of diplomatic practice. It is many years since the chancelleries of the Powers endorsed the principle that a State could not be held responsible for acts of an insurrectionary movement in revolt against the lawful Government and that, in such cases, there could be no question of responsibility on the part of the State unless its organs were in a position to take appropriate preventive and punitive action but omitted to do so. Thus, the views of Governments coincided with those expressed at the time by arbitration bodies, often in connexion with the same situations. This can be seen in a number of cases, whether the injury done to aliens by organs of insurrectional movements occurred during the War of Secession of 1861-1865 in the United States,²³⁰ the Paris Commune of 1871 in France,²³¹ the 1874 Carlist insurrection in Spain,²³² the 1882 revolt of Arabi Pasha in Egypt,²³³ the two insurrections of 1868-1878 and 1895-1898 for the independence of Cuba,²³⁴ or the various insurrections against the Governments of other Latin American na-

²²⁹ *Ibid.*, p. 80.

²³⁰ For cases included in the digests of United States practice, see Moore, *History and Digest ... (op. cit.)*, vol. II, pp. 1621-1624, and *A Digest ... (op. cit.)*, vol. VI, pp. 957-958; for opinions of the Law Officers of the British Crown, see A. D. McNair, *International Law Opinions* (Cambridge, University Press, 1956), vol. II, pp. 256-257.

²³¹ McNair, *op. cit.*, pp. 261 *et seq.*

²³² *Ibid.*, p. 265.

²³³ *Ibid.*, pp. 267-268.

²³⁴ Moore, *A Digest ... (op. cit.)*, pp. 961 *et seq.* and 966 *et seq.*

tions.²³⁵ The principle that, in the case of damage by organs of an insurrectional movement, the State can only be held responsible for the omissions of its own organs is also stressed in a series of significant opinions dating from the first 15 years of the present century.²³⁶

(20) It is clear from the replies of Governments to point IX of the request for information addressed to them by the Preparatory Committee for the Codification Conference of 1930 that there was substantial agreement among States that: (a) the conduct of organs of an insurrectional movement acting in the territory of the State against which this movement is directed cannot be attributed as such to the State or entail its international responsibility; (b) only conduct engaged in by organs of the State in connexion with the injurious acts of the insurgents could be attributed to the State and entail its international responsibility if such conduct constituted a breach of an international obligation of that State.²³⁷ On the basis of the replies received, the Preparatory Committee of the Conference prepared two bases of discussion (No. 22²³⁸ and No. 22 (a),²³⁹) but before it could consider them, the Conference had to break off its work. However, the opinion of Governments is quite clear from their replies to the request formulated by the Preparatory Committee. Moreover, this opinion seems to be fully confirmed by the view subsequently expressed by some of those Governments in connexion with specific cases in the 1930s.²⁴⁰

(21) After the Second World War, the same principles were affirmed in the decisions of the national commissions

²³⁵ See Moore, *A Digest ... (op. cit.)*, pp. 966 (insurrection of 1893 in Brazil), 980-981 (temporary installation in power in Mexico of Emperor Maximilian), 981-984 (insurrection of 1873 in Venezuela); Hackworth, *op. cit.*, p. 673 (insurrection of 1926 in Honduras); McNair, *op. cit.*, pp. 259-260 (insurrection in Venezuela) and 271 (insurrection in Brazil). See also letter of 17 August 1894 from the Italian Minister for Foreign Affairs (Blanc) to the Italian Chargé d'Affaires at Rio de Janeiro, in the Green Book presented to the Chamber of Deputies on 6 December 1894 (Italy, Atti parlamentari, Camera dei deputati, Documenti diplomatici presentati al Parlamento italiano dal Ministro degli Affari esteri, document No. VII bis, *Brasile: Reclami italiani*, Rome, 1895).

²³⁶ For example: general conclusion No. 3 of the Commission established in the United States by the Act of 2 March 1901 to adjudicate claims under the Treaty with Spain of 10 December 1898 terminating the war in Cuba (Moore, *A Digest ... (op. cit.)*, pp. 971 and 972; letter of 7 November 1911 addressed by the Acting Secretary of State (Adee) to the United States Ambassador in Mexico City (Hackworth, *op. cit.*, p. 668); instructions sent by the Foreign Office to British consular posts abroad (*ibid.*).

²³⁷ League of Nations, *Bases of discussion ... (op. cit.)*, pp. 108 *et seq.*; and *Supplement to Volume III (op. cit.)*, pp. 3 and 20. See, for example, the replies of Germany, Poland and Sweden (League of Nations, *Bases of discussion ... (op. cit.)*, pp. 108, 110-111).

²³⁸ "A State is, in principle, not responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence." (*Yearbook ... 1956*, vol. II, p. 224, document A/CN.4/96, annex 2).

²³⁹ "Nevertheless, a State is responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence if it failed to use such diligence as was due in the circumstances in preventing the damage and punishing its authors" (*ibid.*).

²⁴⁰ See, for example, the positions taken by the United States Government at the time of the insurrectional movements in Mexico (Hackworth, *op. cit.*, vol. V, pp. 671-672), in Cuba (*ibid.*, p. 670) and in Spain (*ibid.*, *loc. cit.*), and by the Legal Department of the French Ministry of Foreign Affairs (Kiss, *op. cit.*, p. 637).

set up in the United States to distribute among the claimants the funds paid as a lump sum to the United States Government in settlement of disputes concerning damage suffered by United States nationals.²⁴¹ More recently, in 1958, during the war against the Indonesian dissidents, the merchant vessels *San Flaviano* and *Daronia*, and later the submarine *Aurochs*, all British, were bombed by aircraft in Indonesian territorial waters, and one of the merchant vessels was destroyed. When questioned in the House of Commons on the action taken by the Government, the British Under-Secretary of State stated on 11 June 1958 that:

In both cases Her Majesty's Ambassador at Djakarta made inquiries of the Indonesian Government, as a result of which Her Majesty's Government are satisfied that the action was not carried out by the armed forces of the Indonesian Government. It is presumed that the attacking aircraft were under the orders of the Indonesian dissident forces in North Celebes.²⁴²

The British Government therefore did not feel it possible to attribute the wrongful acts of the insurgent armed forces to the Indonesian State as a source of responsibility on its part.²⁴³

(22) Another example is the position taken by the Belgian Government in connexion with reparation of the damage suffered by Belgian nationals in the Democratic Republic of the Congo during the civil war. On 10 December 1969, the Belgian Minister for Foreign Affairs, replying to a question in the legislature, asserted that "wrongful and injurious acts committed by rioters or insurgents" could be the object of reparation only "if the forces responsible for maintaining order were culpably negligent in the performance of their duties".²⁴⁴

(23) The positions taken by Governments in connexion with specific situations appear particularly significant in that most of them result in a negative decision with regard to the presentation of a claim. Apart from that, the language used in certain notes should not be taken literally. The fact that reference is made, for example, to negligence on the part of public authorities "in repressing insurrection" certainly does not mean that the State is regarded as responsible in the event of injuries caused by the organs of an insurrectional movement to a foreign State on the

²⁴¹ See, for example, the decisions of the American-Mexican Claims Commission established under the Act of 18 December 1942, in the *Batopilas Mining Company case* and in the *Simpson case* (M. Whiteman, *op. cit.*, pp. 822-823) and of the International Claims Commission set up in 1949 to distribute funds paid as a lump sum by the Yugoslav Government—in its decision on the *Socony Vacuum Oil Company claim (International Law Reports, 1954*, Sir Hersch Lauterpacht, ed., London, Butterworth, 1957), p. 61. These two Commissions were organs of United States internal law.

²⁴² British Institute of International and Comparative Law, *International and Comparative Law Quarterly* (London), vol. 7 (July 1958), p. 552.

²⁴³ See also the instructions sent on 28 November 1958 by the Department of State to the United States Embassy in Cuba (Whiteman, *op. cit.*, p. 819), and those issued on 18 May 1967 by the Canadian Department of External Affairs defining the cases in which the Canadian Government is prepared to espouse claims, in particular, paragraph 3 (*Canadian Yearbook of International Law, 1968* (Vancouver, B.C.), vol. VI, p. 265).

²⁴⁴ *Revue belge de droit international* (Brussels), vol. VIII, No. 1 (1972), p. 372.

grounds that the effort to crush the insurrection has not in general been conducted vigorously. The lack of vigilance and failure to intervene on the part of the State authorities must obviously have occurred in connexion with the protection of the foreign States or individuals harmed by certain acts committed by the insurgents, and what is more, it must have occurred specifically in relation to those acts. Likewise, the fact that the State is said not to be responsible "for the damage" caused by insurgents "unless" the State organs have in a specific case failed to provide protection certainly does not mean that such negligence would suddenly make possible the attribution to the State—which is in principle excluded—of the acts of the insurrectional movement. All that it means is that in such cases the State, being responsible for the omission on the part of its organs, is required to compensate for the damage caused by the acts of the insurgents, in reparation for that omission. However, the internationally wrongful act of the State still remains nothing more than the omission itself. In relation to the conduct of the State, the act committed by the organs of the insurgents is nothing more than the external event which serves as a catalyst for the wrongfulness of the conduct.

(24) From an analysis of the opinions of the writers, it is clear that international jurists, too, are remarkably unanimous in their views on questions falling within the framework of this article. They have long been agreed in recognizing that the conduct of organs of an insurrectional movement cannot be considered as acts of the State involving its international responsibility. They acknowledge that State responsibility cannot be spoken of in relation to such conduct unless the conduct has involved a failure on the part of the State's organs to fulfil an international obligation. Some writers expressed this view as far back as the nineteenth century.²⁴⁵ The attempt by the Institute of International Law between 1898 and 1900 to bring about the acceptance of a kind of objective guarantee on the part of the State for all injurious events caused by riots or civil wars was quickly abandoned. Moreover, the Institute's proposals were posited essentially on the assumption that revolutionaries are nothing more than private individuals.²⁴⁶

²⁴⁵ See, for example, C. Calvo, "De la non-responsabilité de l'Etat à raison des pertes et dommages éprouvés par les étrangers en temps de troubles intérieurs ou de guerres civiles", *Revue de droit international et de législation comparée* (Brussels), 1st series, vol. I, No. 3 (1869), pp. 417 et seq.

²⁴⁶ Brusa, Fauchille and von Bar proposals. Article II, paragraphs 2 and 3 of the resolution adopted in 1900 by the Institute of International Law (*Annuaire de l'Institut de droit international*, 1900 (Paris), vol. 18 (1900), pp. 236 et seq.) made it clear that if the "insurrectional government" had been recognized as a "belligerent power", and therefore as a subject of international law, it was to that government that injured States should address their claims for reparation of the injuries sustained. L. von Bar expressed the same view ("De la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas de troubles, d'émeutes ou de guerres civiles", *Revue de droit international et de législation comparée* (Brussels), 2nd series, vol. I, No. 4 (1899), p. 475). Writers who later supported the proposition that, given certain circumstances, the State was responsible for acts committed by insurgents, all nevertheless excluded that responsibility in cases where the State has recognized the insurgents as "belligerents". See, for example, A. Rougier, *Les guerres civiles et le droit des gens* (Paris, Larose, 1903), p. 462.

(25) As for modern writers, whether of special studies of the problem,²⁴⁷ whether of more wide-ranging works on international responsibility²⁴⁸ or the problem of recognition,²⁴⁹ or whether of general treatises,²⁵⁰ while they may sometimes differ on other points, they are almost unanimous in agreeing that, under the rules at present in force,²⁵¹ injurious conduct on the part of the organs of an insurrectional movement is not attributed to the State and thus does not entail its international responsibility. At most, such responsibility can arise only where organs of the State have omitted to fulfil their recognized obligation to exercise diligence in preventing or punishing the injurious conduct in question. Moreover, even that does not seem to follow automatically, according to some less recent writers, at least in the specific case of "recognized

²⁴⁷ See, for example: Arias, *loc. cit.*, pp. 724 et seq.; Strupp, "Responsabilité internationale de l'Etat ... (*loc. cit.*)", pp. 133 et seq.; Podestá Costa, *loc. cit.*, pp. 220-221; J. Spiropoulos, *Die de facto-Regierung im Völkerrecht (Beiträge zur Reform und Kodifikation des Völkerrechts*, No. 2), (Kiel, Verlag des Instituts für Internationales Recht an der Universität Kiel, 1926), pp. 180 et seq.; Garner, *loc. cit.*, pp. 58 et seq.; G. Berlia, "La guerre civile et la responsabilité internationale de l'Etat" *Revue générale de droit international public*, Paris, 3rd series, vol. XI, No. 1 (January-February 1937), pp. 55 et seq.; C. Rousseau, "La non-intervention en Espagne", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. XIX (1938), pp. 275 et seq.; H. Silvanie, "Responsibility of States for Acts of Insurgent Governments", *American Journal of International Law* (Washington, D.C.), vol. 33, No. 1 (January 1939), pp. 90 et seq. and *Responsibility of States for Acts of Unsuccessful Insurgent Governments* (New York, Columbia University Press, 1939), pp. 135 et seq., and 159 et seq.; M. Akehurst, "State responsibility for the wrongful acts of rebels—An aspect of the Southern Rhodesian problem", *The British Year Book of International Law, 1968-1969* (London), vol. 43 (1970), pp. 49 et seq.

²⁴⁸ For instance: Borchard, *op. cit.*, pp. 228 et seq.; Schoen, *loc. cit.*, p. 78; Decencière-Ferrandière, *loc. cit.*, pp. 158 et seq.; M. G. Guerrero, "La responsabilité internationale des Etats dans les faits et dans sa règle", *Académie diplomatique internationale, Dictionnaire diplomatique*, Paris [n.d.] vol. II, pp. 567 et seq.; Strisower, *loc. cit.*, pp. 481 et seq.; Eagleton, *The Responsibility of States ... (op. cit.)*, pp. 138 et seq.; Maúrtua and Scott, *op. cit.*, pp. 55 et seq.; Reuter, *loc. cit.*, pp. 93-94; Accioly, *loc. cit.*, pp. 395 et seq.; von Münch, *op. cit.*, p. 232; Amerasinghe, *loc. cit.*, pp. 127-128; Jiménez de Aréchaga, *loc. cit.*, pp. 562 et seq.; Ténékidès, *loc. cit.*, p. 788; Kouris, *op. cit.*, pp. 202 et seq.

²⁴⁹ For instance: H. Lauterpacht, *Recognition in International Law* (Cambridge, University Press, 1947), pp. 247 et seq.; B. Chen, *The International Law of Recognition* (New York, Praeger, 1951), pp. 327 et seq.

²⁵⁰ For instance: C. C. Hyde, *International Law chiefly as Interpreted and Applied by the United States*, 2nd ed., rev. (Boston, Little, Brown, 1951), vol. 2, pp. 979 et seq.; Fenwick, *op. cit.*, pp. 284 et seq.; Schwarzenberger, *op. cit.*, pp. 629-630; I. Brownlie, *Principles of Public International Law* (Oxford, Clarendon Press, 1966), pp. 373 et seq.; Cavaré, *op. cit.*, pp. 548 et seq.; D. P. O'Connell, *International Law*, 2nd ed. (London, Stevens, 1970), vol. II, pp. 969 et seq.; G. von Glahn, *Law among Nations: An Introduction to Public International Law*, 2nd ed. (London, Macmillan, 1970), pp. 242 et seq.

²⁵¹ There are, however, some writers—like O'Connell (*op. cit.*, pp. 969-970) and E. Castrén ("Civil War", *Annales Academiae Scientiarum Fennicae*, series B, vol. 142, fasc. 2 (Helsinki, Suomalainen Tiedeakatemia, 1966), p. 232)—who would argue *de jure condendo* that the State should always be held responsible, when the revolution is over, for the acts of insurgents acting on behalf of a local *de facto* government.

insurgents" who, as such, possess international personality.²⁵²

(26) According to some of the writers mentioned in the preceding paragraph, such as Silvanie, Reuter, Schwarzenberger and O'Connell, an exception ought to be provided to the general rule that the conduct of organs of an insurrectional movement cannot be attributed to the State as a source of international responsibility; the exception would apply to any routine administrative acts performed by the organs of the insurrectional movement in that part of the State territory which is under their control. However, while on occasion a State may conceivably acknowledge that it is bound by certain obligations deriving from routine administrative acts performed by organs of an insurrectional movement in territory formerly under its administration, it is much less certain, not to say altogether unlikely, that a State would do so in the case of obligations arising out of internationally wrongful conduct of the same organs. Even supposing that a State was willing to assume *in proprio* certain obligations incurred by an insurrectional movement, that would be done by virtue of the succession of one subject of international law to the obligations of another subject, and not by virtue of the attribution to the former of the acts of the latter in accordance with the rules applying to the international responsibility of States. Another alleged exception to the general principle which seems to call for a negative conclusion is the attribution to a State of the wrongful conduct of an unsuccessful insurrectional movement in the event of a grant of amnesty by the State concerned. Some writers, such as Berlia, Reuter, Ténékidès and Brownlie, see the grant of a pardon to such insurgents as a kind of ratification of their acts by the State. It may, of course, happen that the State, in granting an amnesty, is breaching an international obligation to punish which it ought to have fulfilled, but that does not mean that it is endorsing the acts of others. In such a case, it is the breach which will be attributed to it as a source of responsibility, and not the acts committed by the organs of the insurrectional movement.²⁵³

(27) With regard to draft codifications, rule VII of the resolution adopted at Lausanne in 1927 by the Institute of International Law related to "injuries caused in case of mob, riot, insurrection or civil war", and the State was held responsible in cases of lack of diligence in preventing or punishing the injurious acts.²⁵⁴ The draft prepared in 1930 by the German International Law Association was noteworthy for the way in which it considered recognition of the insurrectional movement as a belligerent party to be

²⁵² Spiropoulos, like Schoen and Strupp before him, argues that recognition of the "insurrectional government as a belligerent party" releases the lawful government from all responsibility, even in case of wrongful negligence. However, it is difficult to see why the State, which is unquestionably responsible in the event of wrongful failure to give protection against the conduct of organs of another State, should cease to be responsible when the conduct in question is that of organs of an insurrectional movement.

²⁵³ This does not necessarily affect the question of the amount of compensation which the State may be required to pay in reparation for the breach with which it is charged.

²⁵⁴ *Yearbook... 1956*, vol. II, p. 228, document A/CN.4/96, annex 8.

a decisive factor.²⁵⁵ The two drafts prepared by the Harvard Law School, on the other hand, were noteworthy for the fact that they introduced a distinction between unsuccessful and successful revolutions.²⁵⁶ Among the drafts emanating from official sources, the two texts prepared by the Inter-American Juridical Committee—one expressing the views of the Latin American countries (article V) and the other giving the views of the United States (article VI)—both followed the same criteria with regard to injurious acts committed by insurgents as were adopted with regard to injurious acts committed by individuals.²⁵⁷ With respect to the drafts prepared under League of Nations or United Nations auspices, the 1926 Guerrero report also followed, in conclusion 8, the criteria laid down in conclusion 5, in connexion with the acts of private individuals; conclusion 9, however, introduced a reservation in case of seizures or confiscations by the revolutionaries, in which event the State must place all necessary legal means at the disposal of foreigners who suffered loss.²⁵⁸ The text of bases of discussion Nos. 22 and 22 (a) drawn up by the Preparatory Committee for the Conference was reproduced earlier. Lastly, the question was also dealt with by F. V. García Amador in the drafts he prepared for the International Law Commission in 1957 and 1961.²⁵⁹

(28) As has already been pointed out from the very beginning of this commentary, the injurious conduct of organs of an insurrectional movement is to be distinguished from that of individuals or groups of individuals during a riot or demonstrations by a rebellious mob. This is because, in the case of a genuine insurrectional movement in the sense in which that term is understood in international law, there is a possibility of holding the movement itself responsible for the wrongful acts of its organs. Despite the frequent difficulties involved, States have sometimes actually presented claims to an insurrectional movement for injuries caused to them or their nationals by organs of that movement.²⁶⁰ Cases can be quoted, even from the distant past, of claims of this kind. For instance, the note of 26 November 1861 from the British Secretary of State for Foreign Affairs, Earl Russell, to the United States Ambassador, Mr. Adams, justified the

²⁵⁵ *Yearbook... 1969*, vol. II, p. 150, document A/CN.4/217 and Add.1, annex VIII.

²⁵⁶ *Yearbook... 1956*, vol. II, p. 229, document A/CN.4/96, annex 9; and *Yearbook... 1969*, vol. II, p. 151, document A/CN.4/217 and Add.1, annex VII.

²⁵⁷ *Yearbook... 1969*, pp. 153–154, document A/CN.4/217 and Add.1, annexes XIV and XV.

²⁵⁸ *Yearbook... 1956*, vol. II, p. 223, document A/CN.4/96, annex 1.

²⁵⁹ Article 11 of the 1957 draft (*Yearbook... 1957*, vol. II, p. 130, document A/CN.4/106, annex) and article 7, paragraph 1, of the 1961 revised draft (*Yearbook... 1961*, vol. II, p. 47, document A/CN.4/134 and Add.1, addendum). Article 7, paragraph 1, of the 1961 text reads as follows: "The State is responsible for the injuries caused to an alien by illegal acts of individuals, whether isolated or committed in the course of internal disturbances (riots, mob violence or civil war), if the authorities were manifestly negligent in taking the measures which, in view of the circumstances, are normally taken to prevent the commission of such acts."

²⁶⁰ This is clearly further proof that the claimant States are of the firm opinion that the injurious conduct in question cannot be attributed to the "legitimate" government.

necessity for the relations maintained by Great Britain with the Confederates in the following terms:

Her Majesty's Government hold it to be an undoubted principle of international law, that when the persons or the property of the subjects or citizens of a State are injured by a *de facto* government, the State so aggrieved has a right to claim from the *de facto* government redress and reparation.²⁶¹

On 9 April 1914, members of the crew of the United States vessel *Dolphin*, anchored at Tampico in Mexico, were arrested by an armed band belonging to the forces of General Huerta, head of the Government which had then temporarily seized power. On 11 April the United States admiral in command requested various forms of reparation from the authorities of that Government. The Department of State supported his request in instructions sent on 14 April to the United States Chargé d'Affaires in Mexico. Since General Huerta had not given satisfaction, United States forces proceeded on 21 April to occupy Veracruz.²⁶² More recently, the United Kingdom Government on three occasions during the Spanish Civil War presented claims to the Nationalist Government, which was then located at Burgos or Salamanca. These occasions were after the loss of the destroyer *Hunter*, blown up on 13 May 1937 by a mine laid by the Nationalists four miles off Almeria, after the destruction of the steamer *Alcyra*, sunk 20 miles from Barcelona on 4 February 1938 by two seaplanes from the Nationalist base in Majorca, and after the attack on the British merchant vessel *Stanwell* by a Nationalist aircraft, on 15 March 1938, in the port of Tarragona. In all three cases, a formal request for reparation was addressed to the Nationalist authorities.²⁶³

(29) With regard to the formulation of the rule to be laid down in this article, the Commission, taking into account the foregoing considerations, decided to set out in *paragraph 1* the basic principle of the non-attribution to a State of the conduct of an organ of an insurrectional movement established in the territory of that State or in any other territory under its administration. The expression "or in any other territory under its administration" was included in order to take account of the legal status of dependent territories, which it is now incorrect to describe as the "territory of a State". The expression "insurrectional movement, which is established in the territory ..." was chosen as being that which best expressed the fact that the conduct of the organ of the insurrectional movement cannot be attributed to the territorial State, irrespective of whether or not that State is the State against which or against the government of which the movement is directed. The wording thus covers the case

in which the insurrectional movement operates in, or from within, a third State. The case dealt with in article 14 is clearly that in which the organ of the insurrectional movement acts in that capacity. The Commission did not, however, deem it necessary to specify that point in the text of the article, since the latter is drafted in negative form. The principle of non-attribution to the State would also of course apply, by virtue of article 11, to acts committed by an organ of an insurrectional movement in a private capacity.

(30) In order to avoid any ambiguity with regard to any failure by a State to fulfil its own international obligations, *paragraph 2* of the article stipulates, in the form of a safeguard clause, that the principle of the non-attribution to a State of the conduct of an organ of an insurrectional movement 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 of the draft. It should be noted that, by referring back to those articles of the draft, the formulation covers all the cases in which an act may be regarded as an "act of the State" under international law and may entail the international responsibility of the State, and not merely those cases in which the author of the conduct is an organ of the State under its internal law.

(31) Finally, *paragraph 3* of the article contains a second safeguard clause, this time relating to the insurrectional movement itself. Under this clause, the non-attribution to a State of the conduct of an organ of an insurrectional movement is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement. The purpose of this clause is not to settle forthwith all problems of attribution which may arise in this connexion, but, in the light of international practice, to provide for the possibility of such attribution by referring the solution of those problems to the relevant principles of international law. It was precisely in order to avoid prejudging such solutions that the Commission had preferred the formula "in any case in which such attribution may be made under international law", to any of the other expressions suggested during the discussion, such as "possessing separate international personality", "possessing recognized international personality", "if it controls part of the State in question", or "the international status of which is applicable to the relations in question". The use of any of those expressions might have given the impression that the Commission intended to take a position on problems which, as already mentioned,²⁶⁴ are not relevant to the subject-matter of the present draft codification.

²⁶¹ Moore, *A Digest ... (op. cit.)*, vol. I, p. 209.

²⁶² Hackworth, *op. cit.*, 1941, vol. II, pp. 420-421.

²⁶³ These cases are described in C. Rousseau's article, "La non-intervention en Espagne", *loc. cit.*, pp. 277-278. The author also recalls that the National Defence Junta at Burgos accepted a Portuguese claim for events which had taken place before the Nationalist forces occupied the area in which they had occurred (*ibid.*, pp. 278 *et seq.*), but that it did so rather as the "successor" of the Government of the Spanish Republic. See also the position taken by the United States Government in connexion with the attack on the United States destroyer *Kane* (Hackworth, *op. cit.*, 1940, vol. I, pp. 362-363; *ibid.*, 1943, vol. VII, pp. 172-173).

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

²⁶⁴ See above, paras. 5-7 of the commentary.

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.

Commentary

(1) This article concerns conduct which, when it took place, was engaged in by organs of an insurrectional movement in conflict with the constituted power. It provides that, in the event of the insurrectional movement subsequently becoming the new government of the State against whose authority it rebelled, or the government of a new State which has become independent of that State, the conduct in question shall be considered as the act of those States. It should therefore be understood that the questions of attribution contemplated in the present article arise solely in the case where the insurrectional movement, having triumphed, has substituted its structures for those of the previous government of the State in question, or in the case where the structures of the insurrectional movement have become those of a new State, constituted by secession or decolonization in part of the territory which was previously subject to the sovereignty or administration of the pre-existing State.

(2) It is held in some instances that the attribution to the State, as a possible source of responsibility, of acts committed by subsequently victorious insurgents is justified by the fact that during the conflict the insurgents were already exercising authority as a "*de facto* government" in at least part of the territory of the State. But in practice, for the purpose of attributing acts to the State, no distinction is made between the acts of organs of the insurrectional movement according to whether they preceded or followed the acquisition by the movement of effective power over a given region. At the same time, as we have seen, the acts of insurgents are not considered to be acts of the State when the final outcome of the civil war is unfavourable to them, even if they succeeded at a particular moment in exercising *de facto* authority over some portion of the territory of the State; this proves that the attribution or non-attribution to the State of the acts of insurgents is quite independent of their exercise of *de facto* power. The idea has also been put forward that, where the action of the insurgents was successful, they would be regarded as having represented the true national will ever since their uprising against the constituted power. But the very concept of "national will" is to be treated with caution, quite apart from the fact that, in general, international law is not greatly concerned with whether a given government is or is not the representative of the "true" national will. Even leaving that aside, it is difficult to maintain that the outcome of fighting should, like a judgement of God, establish retrospectively that the victors, from the outset of the civil war, were more representative of the true national will than the defeated. Furthermore, the idea that a subsequently victorious insurrectional movement was from the outset the "true"

government of the State because it embodied the "true" national will would involve the consequence that only the acts of organs of that movement could be considered subsequently to be acts of the State. This, however, is clearly contradicted by the practice which, as we shall see, holds the State too to be responsible for acts committed during the struggle by the government which is overthrown by the insurgents.

(3) In truth, the point is not so much to find a justification for the attribution to the State, as a possible source of international responsibility, of conduct engaged in by the organs of an insurrectional movement before the latter has taken power. What is important is to determine whether that attribution is or is not made in the real world of international relations. But if we do wish, nevertheless, to find a justification of principle for such an attribution, we ought perhaps to seek it in the fact that there is continuity between the organization with which the insurrectional movement had provided itself before taking power and the organization with which, as the result of its success, it has endowed the government of the pre-existing State or that of the new State which has separated from the pre-existing State. It is indeed the existence of this continuity which justifies wondering whether or not it is possible to attribute to the State in question, as a possible source of international responsibility for that State, conduct engaged in by the organs of the insurrectional movement before the victory of the movement in the civil war. That having been said, it should be made clear that the question does not arise in the same way in respect of each of the hypotheses referred to above.

(4) In the first hypothesis, the insurrectional movement, as a new government or new régime, replaces the previous government or régime of the State. The ruling organization of the insurrectional movement takes power in the State and becomes the ruling organization of that State or is at least integrated, in one way or another, into the previous organization of the State. The continuity which thus exists between the new organization of the State and that of the insurrectional movement therefore naturally leads to the attribution to the State of the acts which the organs of the insurrectional movement may have committed during the struggle; this is without derogation from the principles habitually applied.

(5) In such a case, the State does not cease to exist as a subject of international law. Its identity remains the same, without any break in continuity, despite the changes, reorganizations and adaptations which occur in the institutions of the State. That means that it is necessary to continue to attribute to the State, after the success of the insurrectional movement, the conduct previously engaged in by the organs of the pre-existing State apparatus. Consequently, the situation requires that the State should be responsible for acts committed during the struggle for power both by the apparatus of the insurrectional movement and by the apparatus of the legitimate government. There is nothing surprising in this. During the insurrectional struggle, two organizations are opposed to each other and are fighting for final victory. Each of the two wishes to be the organization of the State; at the outset, one is so in fact and the other potentially. In the case where the insurgents triumph and install themselves in the

government of the pre-existing State, the organization of the insurrectional movement is integrated within the framework of the State organization. The resulting State apparatus is in reality the continuation of both the organizations which confronted each other during the struggle. It is therefore logical to attribute to the State the acts of organs of its preceding organization and the acts of organs of the organization which grew up during the insurrection and then became the organization of the State itself. It should be added that this conclusion appears to be justified both in the case of total victory for the insurrectional movement, which then modifies the State apparatus to its liking, and in the case of an agreement between the legitimate government and the insurrectional government under which members of the insurrection are called upon to participate in the government of the State.²⁶⁵

(6) In the second hypothesis, the success of the insurrectional movement gives rise to the creation of a new State, either in part of the territory of the pre-existing State or in a territory which was previously under the administration of that State. The attribution to the new State of the acts of the organs of the insurrectional movement which preceded it, and of such acts only, is then justified by virtue of the continuity between the organization of the insurrectional movement and the organization of the State to which it has given rise. From being only an embryo State, the insurrectional movement has become a State proper, without any break in the continuity between the two. It is in fact the same entity which previously had the characteristics of an insurrectional movement and which now has those of a State proper. However, the acts of the organs of the pre-existing State are in no way attributable to the new State, which has separated from the pre-existing State by secession or decolonization. These are and remain exclusively the acts of the pre-existing State, which as a general rule, moreover, will continue to exist after the constitution of the new State by the insurrectional movement.

(7) It has sometimes been maintained that, in a number of the cases falling within the first of the two hypotheses discussed above, and in particular in the case of major social revolutions, the change brought about in the State apparatus by the insurrectional movement as a result of its success might be so far-reaching as to alter the identity of the State itself.²⁶⁶ Even for writers who support such

a view, however, these are rather exceptional cases;²⁶⁷ also, in evaluations of the situation which such cases represent, political and philosophical considerations sometimes become more important than strictly legal ones. In any event, these cases remain somewhat on the borderline compared to what normally happens in the international practice of States. The Commission has already had occasion to express its views on this matter in the introduction to its draft articles on succession of States in respect of treaties.²⁶⁸ With regard to the questions now under consideration, it should be stressed that, even if a change occurred in the identity of the State, internationally the new State would be the continuation, in a more stable and perfect form, of the insurrectional movement, whose organization would become that of the new State. The attribution to such a State, as a possible source of international responsibility, of the conduct previously attributed to the insurrectional movement—because it was the conduct of its organs—would be only natural. The relationship of continuity between the insurrectional movement and the new State which resulted from the revolution would be even more obvious than in the normal case in which the insurrectional uprising led only to a change of government without affecting the identity of the State. The validity of the basic principle enunciated in this article would therefore be fully confirmed. It is only in connexion with the possibility of attributing to the State the conduct of the organs of the former governmental apparatus that the conclusions might be different from those mentioned in paragraph 5 of this commentary. In fact, this second aspect of the problem would then have to be seen from another point of view. It would no longer be a matter of attributing to the State the conduct of organs of a previous government of the same State but rather a question involving the existence of two different States.

(8) Apart from this particular case, however, it is obvious that, whenever the identity of the State and the continuity of its existence have not been called into question because of the ultimate success of the insurrectional movement, no question of succession as between different subjects of international law arises. As we have shown, acts committed by agents of the insurrectional movement before the movement takes power are attributed to the State because there is continuity between the apparatus of the insurrectional movement and the new governmental apparatus of the State, not a succession of the State as one subject of international law to the insurrectional movement as another.²⁶⁹ This is, moreover, shown to be the case, by the fact that the question arises in the same way in cases where the insurrectional movement, at a given time in the struggle, constituted an entity which was liable as such to have international responsibility attributed to it, and in the case where that

²⁶⁵ It is only when the struggle ends in victory for the pre-existing power that the insurrectional organization is dissolved and only the established apparatus remains. It is then logical that one should attribute to the State only the acts of organs of this continuing apparatus, and not those of the organs of a movement which has ceased to exist without ever having succeeded in being the actual organization of the State or even in participating in it.

²⁶⁶ See, for example, R. Quadri, "Stato (Diritto internazionale)", *Nuovo Digesto Italiano* (Turin), vol. XII, part 1 (1940), pp. 815-816, and *Diritto internazionale pubblico* (*op. cit.*), pp. 500 *et seq.*; M. Giuliano, *La Comunità internazionale e il diritto* (Padua, CEDAM, 1950), pp. 248 and 290; Arangio-Ruiz, *Sulla dinamica ...* (*op. cit.*), pp. 19 and 131 *et seq.*, and "Stati e altri enti ...", (*loc. cit.*), p. 167. The last-named writer uses the term "revolution" to describe a situation where the entity resulting from the change presents such markedly different characteristics from the pre-existing entity that its "newness" must be acknowledged.

²⁶⁷ Arangio-Ruiz, in "Stati e altri enti ...", (*loc. cit.*), p. 167, emphasizes that, in the most common case, the pre-existing personality does not cease to exist but is only modified "materially".

²⁶⁸ *Yearbook... 1974*, vol. II, p. 170, document A/9610/Rev.1, para. 66.

²⁶⁹ It does not therefore seem entirely correct to refer to these possible cases as though they were cases of State responsibility "for wrongful acts of an insurrectional movement".

"intermediary" phase did not occur. However, it is scarcely conceivable to talk of the succession of one subject of international law to the obligations of another such subject in cases where the insurgents did not constitute a movement having its own international personality. Also, it should be made clear that the article under consideration relates only to the attribution of certain acts to the State. It in no way seeks to define at the same time the international responsibility which might possibly derive from this attribution or to determine the amount of compensation due.

(9) Some international arbitral decisions expressly recognize the principle of the international responsibility of the State for acts committed during a civil war by agents of an insurrectional movement which was subsequently successful. The statements made in this respect are less numerous than those which could be cited in connexion with the questions discussed in the preceding article,²⁷⁰ but this can be explained specifically by the fact that there is no divergence of views, no doubt whatsoever, as to the validity of the principle in question. The most interesting statements are to be found in certain decisions of the mixed commissions which were established in respect of Venezuela in 1903 and of Mexico in 1920-1930. These decisions were given in connexion with disputes arising out of injuries inflicted on foreign nationals during the revolutionary events which had occurred in those countries.

(10) As regards the "Venezuelan arbitrations", the best-known statement of principle is that which appears in the decision concerning the *Bolivar Railway Company case* written by Umpire Plumley for the British-Venezuelan Mixed Claims Commission in 1903. In this decision, the principle in question is stated in the following terms:

The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented *ab initio* a changing national will, crystallizing in the finally successful result.²⁷¹

The principle of the attribution to the State of acts of successful insurrectional movements, affirmed in that decision, was also applied by the same umpire in the decision relating to the *Puerto Cabello and Valencia Railway Company case*,²⁷² which involved specifically injuries caused to foreigners by wrongful acts of the insurgents and, for the French-Venezuelan Mixed Claims Commission of 1902, in the decision concerning the

French Company of Venezuelan Railroads case.²⁷³ This decision affirms the principle that the State cannot be held responsible for the acts of revolutionaries "unless the revolution was successful", since such acts then involve the responsibility of the State "under the well-recognized rules of public law".

In the statement of reasons for the decision concerning the *Dix case*, written by the United States Commissioner, Bainbridge, on behalf of the United States-Venezuelan Mixed Claims Commission established under the Protocol of 17 February 1903, it is stated that:

The revolution of 1899 ... proved successful and its acts, under a well-established rule of international law, are to be regarded as the acts of a *de facto* government. Its administrative and military officers were engaged in carrying out the policy of that government under the control of its executive. The same liability attaches for encroachments upon the rights of neutrals in the case of a successful revolutionary government, as in the case of any other *de facto* government.²⁷⁴

(11) In the context of the "Mexican arbitrations", attention should be drawn above all to the decision concerning the *Pinson case*, given on 19 October 1928 by the French-Mexican Claims Commission of 1924, in which the President of the Commission, Verzijl, who wrote the decision, ruled that:

... if the injuries originated, for example, in requisitions or forced contributions demanded ... by revolutionaries before their final success, or if they were caused ... by offences committed by successful revolutionary forces, the responsibility of the State, in my opinion, cannot be denied.²⁷⁵

State responsibility for the acts of successful insurgents was also affirmed by Nielsen in two opinions given by him, as United States Commissioner, in the Mexico-United States General Claims Commission established under the Convention of 8 September 1923 and in the Mexico-United States Special Claims Commission established under the Convention of 10 September of the same year. In the first opinion, dissenting from the decision in the *Pomeroy's El Paso Transfer Company case* given on 8 October 1930 by the General Claims Commission, Nielsen points out that "international tribunals have repeatedly held a government responsible for acts of successful revolutionists".²⁷⁶ In the second opinion, referring to the decision in the *Russel case*, given on 24 April 1931 by the Special Claims Commission, Nielsen maintains explicitly that, according to general international law, "a government is responsible for the acts of successful revolutionists".²⁷⁷ In both cases, moreover, the other members of the Commission in no way defended a principle differing from that propounded by Nielsen.

²⁷⁰ On the other hand, several arbitral decisions can be found which considered lawful acts committed during a civil war by successful insurgents, particularly contracts, to be acts of the State. But such decisions cannot generally be produced in support of the principle of State responsibility for the wrongful acts of the insurgents in question.

²⁷¹ United Nations, *Reports of International Arbitral Awards*, vol. IX (United Nations publication, Sales No. 59.V.5), p. 453. The case in question in fact involved the attribution to the State not of an internationally wrongful act but of a lawful act, a debt contracted by the insurgents. However, the principle stated by the umpire is formulated in terms which are perfectly suited also to the case of the attribution to the State of a wrongful act. It should be added that, although the principle enunciated is correct and not open to challenge, the justification given by the umpire for the solution adopted is much less so and has been strongly criticized by certain authors.

²⁷² *Ibid.*, p. 513.

²⁷³ *Ibid.*, vol. X (*op. cit.*), p. 354.

²⁷⁴ *Ibid.*, vol. IX (*op. cit.*), p. 120. In this connexion, it should be noted that the justification given for the principle applied is the fact that, at the time of the injuries caused by its organs, the insurrectional movement was already exercising the authority of a *de facto* government. See also in this connexion the statement of reasons for the decision relating to the *Heny case*, written by Umpire Barge (*ibid.*, p. 133).

²⁷⁵ *Ibid.*, vol. V (*op. cit.*), p. 353 [translation from French].

²⁷⁶ *Ibid.*, vol. IV (*op. cit.*), p. 563.

²⁷⁷ *Ibid.*, p. 831.

They simply refrained from touching on the question because they deemed it irrelevant to the decision in the cases considered.

(12) An analysis of the practice of States shows that Governments have taken a position on the problem similar to that taken by the arbitrators responsible for ruling on certain claims. Thus, in an opinion given on 21 October 1861 by the Law Officers of the British Crown, i.e. in the early days of the American Civil War, on the possibility of obtaining compensation for the injuries caused to British subjects, we read that:

... should the party by whose officers or troops, or under whose authority, such losses or destruction have been inflicted, ultimately succeed in acquiring power, and be recognized by Her Majesty's Government as the Sovereign Government, it may be open to Her Majesty to insist upon compensation in respect of such losses and injuries.²⁷⁸

Subsequently, at the height of the War of Secession, the Law Officers of the Crown, in an opinion given on 16 February 1863, considered the possibility that the Confederates might succeed in their separatist aims and assert their sovereignty over the Southern territories by constituting there a State independent of the Union. Thus, the situation envisaged was that of the formation of a new State by secession from the pre-existing State. Referring to this specific situation, the Law Officers of the British Crown observed that:

In the event of the war having ceased, and the authority of the Confederate State being *de jure* as well as *de facto* established, it will be competent to Her Majesty's Government to urge the payment of a compensation for the losses inflicted on Her Majesty's subjects by the Confederate Authorities during the War...²⁷⁹

(13) During the revolutionary events which took place in Mexico following the restoration of the Republic and which led to the assumption of power by the insurgents and, subsequently, to the appointment of General Porfirio Díaz as President, Secretary of State Evarts sent to the United States Minister to Mexico, on 4 April 1879, instructions in which he declared himself convinced that the Mexican Government would not reject the claims of United States nationals for injuries sustained during the revolution as a result of acts by the insurgents. The Secretary of State believed that the usual objection that the State was not responsible for the acts of an insurrectional movement would not "be pleaded in this case, as the insurgent has become the regular government".²⁸⁰

(14) Later, a number of interesting opinions were given with respect to the question of compensation for injuries caused to foreigners in Mexico in 1910, first by agents of the revolutionary movement of Francisco Madero and later by supporters of abortive insurrectional attempts against the Madero Government. The distinction between the two situations stands out very clearly in the notes sent

by the British Minister to Mexico²⁸¹ to his colleague, the Ambassador of the United States, who did not share his view. The United States Department of State, however, adopted a viewpoint similar to that maintained by the British Minister and in a despatch addressed to the Ambassador, signed on behalf of the Secretary of State, commented as follows:

It being assumed that the so-called Madero revolution was successful, it would appear that, under the generally accepted rules of international law, claimants seeking compensation for damages caused during that revolution would, as a class, be in a better legal position than would persons whose claims arose out of an unsuccessful revolution.

The statement in your notes to the Mexican Foreign Office and the British Minister, that the Government of the United States perceived no distinction between the two classes of claims, appears to have been made upon your own responsibility and without instructions from the Department. Probably it was intended to convey the opinion that claims arising out of the late revolutionary movements were valid; but it might, on the other hand, be construed as involving a renunciation or waiver of the benefit of the rule which imposes upon successful revolutionists liability for their acts. You will therefore take occasion to inform the appropriate authorities that the statements contained in your note of January 21, 1913, were made on your own responsibility, and were not intended to admit a doubt as to any of the established grounds of international liability; and you should make a similar expression to the British Minister with relation to the statements contained in your letter to him on January 27, 1913.²⁸²

(15) The possibility of holding the State responsible for acts of organs of an insurrectional movement where the latter has subsequently been successful was clearly brought out in the request for information addressed to Governments by the Preparatory Committee for the 1930 Codification Conference, under the general heading of point IX, concerning "damage done to the person or property of foreigners by persons engaged in insurrections or riots, or through mob violence".²⁸³ In reply to the question "What is the position ... where a rebellion is successful and the insurgent party which did the damage is installed in power and becomes the Government?" (point IX (c)), 10 Governments²⁸⁴ all stated clearly that, where the insurrectionist party, having taken power, has become the government of the State, the latter must be liable for injuries caused by the insurgents during the civil war to the person or property of foreigners. On the basis of

²⁸¹ See, for instance, the note of 28 January 1913 (United States of America, Department of State, *Papers relating to the Foreign Relations of the United States, 1913* (Washington, D.C., U.S. Government Printing Office, 1920), p. 938). In one of the notes exchanged, the British Minister refers to the instructions sent by the British Foreign Minister to British consular offices (*ibid.*, p. 937).

²⁸² *Ibid.*, p. 949.

²⁸³ League of Nations, *Bases of discussion ... (op. cit.)*, pp. 108 and 116.

²⁸⁴ These were the Governments of Australia, Austria, Great Britain, India, Japan, Norway, New Zealand, South Africa, Switzerland and the United States (*ibid.*, pp. 116 *et seq.*, and *Supplement to Volume III, (op. cit.)*, p. 21). The replies sent by three other Governments (Hungary, the Netherlands and Czechoslovakia) are vague and no definite conclusions can be drawn from them (League of Nations, *Bases of Discussion ... (op. cit.)*, pp. 117-118). Two others, those of Denmark and Finland, seem to hold the State liable in the circumstances given in the request; they too, however, are not clear (*ibid.*, p. 117).

²⁷⁸ McNair, *op. cit.*, p. 255.

²⁷⁹ *Ibid.*, p. 257.

²⁸⁰ Moore, *A Digest ... (op. cit.)*, vol. VI, pp. 991-992. Similar arguments were behind the claims for compensation submitted by the United States to the Governments established following successful revolutions in Honduras (*Oteri case, ibid.*, pp. 992-993) and Peru (*Fowks case, ibid.*, pp. 993-994).

the replies received, the Preparatory Committee of the Conference drew up Basis of discussion No. 22 (c),²⁸⁵ but the Conference had to end its work before it had an opportunity to consider this basis of discussion. Note should also be taken of the replies by two Governments²⁸⁶ which related to a different problem from that mentioned in the request of the Preparatory Committee and affirmed the principle of the responsibility of the government which resulted from the revolution for the wrongful acts committed by organs of the preceding government.

(16) As a whole, the replies sent by Governments to the Preparatory Committee's questionnaire seem to be sufficient to confirm the widely recognized existence of a general principle of international law; a principle providing precisely for attribution to the State or government resulting from a successful revolution of acts committed by the insurgents during their struggle to take power, as a possible source of international responsibility. The practice of States on the question after 1930 is less accurately known. But there is no reason to think that there has been any change from the principle generally accepted at the time of the Hague Conference. That principle was taken up, for instance, in a recent opinion, namely, the instruction sent on 26 January 1959 by the Department of State to the United States Embassy in Cuba.²⁸⁷

(17) The principle that it is legitimate to attribute to a government resulting from a successful revolution the injurious acts committed earlier by the revolutionaries must also apply, as previously mentioned, to the case of a coalition government formed following an agreement between the "legitimate" authorities and the leaders of the revolutionary movement.²⁸⁸ The Peruvian civil war, which was terminated by an agreement signed on 2 December 1885 by the Head of State, General Iglesias, and the leader of the insurrectional movement, General Cáceres, is a historic example of this kind. Pursuant to that agreement, a provisional government was constituted, composed of representatives of the two parties, and that government held elections. On 3 June 1886, the Congress

which was elected as a result of that popular consultation proclaimed Cáceres President of the Republic. After these events, the United States Government presented certain claims to Peru in connexion with acts committed during the revolution by supporters of General Cáceres's insurrectional movement. The first claim, which concerned the seizure by the insurgent forces, in 1848, of a quantity of guano belonging to a United States firm, rested on the ground that the guano seized had been appropriated to sustain a cause "which has become national by the voluntary action of the people of Peru, its chief representative being at the present time the duly elected and installed constitutional executive of the Republic".²⁸⁹ A second and more significant claim concerned the ill-treatment inflicted in 1885 on a United States consular agent. The Peruvian Government at first rejected the claim, arguing that the acts complained of had been committed by "a chief in arms against the government then recognized as legitimate by all nations" and that the Peruvian State could therefore not be held responsible. The United States Minister to Peru replied that the Peruvian Government now in office was the successor of the provisional government of Iglesias and Cáceres and that therefore it was responsible for the acts of the officials of both. The Peruvian Government thereupon abandoned its earlier argument and acknowledged that the measures taken against the United States consular agent emanated from a "legitimate authority".²⁹⁰

(18) Writers on international law, while they differ in details of their individual approaches, are in principle agreed in affirming that a State whose government is the expression of a successful insurrectional movement must be answerable for the acts committed by agents of that movement during the struggle.²⁹¹ In that connexion,

²⁸⁹ J. B. Moore, *A Digest ... (op. cit.)*, p. 992.

²⁹⁰ See in particular the notes from Alzamora to Buck of 28 August 1888, from Buck to Alzamora of 3 September 1888, and again from Alzamora to Buck of 6 November 1888 (*ibid.*, pp. 985 *et seq.*). While the Peruvian Government continued nevertheless to deny any responsibility, it did so by contesting the objectively wrongful character of the measures in question.

²⁹¹ See, on this subject, the following works devoted specifically to the subject of insurrections, civil wars and *de facto* governments: Goebel, *loc. cit.*, p. 818; Spiropoulos, *op. cit.*, pp. 176-177; Silvanie, *loc. cit.*, pp. 78 *et seq.*; Berlia, *loc. cit.*, p. 59; J. Charpentier, *La reconnaissance internationale et l'évolution du droit des gens* (Paris, Pédone, 1956), pp. 52-53; Castrén, *loc. cit.*, pp. 236 *et seq.*; J. A. Frowein, *Das de facto—Régime in Völkerrecht* (Cologne, Heymann, 1968), pp. 85-86.

See also the following works devoted in general to responsibility: Borchard, *op. cit.*, pp. 241-242; Strupp, "Das völkerrechtliche Delikt", *Handbuch des Völkerrechts* (Stuttgart, Kohlhammer, 1920), vol. III, part IV, pp. 91-92; Decencière-Ferrandière, *op. cit.*, p. 166; Eagleton, *The Responsibility of States ... (op. cit.)*, p. 147; Maurtua et Scott, *op. cit.*, pp. 57 *et seq.*; Reuter, *loc. cit.*, pp. 94-95; Amerasinghe, *loc. cit.*, pp. 123 *et seq.*; Jiménez de Aréchaga, *loc. cit.*, pp. 563-564.

Lastly, see the following general works and manuals of international law: J. H. Ralston, *The Law and Procedure of International Tribunals* (Stanford, Calif., Stanford University Press, 1926), pp. 343 *et seq.*; Hyde, *International Law ... (op. cit.)*, pp. 987-988; Cheng, *op. cit.*, pp. 190-191; C. Rousseau, *Droit international public* (Paris, Sirey, 1953), p. 380; Schwarzenberger, *op. cit.*, pp. 627 *et seq.*; Dahm, *op. cit.*, p. 202; W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. II, p. 1020; Brownlie, *Principles ... (op. cit.)*, p. 375; Cavare, *op. cit.*, pp. 547-548; O'Connell, *op. cit.*, p. 968; von Glahn, *op. cit.*, p. 245.

²⁸⁵ "A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops" (League of Nations, *Bases of discussion ... (op. cit.)*, p. 118, and *Yearbook... 1956*, vol. II, p. 224, document A/CN.4/96, annex 2).

²⁸⁶ Those of Poland and Canada (League of Nations, *Bases of discussion ... (op. cit.)*, p. 118, and *Supplement to Volume III (op. cit.)*, p. 3).

²⁸⁷ This reads: "... a government which becomes the legitimate government of a state by a successful revolution, such as the present Government of Cuba ... is internationally responsible as a general rule for damages caused by acts of forces or authorities of both the former government and the revolutionists which were not legitimate from a military standpoint or sanctioned by the rules of warfare, such as wanton or unnecessary injury to persons or property and pillage. The government of the successful revolutionists is also internationally obligated to pay for property which was requisitioned by either the former government or the revolutionists" (Whiteman, *op. cit.*, p. 819).

²⁸⁸ Such a situation is not to be confused with that of a "legitimate" government which, after having overcome an insurrection, grants an amnesty to the insurgents. In a case of that kind, the only existing government is still the "legitimate" government. In this connexion, see above, para. 26 of the Commentary to article 14.

they generally make no distinction between the situation where the insurgents have asserted their authority as a new government or new régime over the whole of the territory of the pre-existing State and the situation where they have, on the contrary, caused the formation of a new State in part of the territory of the pre-existing State, which is therefore detached from the latter. International jurists also generally agree that in the former situation the fact that the State is held responsible for wrongful acts committed by insurgents during the revolution in no way precludes the possibility of attributing to it, at the same time, responsibility for the conduct of organs of the preceding government. Finally, with a few exceptions, the writers who have gone most deeply into the question do not hesitate to affirm explicitly that the acts of insurrectional movements are to be regarded retrospectively as acts of the government which they have subsequently created.²⁹² These writers take the view that such acts are to be considered as "acts of the State" from the time when the insurrectional movement became victorious.

(19) Apart from Basis of discussion No. 22 (c) drawn up by the Preparatory Committee of the 1930 Conference, five codification drafts deal with the question with which this article is concerned. The Harvard draft of 1929,²⁹³ the 1965 draft of the Inter-American Juridical Committee²⁹⁴ and García Amador's draft of 1957²⁹⁵ speak in general of State responsibility for the acts of a successful insurrection. The Harvard draft of 1961 expresses more precisely the idea of attributing to a State the acts of organs of an insurrectional movement which has subsequently become the government of that State.²⁹⁶ Only García Amador's revised draft of 1961 departs from the others, since it seems to try to limit the question, even where the revolution is successful, to cases, in which there has been negligence on the part of the "legitimate" organs of the State.²⁹⁷

²⁹² See Goebel, *loc cit.*, p. 818; Eagleton, *The Responsibility of States ... (op. cit.)*, p. 147; Ralston, *op. cit.*, p. 343; Hyde, *International Law ... (op. cit.)*, pp. 987-988; Cavaré, *op. cit.*, p. 547; Cheng, *op. cit.*, p. 190; Reuter, *op. cit.*, p. 94; Schwarzenberger, *op. cit.*, pp. 628-629; Amerasinghe, *op. cit.*, pp. 127-128. It may also be pointed out that all those writers, like Borchard, Berlia, Rousseau, Verdross and Castrén, who subscribe to the idea that successful insurgents are regarded as having from the outset represented the *true national will* must necessarily consider the organs of the insurrectional movement as being already organs of the State at the time when they committed the injurious acts. Of all the writers consulted, only Strupp and, following in his footsteps, Decencière-Ferrandière appear to be negative regarding the attribution to the State of the conduct of organs of an insurrectional movement during the revolution.

²⁹³ Article 13 (b) (*Yearbook... 1956*, vol. II, p. 229, document A/CN.4/96, annex 9).

²⁹⁴ Paragraph VI (*Yearbook... 1969*, vol. II, p. 154, document A/CN.4/217 and Add.1, annex XV).

²⁹⁵ Article 12, para. 2 (*Yearbook... 1957*, vol. II, p. 130, document A/CN.4/106, annex).

²⁹⁶ Article 18, para. 1: "In the event of a revolution or insurrection which brings about a change in the government of a State or the establishment of a new State, an act or omission of an organ, agency, official, or employee of a revolutionary or insurrectionary group is, for the purposes of this Convention, attributable to the State in which the group established itself as the government." (*Yearbook... 1969*, vol. II, p. 146, document A/CN.4/217 and Add.1, annex VII).

²⁹⁷ Article 16 (*Yearbook... 1961*, vol. II, p. 48, document A/CN.4/134 and Add.1, addendum).

(20) Having regard to the foregoing considerations, this article contains two paragraphs, dealing respectively with the situation where the organization of the insurrectional movement becomes the new government of the entire country and the situation where the organization of the insurrectional movement becomes that of a new State established in part of the territory formerly under the sovereignty or administration of a pre-existing State. The Commission considered that no distinction should be made, for the purposes of this article, between different categories of insurrectional movements on the basis of any international "legitimacy" or any illegality in respect of their establishment as the government, despite the possible importance of such distinctions in other contexts. From the standpoint of the formulation of rules of law governing State responsibility, it would be extremely dangerous to introduce concepts which might exonerate a new government or a new State from all responsibility by reason of the fact that it derived from an insurrectional movement characterized as "illegitimate" or from an insurrectional movement which had attained power as the result of internationally wrongful actions. If the success of the insurrectional movement is due to the intervention of a foreign State which has provided it with assistance that played a decisive role, in violation of its international obligations, that act of the foreign State in question will be attributed to that State and will entail its international responsibility. However, that does not affect the problem of the attribution to the State in which the insurrectional movement has taken over the government, or to the State whose creation it has brought about, of internationally wrongful conduct engaged in by the insurrectional movement during the struggle. For such an attribution, no condition is required other than the mere existence of that movement and the relationship of continuity between its organization and that of the new government or State established as a result of its action.

(21) *Paragraph 1* of the article begins by stating the rule that the act of an insurrectional movement that becomes the new government of a State is regarded as an act of that State. There can be no exceptions to this general principle. The second sentence of that paragraph specifies that such attribution is without prejudice to the attribution to that State of any conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10 of the draft. In other words, this provision emphasizes that the attribution to the State of the behaviour of the organs of the insurrectional movement in no way excludes the parallel attribution to that State of the actions carried out, during the conflict, by the organs of the government then established, since it is important to maintain the possible responsibility of the State for the acts of the government which had been in power until the moment of its replacement by that of the insurrectional movement. The rule in question, which is formulated as a saving clause, does not exclude the possibility of taking into account exceptional situations, such as those mentioned in paragraph 7 of the present commentary.

(22) *Paragraph 2*, as we have pointed out, concerns the case of the formation of a new State by means of secession or decolonization. It provides that 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 which had previously been under its administration, shall be considered as an act of the new State. As already explained,²⁹⁸ the expression "or in a territory under its administration" was inserted in order to take

account of the legal status of dependent territories. It goes without saying that, since the pre-existing State will continue to exist, although with a reduced territory, it will still be responsible for its own acts carried out before the creation of the new State, by virtue of the provisions contained in other articles of this chapter of the draft. It is quite unnecessary, therefore, to add a special saving clause on this subject.

²⁹⁸ See above, para. 29 of the commentary to article 14.

Chapter III

SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

A. Introduction

1. HISTORICAL REVIEW OF THE WORK OF THE COMMISSION

53. As noted in the Commission's report on its twenty-fifth session,²⁹⁹ the Commission, at its nineteenth session, in 1967, made new arrangements for dealing with the topic "Succession of States and Governments",³⁰⁰ which was among the topics it had selected for codification in 1949.³⁰¹ 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 Subcommittee on Succession of States and Governments.³⁰² 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.

54. In 1967, the Commission also appointed Sir Humphrey Waldock Special Rapporteur for succession in respect of treaties and Mr. Mohammed Bedjaoui 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.³⁰³

55. Between 1968 and 1972, Sir Humphrey Waldock submitted to the Commission five reports on succession of States in respect of treaties.³⁰⁴ In 1972, at its twenty-fourth session, the Commission adopted, in the light of those reports, a set of 31 provisional draft articles on the

topic,³⁰⁵ which were transmitted in the same year to Governments of Member States for their comments, in accordance with articles 16 and 21 of the Commission's Statute.³⁰⁶ In 1974, in the light of the comments received in the meantime from the Governments of Member States, the Commission adopted a final set of draft articles "on succession of States in respect of treaties".³⁰⁷

56. Following his appointment as Special Rapporteur, Mr. Bedjaoui submitted to the Commission in 1968 a first report on succession of States in respect of rights and duties resulting from sources other than treaties.³⁰⁸ In it, he considered *inter alia* the scope of the subject which 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, at its twentieth session, 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.

57. Endorsing the recommendations contained in the first report by Mr. Bedjaoui, the Commission considered that the criterion for delimitation of the topic entrusted to him and the topic of succession in respect of treaties should be "the subject-matter of succession". 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 the delimitation of the topic entrusted to the Special Rapporteur. 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".³⁰⁹

58. This 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

²⁹⁹ See *Yearbook... 1973*, vol. II, pp. 198 *et seq.*, document A/9010/Rev. 1, paras. 60 *et seq.*

³⁰⁰ For a detailed account of the historical background of the topic as a whole, see *Yearbook... 1968*, vol. II, pp. 213 *et seq.*, document A/7209/Rev.1, paras. 29-42, and *Yearbook... 1969*, vol. II, pp. 222 *et seq.*, document A/7610/Rev.1, paras. 20-34.

³⁰¹ See *Yearbook... 1949*, p. 281, document A/925, para. 16.

³⁰² *Yearbook... 1963*, vol. II, p. 260, document A/5509, annex II,

³⁰³ *Yearbook... 1967*, vol. II, p. 368, document A/6709/Rev.1, paras. 38-41.

³⁰⁴ *Yearbook... 1972*, vol. II, p. 224, document A/8710/Rev.1, paras. 17-21.

³⁰⁵ *Ibid.*, pp. 230 *et seq.*, document A/8710/Rev.1, chap. II, section C.

³⁰⁶ *Ibid.*, p. 225, document A/8710/Rev.1, para. 23.

³⁰⁷ *Yearbook... 1974*, vol. II (Part One), pp. 174 *et seq.*, document A/9610/Rev.1, chap. II, sect. D.

³⁰⁸ *Yearbook... 1968*, vol. II, p. 94, document A/CN.4/204.

³⁰⁹ See *Yearbook... 1968*, p. 216, document A/7209/Rev.1, para. 46.

respect of matters other than treaties". The absence of any reference to "succession of Governments" in that recommendation by the General Assembly reflects the decision taken by the Commission at its twentieth 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".³¹⁰

59. As mentioned above,³¹¹ the first report by Mr. Bedjaoui reviewed the various particular 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 in this connexion that during the debate

some members of the Commission referred to certain particular aspects of the topic (public property; public debts; legal régime 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.³¹²

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.³¹³

60. The second report by Mr. Bedjaoui,³¹⁴ submitted at the twenty-first session of the Commission in 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. They 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".³¹⁵ 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".³¹⁶

61. Between 1970 and 1972, Mr. Bedjaoui submitted three reports to the Commission—his third report³¹⁷ in 1970, the fourth³¹⁸ in 1971 and the fifth³¹⁹ in 1972. Each of these 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 these reports during its twenty-second (1970), twenty-third (1971) or twenty-fourth (1972) sessions. It did, however, include a summary of the third and fourth reports in its report on the work of its twenty-third session³²⁰ and an outline of the fifth report in its report on the work of its twenty-fourth session.³²¹

62. 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 International Law Commission, several representatives expressed the wish that progress should be made with the study on succession of States in respect of matters other than treaties.³²² 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, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) of 20 November 1962 and 1902 (XVIII) of 18 November 1963, with a view to ... making progress in consideration of succession of States in respect of matters other than treaties.

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 succession of States in respect of matters other than treaties". 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".

63. In 1973, for the twenty-fifth session of the Commission, Mr. Bedjaoui submitted a sixth report³²³ dealing, like his three previous reports, with succession of

³¹⁰ *Ibid.*, pp. 228–229, para. 62.

³¹¹ *Yearbook... 1970*, vol. II, p. 131, document A/CN.4/226.

³¹² *Yearbook... 1971*, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1.

³¹³ *Yearbook... 1972*, vol. II, p. 61, document A/CN.4/259.

³¹⁴ *Yearbook... 1971*, vol. II (Part One), pp. 341 *et seq.*, document A/8410/Rev.1, paras. 77–98.

³¹⁵ *Yearbook... 1972*, vol. II, p. 323, document A/8710/Rev.1, para. 71.

³¹⁶ See *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 72; *ibid.*, *Twenty-sixth Session, Annexes*, agenda item 88, document A/8537, para. 135; *ibid.*, *Twenty-seventh Session, Annexes*, agenda item 85, document A/8892, para. 194.

³¹⁷ *Yearbook... 1973*, vol. II, pp. 3 *et seq.*, document A/CN.4/267.

³¹⁰ *Yearbook... 1963*, vol. II, p. 224, document A/5509, para. 57.

³¹¹ Para. 56.

³¹² *Yearbook... 1968*, vol. II, pp. 220 and 221, document A/7209/Rev.1, paras. 73 and 78.

³¹³ *Ibid.*, p. 221, document A/7209/Rev. 1, para. 79.

³¹⁴ *Yearbook... 1969*, vol. II, p. 69, document A/CN.4/216/Rev.1.

³¹⁵ See *Yearbook... 1969*, vol. II, p. 228, document A/7610/Rev.1, para. 61.

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 1972.³²⁴ It contained a series of draft articles relating to public property in general. These 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.

64. Mr. Bedjaoui'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 just one of the three categories of public property dealt with by the Special Rapporteur, namely property of the State.³²⁵ In the same year, it adopted eight draft articles, the text of which is reproduced below.³²⁶ Articles 1 to 3 constitute the Introduction to the draft, relating to the question as a whole of succession of State in respect of matters other than treaties. Articles 4 to 8 belong to part I of the draft, entitled "Succession to State property". They form the initial provisions of section 1 of that part, entitled "General provisions".

65. In 1974, for the twenty-sixth session of the Commission, the Special Rapporteur submitted a seventh report, dealing exclusively with succession to State property.³²⁷ 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 this 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.³²⁸ In the same year, in resolution 3315 (XXIX) of 14 December 1974, the General Assembly recommended that the Commission should "proceed with the preparation, on a priority basis, of draft articles on succession of States in respect of matters other than treaties" (sect. I, para. 4 (b), of the resolution).

66. At the present session, at its 1318th to 1329th meetings, the Commission considered draft articles 9 to 15 and X, Y and Z, contained in Mr. Bedjaoui's seventh report. It referred all these provisions to the Drafting Committee with the exception of article 10, relating to

rights in respect of the authority to grant concessions,³²⁹ on which it reserved its position. It wishes to point out, however, that as regards article 10 it considers it unnecessary that the draft articles should affirm the principle of the sovereignty of the successor State over its natural resources, since that principle derives from statehood itself and not from the law of succession of States. Having examined all the provisions referred to it (with the exception, for lack of time, of articles 12 to 15), the 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 sub-paragraph (e) of article 3. At its 1329th meeting, the Commission adopted all the texts submitted by the Committee, subject to a few amendments. These texts are reproduced below in the form agreed by the Commission.³³⁰ One of them, sub-paragraph (e) of article 3, forms part of the introduction to the draft. The others, namely articles 9, 11 and X, belong to section 1 (General provisions) of part I (Succession to State property).

2. GENERAL REMARKS CONCERNING THE DRAFT ARTICLES

(a) *Form of the draft*

67. 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 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 being prepared in a form which would permit its use as a basis for a convention if it were decided that a convention should be concluded.

(b) *The expression "matters other than treaties"*

68. As noted above,³³¹ the expression "matters other than treaties" did not appear in the titles of the three topics into which the question of succession was divided in 1967, namely, (a) succession in respect of treaties; (b) succession in respect of rights and duties resulting from

³²⁴ *Yearbook... 1972*, vol. II, pp. 223 *et seq.*, document A/8710/Rev.1, chap. II, section C.

³²⁵ *Yearbook... 1973*, vol. II, p. 202, document A/9010/Rev.1, para. 87.

³²⁶ 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.*, document A/9010/Rev.1, chap. III, sect. B. For the text of articles 1 to 9, 11 and X adopted by the Commission at its twenty-fifth and twenty-seventh sessions, see Sect. B, 1 below.

³²⁷ *Yearbook... 1974*, vol. II (Part One), p. 91, document A/CN.4/282.

³²⁸ *Yearbook... 1974*, vol. II (Part One), p. 304, document A/9610/Rev.1, para. 160.

³²⁹ Draft article 10 reads as follows:

"Article 10. *Rights in respect of the authority to grant concessions*

"1. For the purposes 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."

³³⁰ See sect. B,2 below.

³³¹ See para. 53 above.

sources other than treaties, and (c) succession in respect of membership of international organizations. In 1968, in a report submitted at the twentieth session of the Commission, 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, apart from the lack of homogeneity, this division of the question had the drawback of excluding from the second topic all matters which 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 these aspects did not come under the first topic either, the Commission would have been obliged, if this title had been retained, to leave a substantial part of the subject-matter aside in its study on State succession.³³²

69. 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".³³³ This proposal was adopted by the Commission, which stated in its report on the work of the twentieth session that:

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", since any such reference might imply that it was intended to divide up the topic by distinguishing between conventional and non-conventional succession.³³⁴

70. Until the study has been completed, the Commission will not be able to indicate precisely what "matters other than treaties" are included in the topic.

(c) *Structure of the draft*

71. At its twentieth session, 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."³³⁵ Accordingly, at its twenty-fifth session, the

Commission expressed the intention, subject to any later decision, to include in the draft articles as many "matters other than treaties" as possible.³³⁶

72. At the present stage of its work, the Commission intends to divide the draft into an introduction and a number of parts. The introduction will contain those provisions which apply to the draft as a whole, while each part will contain those which apply exclusively to one category of specific matters. The Commission moreover decided, in the circumstances outlined above,³³⁷ to devote part I of the draft to succession to State property.

73. As can be seen from paragraphs 64 and 66 above, the Commission has so far in the course of two sessions adopted 11 draft articles, three of which belong to the Introduction and eight to part I of the draft articles. These eight articles fall in section 1, "General provisions", and apply to all types of succession to State property. At the present stage of its work, the Commission intends to devote the other sections of part I to particular types of succession.

74. In the normal course of events, after completing its study of succession to State property in part I, the Commission would have considered succession to the other categories of public property.³³⁸ However, in view of the instructions laid down by the General Assembly in resolution 3315 (XXIX),³³⁹ above, the Special Rapporteur intends, as soon as part I of the draft is complete, to proceed directly to the study of succession to public debts, in all probability confining this to succession to State debts. The Commission will decide later in what order the other questions concerning public property, and the other matters included in the topic are to be considered.

(d) *Provisional nature of the provisions adopted at the twenty-fifth and twenty-seventh sessions*

75. In its report on the work of its twenty-fifth session, the Commission stated that it 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 which might be found necessary.³⁴⁰ At its present session, the Commission extended that decision to the articles adopted during the session.

³³² *Yearbook... 1968*, vol. II, pp. 96-97, document A/CN.4/204, paras. 18-21.

³³³ For the General Assembly's insertion of the words "of States" after the word "Succession" in the title of the topic, see para. 58 above.

³³⁴ *Yearbook... 1968*, vol. II, pp. 216-217, document A/7209/Rev.1, para. 46.

³³⁵ See para. 59 above.

³³⁶ *Yearbook... 1973*, vol. II, p. 202, document A/9010/Rev.1, para. 85.

³³⁷ Paras. 63-64.

³³⁸ *Ibid.*

³³⁹ See para. 65 above.

³⁴⁰ *Yearbook... 1973*, vol. II, p. 202, document A/9010/Rev.1, para. 91.

B. Draft articles on succession of States in respect of matters other than treaties

76. The text of articles 1 to 9, 11 and X adopted by the Commission at its twenty-fifth and twenty-seventh sessions, together with the text of articles 9, 11 and X, article 3, sub-paragraph (e), and commentaries adopted by the Commission at the present session, is reproduced below for the information of the General Assembly.

1. TEXT OF ARTICLES 1 TO 9, 11 AND X ADOPTED BY THE COMMISSION AT ITS TWENTY-FIFTH AND TWENTY-SEVENTH SESSIONS

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, 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.

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 purpose of the article 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 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].

2. TEXT OF ARTICLES 9, 11 AND X, ARTICLE 3, SUB-PARAGRAPH (e), AND COMMENTARIES ADOPTED BY THE COMMISSION AT ITS TWENTY-SEVENTH SESSION

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.

Commentary

(1) Article 8, which was adopted by the Commission in 1973 at its twenty-fifth session, provides that, subject to the reservations set forth therein, the passing of State property from the predecessor State to the successor State takes place without compensation. As the Commission noted in 1973, this article "is not intended to determine what State property passes to the successor State".³⁴¹ It is in order to determine what property does pass to the successor State that the Commission adopted article 9 at the present session. Like the other provisions of section 1 of Part I of the draft, article 9 states a general

* Provisional designation.

³⁴¹ *Yearbook... 1973*, vol. II, p. 208, document A/9010/Rev.1, chap. III, sect. B, para. 1 of the commentary to article 8.

rule applicable to all types of succession. This rule is, however, subject to certain limitations which are specified in the text.

(2) In the first place, the rule is formulated "subject to the provisions of the articles of the present Part". The first exception to this rule is made in article 11 relating to the passing of debts owed to the State.³⁴² Exceptions may also be made in some of the provisions which the Commission will adopt for each particular type of State succession.

(3) In the second place, the residuary nature of the rule stated in article 9 is emphasized by the phrase "unless otherwise agreed or decided". The phrase already appears in another context in articles 7 and 8. With regard to the words "or decided", the Commission included the following paragraph in its commentary to article 7, relating to the date of the passing of State property:

There have ... been cases where an international court has ruled on the question what was the date of the passing of certain State property from the predecessor State to the successor State.²⁷⁶ The Commission therefore added the words "or decided" after the word "agreed" at the beginning of article 7. However, the Commission did not intend to specify from whom a decision might come.³⁴³

²⁷⁶ See, for example, Judgment No. 7 handed down on 25 May 1926 by the Permanent Court of International Justice in the *Case concerning certain German interests in Polish Upper Silesia (P.C.I.J., Series A, No. 7)*, and its Advisory Opinion of 10 September 1923 on certain questions relating to settlers of German origin in the territory ceded by German to Poland (*ibid.*, Series B, No. 6, pp. 6-43).

(4) Finally, article 9 applies only to "State property which, on the date of the succession of States, is situated in the territory to which the succession of States relates". Thus, the Commission decided not to formulate a general rule to determine what State property situated outside that territory passes to the successor State, since the treatment of such property depends, in practice, on the type of succession envisaged.

(5) With regard to State property situated in the territory to which the succession of States relates, article 9 provides that it passes to the successor State. The article makes no distinction between property in the public domain and property in the private domain of the predecessor State and also applies to these two categories of property. Such a distinction has, however, sometimes been made by the writers.

(6) With regard to property in the public domain situated in the territory to which the succession of States relates, it is unanimously agreed by the writers, following settled practice, that it passes to the successor State. In the words of the Permanent Court of International Justice, that is "the principle of the generally accepted law of State succession".³⁴⁴ On the other hand, with regard to property in the private domain of the predecessor State, some writers have maintained that it does not pass to the

successor State. The Commission nevertheless noted that this thesis conflicts with modern practice in State succession and that, in the large majority of cases of succession which have taken place since the Second World War, property in the private domain of the predecessor State has passed to the successor State in the same way as property in its public domain.

(7) Some of the instruments governing recent cases of State succession expressly provide for the passing to the successor State of property in the public and private domains of the predecessor State. Thus, article 2 of the Protocol annexed to the Final Declaration of the International Conference in Tangier, of 29 October 1956, provides that "the Moroccan State ... recovers possession of the public and private domain entrusted to the International Administration by virtue of the Dahir of February 16, 1924".³⁴⁵ By article 1 of the public property Agreement of 10 May 1963, between France and the Islamic Republic of Mauritania, "France confirms the permanent transfer to the Islamic Republic of Mauritania of its rights to all the immovable property forming the public domain and the private domain of the French State".³⁴⁶

(8) In most cases, however, the instruments governing recent cases of State succession provide for the passing of State property to the successor State without making any distinction between the public domain and the private domain. For example, article 1 of the agreement of 24 March 1950 on the settlement of the public property question between the Government of France and the Government of Viet-Nam provides that "all the immovable property forming part of the former domain of the French State in Viet-Nam shall be permanently transferred to the Vietnamese State".³⁴⁷ Article V of the Treaty of Cession of the Territory of the Free Town of Chandernagore of 2 February 1951 provides that

the Government of the French Republic transfers to the Government of the Republic of India all the properties owned by the State and the public bodies lying within the territory of the Free Town of Chandernagore.³⁴⁸

According to article 36 of the Agreement of 22 June 1960 on co-operation in economic, monetary and financial matters between France and the Federation of Mali, "all the public property registered in the name of the French Republic shall be transferred to the Federation of Mali".³⁴⁹ A similar provision is contained in article 1 of the Convention of 13 September 1962 on the public property settlement between the Government of France and the Government of the Republic of Senegal.³⁵⁰ Article 166 of the Constitution of the Federation of Malaya of 1957 provides for the transfer to the successor States of all the property, assets and land of the predeces-

³⁴⁵ United Nations, *Treaty Series*, vol. 263, p. 171.

³⁴⁶ *Journal officiel de la République française, Lois et décrets* (Paris), 31 October 1963, 95th year, No. 256, p. 9708.

³⁴⁷ *Ibid.*, 22 March 1970, 102nd Year No. 69, pp. 2749 et seq.

³⁴⁸ United Nations, *Treaty Series*, vol. 203, p. 158.

³⁴⁹ *Journal officiel de la République française, Lois et décrets* (Paris), 20 July 1960, 92nd Year, No. 167, p. 6637.

³⁵⁰ *Ibid.*, 21 March 1963, 95th year, No. 69, p. 2720.

³⁴² See below, para. 3 of the commentary to article 11.

³⁴³ *Yearbook...* 1973, vol. II, p. 208, document A/9010/Rev.1, chap. III, sect. B, para. 4 of the commentary to article 7.

³⁴⁴ Judgment of 15 December 1933 (The Peter Pázmány University v. The State of Czechoslovakia), *P.C.I.J.*, Series A/B, No. 61, p. 237.

sor State.³⁵¹ Article 57 of the Constitution of Somalia provides that:

Any property (including any rights arising from contract, or otherwise) that immediately before the commencement of this Constitution is vested in Her Britannic Majesty, or in some person or authority on behalf of Her Britannic Majesty, for the purposes of the Government of the Protectorate of Somaliland or is vested in that Government or in some person or authority on behalf of that Government shall, on the commencement of this Constitution, vest in the Council of Ministers, or in such person or authority on behalf of the Council of Ministers as the Council may, by order published in the Gazette, direct.³⁵²

Provisions of the same kind are to be found in section 19 of the Zambia Independence Order of 1964.³⁵³

(9) In the light of recent practice in matters of State succession, the Commission decided that the rule formulated in article 9 should not make any distinction between property in the public domain and property in the private domain of the predecessor State. It is self-evident that the residuary nature of this rule enables predecessor and successor States to make exceptions to it and to agree that property in the private domain of the predecessor State shall not pass to the successor State or shall pass to it only upon payment of compensation.

(10) Article 9 applies to State property, whether movable or immovable, situated in the territory to which the succession relates. The Commission fully recognizes the tenuous nature of the link between movable property and the territory in which it is situated at a given time and, thus, the risk of abuse to which the application of this provision to movable property is exposed. It also noted that the passing of movable property from the predecessor State to the successor State had often been the subject of agreements based on criteria other than that of the situation of such property at the time of the succession of States. The great diversity of these agreements prevented it from drawing from them any general rule to replace the rule in article 9, so far as movable property is concerned. On the other hand, to restrict the scope of this article to immovable property would have left a serious gap in the draft. The Commission therefore agreed on a wording which applies to both movable and immovable property.

[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.]

Commentary

(1) Before examining the rule contained in article 11, the Commission wishes to make the following observa-

³⁵¹ *Materials on Succession of States* (United Nations publication, Sales No. E/F.68.V.5), pp. 85–86.

³⁵² United Kingdom, *Statutory Instruments, 1960*, Part I (London, 1961), p. 1297.

³⁵³ *Ibid.*, 1964, Part III, sect. 1 (London, 1965), pp. 3651–3652.

tions concerning the presentation of the text of the article. In the English version, the words “debts owed” are followed by the French expression *créances dues*, in parentheses, to show that the meaning intended by the Commission for the words “debts owed” is that of the French *créances dues*. The Commission inserted it in parentheses in the English version because there seems to be no exact English equivalent of the French expression. A similar problem arose with regard to the term in the Russian version corresponding to the word *créances* and the Commission therefore inserted the French word in parentheses after the term in question. In all the language versions, the Commission placed the text of the article between square brackets for the reasons indicated below.³⁵⁴

(2) Article 11 states the rule—valid for all types of succession—that subject to the reservations indicated in the text, “the 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”. The rule applies to all debts that might be owed to the predecessor State, for one reason or another, whether or not they were certain or settled at the date of succession. It applies to debts of any kind, irrespective of their origin, irrespective of the debtor (natural or legal persons, national, territorial or foreign) and irrespective of their legal nature (secured or unsecured debts, stocks, shares, public authority bonds, and not excluding taxes). It also applies to debts due which constitute the public resources of the State, such as (a) *State property rights*, comprising income from property belonging to the State (logging in national forests, hunting or fishing rights, etc.), income from State shareholdings in private enterprises, and income from industrial and commercial operations (State monopolies, public utilities); (b) *administrative fees* or remuneration for services rendered; and, especially (c) *taxes*, which are the supreme expression of sovereignty in that they are levied by the use of authority.

(3) Debts owed to the predecessor State constitute State property within the meaning of that term in article 5. Consequently, in the absence of a separate provision concerning such debts, they would be covered by the rule in article 9 that “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”. The Commission felt, however, that the criterion of the physical situation of State property set forth in article 9 could scarcely be applied in most cases of debts owed to the State. It therefore decided to apply to the passing of debts owed to the State the separate rule contained in the provision of article 11 cited in the preceding paragraph and under which for a debt owed to the State to pass to the successor State it is necessary—and sufficient—that at least one of the following two conditions should be satisfied: (a) that the debt should be owed to the predecessor State by virtue of its sovereignty over the territory to which the succession of States relates, or (b) that it should be owed by virtue of the activity of the predecessor State in such territory. Obviously, only the

³⁵⁴ See paras. 10 and 11.

second condition can apply in any case in which the predecessor State had no sovereignty over the territory to which the succession of States relates and in particular in certain situations concerning dependent territories.

(4) The rule contained in article 11 reflects the decisions of the courts of a number of successor States. In 1864, for example, the French *Cour de Cassation* held that the fact that Savoy had been annexed to France did not release a petitioner from registration taxes which he owed to the predecessor State under Sardinian law.³⁵⁵

(5) In a series of decisions after the First World War, the Supreme Administrative Court of Czechoslovakia found that it was as a consequence of its own territorial sovereignty that the Czechoslovak State had collected all rates and taxes payable on Czechoslovak territory but not yet paid on the date of the State's coming into existence on 28 October 1918, and that the Czechoslovak State was entitled not to recognize the payments which had been made to foreign authorities after that date. An appellant had unsuccessfully contended that the Czechoslovak State was not entitled to collect a fee to which a claim of the former Austrian State had arisen prior to 28 October 1918 and which had been paid to the Austrian authorities in Vienna on 29 November 1918. The court held that as from 28 October 1918 the right to collect taxes in Czechoslovakia, *including taxes due before that day*, belonged only to the Czechoslovak State.³⁵⁶

(6) In a case concerning the estate of a private person (*Heirs of Dietl*), the Supreme Court of Poland held that the successor State (Poland) had acquired a claim to a debt owed to the predecessor State (Russia) and resulting from a deed executed in 1889, by which the decedent undertook to erect a school in the territory to which the succession of States related.³⁵⁷ In another case it held that the debt owed to the predecessor State by a city situated in the territory in question had also passed to the successor State.³⁵⁸

(7) The principles which appear from these decisions may be supported by the provisions of several agreements concluded between predecessor and successor States after the Second World War. Thus, with regard to the succession of India and Pakistan to the United Kingdom, the agreements between India and Pakistan of December 1947³⁵⁹ provided that each of the successor States retained the revenue from taxes collected after 14 August 1947 on their respective territories. In connexion with the succession of India to the French territories of the subcontinent, the agreement between France and India of 21 October 1954 stated that "on the date of the *de facto* transfer, local public accounts shall be closed in the Establishments Treasurer and Paymaster's Books" and that "the Govern-

ment of India shall take the place of the French Government in respect of all credits . . .".³⁶⁰

(8) It is true that in at least one case, that of the transfer of Alsace-Lorraine to Germany in 1871, the predecessor and successor States made a distinction, by way of an agreement, between private debts owed to the Treasury and debts owed in connexion with taxes.³⁶¹ Protocol No. 1 of the Frankfurt Conferences, of 6 July 1871, states:

There are some debt-claims which, being essentially private and to some extent personal, are totally distinct from those which the change of sovereignty carries with it. This is so, for instance, in the case of funds advanced to French industrialists established in the ceded territories.³⁶²

It was accordingly laid down, in article VIII of the Final Protocol to the Additional Agreement of 11 December 1871, that

The German Empire shall allow the French Treasury every facility for the recovery of any debts, secured or unsecured, the repayment of which it may have occasion to claim against debtors domiciled in the ceded territories under instruments or titles prior to the Treaty of Peace and which are not connected with ordinary taxes or other levies.³⁶³

However, the distinction drawn between taxes and other debts owed to the State does not seem to have constituted a precedent and is no doubt attributable to the special circumstances under which the claims arose.

(9) As in the case of article 9 and for the same reasons, the rule stated in article 11 is subject to the exceptions set out in the opening phrase of the article, namely, "Subject to the provisions of the articles of the present Part and unless otherwise agreed or decided". On that point the Commission refers to its observations in connexion with article 9.³⁶⁴

(10) During the preparation of article 11 by the Commission, several members expressed reservations concerning the text. It was observed, first, that the question of the passing of debts owed to the State was not relevant to the topic of State property, which was the subject-matter of the part of the draft in which article 11 appears. It was also argued that, with regard to taxes owed to the predecessor State, that State could no longer collect them after the date of the succession of States since it no longer exercised any authority over the territory to which the succession related. As for the successor State, it collected taxes in that territory by virtue of its own sovereignty and not of the succession of States. Other members criticized the word "pass" in the clause "the debts owed to the predecessor State . . . shall pass to the successor State". They considered the word too vague to effect a real trans-

³⁵⁵ France, *Cour de Cassation*, Civil Chamber, Judgement of 30 August 1864, Barjaud v. Registry (M. Dalloz, *Jurisprudence générale : Recueil périodique et critique de jurisprudence, de législation et de doctrine*, part one (Paris, Bureau de jurisprudence générale, 1864), p. 351.

³⁵⁶ *Yearbook . . . 1963*, vol. II, pp. 134-135, document A/CN.4/157, para. 354.

³⁵⁷ *Ibid.*, p. 132, para. 333.

³⁵⁸ *Ibid.*, p. 133, para. 336.

³⁵⁹ See *Keesing's Contemporary Archives, 1946-1948* (Bristol), vol. VI, p. 9066.

³⁶⁰ *India, Foreign Policy of India: Texts of Documents, 1947-64* (New Delhi, Lok Sabha (Secretariat), 1966), p. 212.

³⁶¹ See Preliminaries to Peace of 26 February 1871 (M. de Clercq, *Recueil des traités de la France* (Paris, Durand, 1880), vol. X, p. 430), Treaty of Peace of 10 May 1871 (*ibid.*, p. 472), Additional Agreement to the Treaty of Peace of 11 December 1871 (*ibid.*, p. 531), Protocol No. 1 of the Frankfurt Conferences, Conference of 6 July 1871 (*ibid.*, p. 503).

³⁶² *Ibid.*, p. 507.

³⁶³ *Ibid.*, p. 541.

³⁶⁴ See above, paras. 2 and 3 of the commentary to article 9.

fer of the debts in question. Lastly, it was noted that, although the rule stated in article 11 was a residuary rule, the very existence of such a rule would make it more difficult for a predecessor State and a successor State to negotiate an agreement concerning the passing of debts owed to the State that was based on other principles.

(11) In view of these reservations and in order to draw attention to the questions they raised, the Commission decided to place article 11 between square brackets.

Article X.* *Absence of effect of a succession of States on third 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 [for the successor State as the case may be].

Commentary

(1) The rule formulated in article X stems from the fact that a succession of States, that is the replacement of one State by another in the responsibility for the international relations of territory, can have no legal effect with respect to the property of a third State. Before giving its comments on this article, the Commission wishes to point out that the article has been placed in part I of the draft, which is concerned exclusively with succession to State property. Consequently, no argument *a contrario* can be drawn from the absence in article X of any reference to private property, rights and interests.

(2) As emphasized by the words "as such" appearing after the words "a succession of States shall not", article X deals solely with succession of States. It in no way prejudices any measures that the successor State, as a sovereign State, might adopt subsequently to the succession of States with respect to the property of a third State, in conformity with the rules of other branches of international law.

(3) The words "property, rights and interests" have been borrowed from article 5, where they form part of the definition of the term "State property". In article X, they are followed by the qualifying clause "which, on the date of the succession of States, are situated in the territory [of the predecessor State or] of the successor State". The Commission regarded it as obvious that a succession of States could have no effect on the property, rights and interests of a third State situated outside the territories affected by the succession, and that the scope of article X should therefore be limited to such territories. Some members took the view that, in this context, the only territory affected by the succession is that of the successor State and, consequently, that only this territory should be mentioned in article X. Others took the opposing view that difficulties might arise in certain circumstances as regards the property of a third State situated in the territory of the predecessor State. They cited the case of depo-

sits made by a third State with a regional bank which the latter then transferred to a central bank. If the territory in which the regional bank is situated subsequently becomes independent, the deposits in question will be situated in the territory of the predecessor State. In the view of these members, the territory of the predecessor State should therefore be mentioned expressly in article X. Faced with this difference of views, the Commission decided to place the words "of the predecessor State or" in square brackets.

(4) The words "according to the internal law of the predecessor State" are also borrowed from article 5. They formed the subject of the following observations, which the Commission wishes to repeat in the context of article X.

In article 5, the expression "internal law of the predecessor State" refers to rules of the legal order of the predecessor State which are applicable to State property. For States whose legislation is not unified, these rules include, in particular, those which determine the specific law of the predecessor State—national, federal, metropolitan or territorial—that applies to each piece of its State property.³⁶⁵

(5) In article X, the words "according to the internal law of the predecessor State" are followed by the words "or the successor State as the case may be" in square brackets. Some members of the Commission maintained that the internal law of the successor State could be applicable in determining the property, rights and interests which belonged to a third State. Others pointed out that, since the property, rights and interests of the third State existed before the date of the succession of States, only the law of the predecessor State should be taken into account in determining their ownership. Since agreement was not forthcoming on this point, the Commission has placed the words in question in square brackets.

Article 3. *Use of terms*

[For the purposes of the present articles:

...]

(e) "third State" means any State other than the predecessor State or successor State.

Commentary

The expression "third State" does not appear in article 2, "Use of terms", of the draft articles on succession of States in respect of treaties, adopted by the Commission in 1974. The commentary to that article explains that the expression "third State" is not available for use in a draft text on succession of States in respect of treaties, since it has already been made a technical term in the Vienna Convention on the Law of Treaties to denote "a State not a party to the treaty".³⁶⁶ As regards the draft articles on succession of States in respect of matters other than treaties, however, the Commission took the view that the expression "third State" was the simplest and clearest way of designating any State other than the predecessor State or the successor State.

³⁶⁵ *Yearbook...* 1973, vol. II, p. 206, document A/9010/Rev.1, chap. III, sect. B, para. 11 of the commentary to article 5.

³⁶⁶ *Yearbook...* 1974, vol. II (Part One), pp. 176-177, document A/9610/Rev.1, chap. II, sect. D, para. 12 of the commentary to article 2.

* Provisional designation.

Chapter IV

THE MOST-FAVOURED-NATION CLAUSE

A. Introduction

1. SUMMARY OF THE COMMISSION'S PROCEEDINGS

77. 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.³⁶⁷ 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 these clauses were in any way touched by the articles in question and for that reason 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 think it advisable to deal with them in the codification of the general law of treaties, although it felt that they might at some future time appropriately form the subject of a special study.³⁶⁸ The Commission maintained this position at its eighteenth session, in 1966.³⁶⁹

78. At its nineteenth session, in 1967, the Commission noted that several representatives in the Sixth Committee at the twenty-first session of the General Assembly had urged that it 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.³⁷⁰

79. 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.³⁷¹ The Special Rapporteur also submitted a questionnaire listing points on which he specifically asked the members of the Com-

mission to express their opinion. The Commission, while recognizing the fundamental importance of the role of the most-favoured-nation clause in the domain of international trade, instructed the Special Rapporteur not to confine his studies to that area but to explore the major fields of application of the clause. The Commission considered that it should focus on the legal character of the clause and 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 fields outside its functions. In the light of these considerations, the Commission further instructed the Special Rapporteur to consult, through the Secretariat, all organizations and interested agencies which might have particular experience in the application of the most-favoured-nation clause.

80. The Commission decided at the same session to shorten the title of the topic to "The most-favoured-nation clause".³⁷²

81. By 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.

82. At the twenty-first session of the Commission, in 1969, the Special Rapporteur submitted his first report,³⁷³ 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.³⁷⁴

83. Following the instructions of the Commission, the Special Rapporteur submitted his second report³⁷⁵ at the Commission's twenty-second session, in 1970. In part I of this 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 Company Case (jurisdiction)* [1952],³⁷⁶ the *Case concerning the rights of*

³⁶⁷ *Yearbook...* 1964, vol. I, p. 184, 752nd meeting, para. 2.

³⁶⁸ *Yearbook...* 1964, vol. II, p. 176, document A/5809, para. 21.

³⁶⁹ *Yearbook...* 1966, vol. II, p. 177, document A/6309/Rev.1, part II, para. 32.

³⁷⁰ *Yearbook...* 1967, vol. II, p. 369, document A/6709/Rev.1, para. 48.

³⁷¹ *Yearbook...* 1968, vol. II, p. 165, document A/CN.4/L.127.

³⁷² *Ibid.*, vol. I, p. 250, 987th meeting, paras. 7-12.

³⁷³ *Yearbook...* 1969, vol. II, p. 157, document A/CN.4/213.

³⁷⁴ *Yearbook...* 1969, p. 234, document A/7610/Rev.1, para. 89.

³⁷⁵ *Yearbook...* 1970, vol. II, p. 199, document A/CN.4/228 and Add.1.

³⁷⁶ *I.C.J. Reports 1952*, p. 93.

nationals of the United States of America in Morocco (Judgment) [1952]³⁷⁷ and the *Ambatielos Case (merits: obligation to arbitrate)* [1953].³⁷⁸ 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.³⁷⁹

84. 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 the circular letter of the Secretary-General dated 23 January 1969. In this letter the organizations and agencies concerned were requested to submit, for transmittal to the Special Rapporteur, all the information derived from their experience which 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 were particularly requested to draw attention to any relevant bilateral or multilateral treaty, statement, practice or fact and to give their views as to the existing rules which could be discerned in respect of the clause. A number of international organizations and interested agencies gave a detailed answer to the circular letter and those answers served as a basis for part II of the Special Rapporteur's second report.

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

86. At its twenty-third session, however, the Commission, on 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".³⁸⁰

87. At the twenty-fourth session of the Commission in 1972, the Special Rapporteur submitted his third report,³⁸¹ containing a set of five draft 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).

88. 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.

³⁷⁷ *Ibid.*, p. 176.

³⁷⁸ *I.C.J. Reports 1953*, p. 10.

³⁷⁹ United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), p. 91.

³⁸⁰ *Yearbook... 1971*, vol. II (Part One), p. 347, document A/8410/Rev.1, para. 113.

³⁸¹ *Yearbook... 1972*, vol. II, p. 161, document A/CN.4/257 and Add.1.

89. At that session, however, at the suggestion of the Special Rapporteur, the Commission requested the Secretariat to undertake research on the most-favoured-nation clauses included in the treaties published in the United Nations *Treaty Series* which would survey the fields 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.³⁸²

90. At the twenty-fifth session of the Commission in 1973, the Special Rapporteur submitted his fourth report³⁸³ containing three more draft articles, with commentaries, dealing with the presumption of unconditional character of the clause (article 6), the *ejusdem generis* rule (article 7) and the acquired rights of the beneficiary State (article 8).

91. Also at the twenty-fifth session the Commission considered the Special Rapporteur's third report, at its 1214th to 1218th meetings, and referred draft 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.

92. The Commission, in its report on the work of the twenty-fifth session, reproduced for the information of the General Assembly the text of those draft articles and the commentaries thereto as adopted by the Commission. In doing so, it drew the attention of the Assembly to the fact that the adoption of the seven draft articles constituted only the initial stage of its work in the preparation of draft articles on the topic. Thus the Commission, as has been its usual practice, adopted an article on the use of terms only on a provisional basis. The final decision on such an article could not, in the Commission's view, be taken until the substantive articles contained in a full set of draft articles had been considered by the Commission.³⁸⁴

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

94. At the twenty-sixth session of the Commission, in 1974, the Special Rapporteur submitted his fifth report,³⁸⁵ containing thirteen additional draft 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*); the observance of the laws and regulations of the granting State (article 6 *quater*); the scope of the most-favoured-nation clause regarding per-

³⁸² *Yearbook... 1972*, vol. II, p. 324, document A/8710/Rev.1, para. 75.

³⁸³ *Yearbook... 1973*, vol. II, p. 97, document A/CN.4/266.

³⁸⁴ *Yearbook... 1973*, vol. II, p. 211, document A/9010/Rev.1, paras. 107-108.

³⁸⁵ *Yearbook... 1974*, vol. II (Part One), p. 117, document A/CN.4/280.

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

95. The Commission was unable to resume consideration of the topic at its twenty-sixth session since it had to devote most of the 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 a first set of draft articles on State responsibility.

96. At the present session, the Special Rapporteur submitted his sixth report (A/CN.4/286³⁸⁶), containing proposals concerning some of the draft articles on the most-favoured-nation clause adopted by the Commission at its twenty-fifth session as well as the draft articles presented by him in his two previous reports, with additional 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 States' economic development.

97. The Commission considered the fourth, fifth and sixth reports submitted by the Special Rapporteur at its 1330th to 1343rd meetings and referred draft 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 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 (A/CN.4/228/Rev.1).³⁸⁷ At its 1352nd and 1353rd meetings, the Commission considered the report of the Drafting Committee and adopted on first reading articles 8 to 21.

98. The text of all the draft articles on the most-favoured-nation clause adopted thus far by the Commission, and also the text of articles 8 to 21 and the commentaries thereto as adopted at the present session, are reproduced below for the information of the General Assembly.³⁸⁸

99. At the twenty-fifth session of the Commission, in 1973, the Special Rapporteur indicated to the Commission the problems with which he intended to deal in the draft articles to be proposed by him in future reports.³⁸⁹ Of the problems listed on that occasion the question remains to be examined by the Special Rapporteur

whether and to what extent the beneficiary State has a right to be informed of the advantages or benefits accorded by the granting State to a third State which related to the most-favoured-nation clause in force between the granting State and the beneficiary State. He also indicated that the question of the succession of States in respect of most-favoured-nation clauses might be dealt with in the future.

100. Also at the twenty-fifth session, the Secretariat distributed the document, entitled "Digest of decisions of national courts relating to the most-favoured-nation clause"³⁹⁰ prepared in accordance with the Commission's request.³⁹¹

2. SCOPE OF THE DRAFT ARTICLES

101. 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.³⁹² The Commission felt 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 it recognized that there was a particular interest in taking up this study because of the attention devoted to the clause as a device frequently used in economic fields, it understood its task as being to deal with the clause as an aspect of the law of treaties.³⁹³ When it first discussed the question on the basis of the preparatory work of the Special Rapporteur in 1968, the Commission 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.³⁹⁴

102. The Commission maintains the position which 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" does 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 remains the same: while recognizing the fundamental importance of the role of the most-favoured-nation clause in the domain of international trade, it does not wish to confine its study to the operation of the clause in this field but to extend the study to the operation of the clause in as many fields as possible.

103. On the other hand, while it is not the Commission's intention to deal with matters not included in its functions, it wishes to take into consideration all modern developments which may have a bearing upon the codification or progressive development of rules pertaining to the operation of the clause. In this connexion, the Commission has 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

³⁸⁶ See p. 1 above.

³⁸⁷ For text, see *Yearbook... 1975*, vol. I, 1342nd meeting, para. 1.

³⁸⁸ See section B of the present chapter.

³⁸⁹ *Yearbook... 1973*, vol. II, p. 211, document A/9010/Rev.1, para. 110. See also *Yearbook... 1973*, vol. I, p. 80, 1217th meeting, para. 76.

³⁹⁰ *Yearbook... 1973*, vol. II, p. 117, document A/CN.4/269, referred to hereafter as "Secretariat Digest".

³⁹¹ See para. 86 above.

³⁹² See para. 77 above.

³⁹³ See para. 78 above.

³⁹⁴ See para. 79 above.

clause in the field of economic relations can be given expression in legal rules.³⁹⁵

104. The Commission also limited the scope of the present draft articles by the introduction of articles 1 and 3; the reasons for this are given in the commentaries to those articles.³⁹⁶

3. THE MOST-FAVOURLED-NATION CLAUSE AND THE NATIONAL TREATMENT CLAUSE

105. At the twenty-fifth session of the Commission in 1973 the Special Rapporteur, in reply to a request from the Rapporteur of the Commission that he indicate to the Commission those problems with which he proposed to deal in future draft articles, expressed his intention to consider, *inter alia*, the interaction between the operation of most-favoured-nation clauses and national treatment clauses, particularly the attraction by most-favoured-nation clauses of benefits obtained under the latter.³⁹⁷

106. In his fifth report, the Special Rapporteur proposed several draft articles dealing with national treatment and the national treatment clause (articles 9 *et seq.*).³⁹⁸ He deemed it appropriate to do so having in mind the close relationship which exists between a most-favoured-nation clause and a national treatment clause, the fact that both clauses often appear in treaties side by side and sometimes in combination and in order to be able to deal with important questions arising from the cumulation of the two.³⁹⁹

107. In his sixth report (A/CN.4/286),⁴⁰⁰ the Special Rapporteur reaffirmed his belief that the draft cannot without the risk of incompleteness avoid dealing with the national treatment clause and national treatment in parallel to the study of the most-favoured-nation clause and most-favoured-nation treatment. Consequently, he proposed mentioning explicitly both the most-favoured-nation clause and the national treatment clause in the articles applicable to the two clauses (*ibid.*, paras. 2-4).

108. At the present session, the Commission considered at its 1330th and 1336th meetings the question whether or not the draft should also deal with national treatment clauses and national treatment, particularly in connexion with draft articles 9 and 10 proposed by the Special Rapporteur, which indicate the meaning to be attributed to those terms for the purposes of the draft. After a general discussion in which divergent views were expressed, the Commission agreed to concentrate its work at the present session on formulating draft rules concerning specifically most-favoured-nation clauses and most-favoured-nation treatment. Nevertheless, the Commission adopted two articles dealing respectively with the right to national treatment under a most-favoured-nation clause (article 16) and most-favoured-nation treat-

ment and national (or other) treatment with respect to the same subject-matter (article 17).⁴⁰¹ The General Assembly may wish to pronounce on the question whether the draft being prepared should extend further in relation to national treatment and national treatment clauses.

4. THE MOST-FAVOURLED-NATION CLAUSE AND THE PRINCIPLE OF NON-DISCRIMINATION

109. 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.

110. The Commission recognized several years ago that the rule of non-discrimination "is a general rule which follows from the equality of States"⁴⁰² and that non-discrimination is "a general rule inherent in the sovereign equality of States".⁴⁰³ The General Assembly, by 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...

111. 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".⁴⁰⁴

112. 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 Relations⁴⁰⁵ and on Consular Relations.⁴⁰⁶ Both 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.⁴⁰⁷

⁴⁰¹ See below, sect. B of the present chapter.

⁴⁰² *Yearbook... 1958*, vol. II, p. 105, document A/3859, chap. III, sect. II, para. 1 of the commentary to article 44.

⁴⁰³ *Yearbook... 1961*, vol. II, p. 128, document A/4843, chap. II, sect. IV, para. 1 of the commentary to article 70.

⁴⁰⁴ *Case concerning Rights of Nationals of the United States of America in Morocco (Judgment) (I.C.J. Reports 1952, p. 192).*

⁴⁰⁵ United Nations, *Treaty Series*, vol. 500, p. 95.

⁴⁰⁶ *Ibid.*, vol. 596, p. 261.

⁴⁰⁷ Article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations.

³⁹⁵ See below, paras. 113 *et seq.* and the commentary to article 21.

³⁹⁶ See *Yearbook... 1973*, vol. II, pp. 213 and 214-215 document, A/9010/Rev.1, chap. IV, sect. B.

³⁹⁷ *Ibid.*, p. 49, para. 110 (*ibid.*, p. 211, document A/9010/Rev.1, para. 110).

³⁹⁸ See para. 94 above.

³⁹⁹ See *Yearbook... 1974*, vol. II (Part One), p. 124, document A/CN.4/280, para. 1 of the commentary to articles 9 and 10.

⁴⁰⁰ See p. 1 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 which 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, provided that the State concerned has itself received the general non-discriminatory treatment on a par with other States. The claim to be assimilated to a State which is placed in a favoured position can only be raised 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.

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

113. 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 field 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") states, *inter alia*:

To apply the most-favoured-nation clause to all countries regardless of their level of development would satisfy the conditions of formal equality, but would in fact involve implicit discrimination against the weaker members of the international community. This is not to reject on a permanent basis the most-favoured-nation clause ... The recognition of the trade and development needs of developing countries requires that for a certain period of time the most-favoured-nation clause will not apply to certain types of international trade relations.⁴⁰⁸

114. The Commission also noted that General Principle Eight of annex A.I.1. of the recommendations adopted by UNCTAD at its first session states, *inter alia*:

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

⁴⁰⁸ See *Yearbook... 1970*, vol. II, p. 231, document A/CN.4/228 and Add.1, para. 188.

One member of the Commission mentioned 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."³

³ Aristotle, *Nicomachean Ethics*, V, iii, 6." (*Yearbook ... 1968*, vol. I, p. 186, 976th meeting, para. 6).

ences should not be extended to developed countries. Developing countries need not extend to developed countries preferential treatment in operation amongst them.⁴⁰⁹

115. 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 fields outside its functions and was not in a position to deal with economic matters and suggest rules for the organization of international trade. Nevertheless, it recognized that the operation of the clause in the sphere of economic relations with particular reference to the developing countries posed serious problems, some of which related to the Commission's work on the topic. The Commission began to examine,⁴¹⁰ on the basis of the Special Rapporteur's sixth report, the question of exceptions to the operation of the clause; it recognizes the importance of the question and intends to revert to it in the course of its future work.

6. THE GENERAL CHARACTER OF THE DRAFT ARTICLES

116. The articles on the most-favoured-nation clause are designed to be supplementary to the Vienna Convention on the Law of Treaties.⁴¹¹ The Commission considers that that Convention is today the most authoritative statement of the general law of treaties. Accordingly the draft articles on the most-favoured-nation clause presuppose the existence of the provisions of that Convention and are conceived as supplementary to the Vienna Convention "as an essential framework". The general rules pertaining to treaties having been stated in the Vienna Convention, the draft articles contain particular rules applicable to a certain type of treaty provisions, namely to most-favoured-nation clauses.

117. As the Commission stated at its twenty-fifth session, in 1973:

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".

Expressed in other words: "speaking strictly, there is no such thing as *the* most-favoured-nation clause: every treaty requires independent examination".⁴¹²

Hence, the draft articles are in general without prejudice to the provisions which the parties may agree to in the treaty containing the clause or otherwise. This residual

⁴⁰⁹ 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.

⁴¹⁰ See below, commentary to article 21.

⁴¹¹ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289. The Convention will be referred to hereafter as "the Vienna Convention".

⁴¹² *Yearbook... 1973*, vol. II, p. 217, document A/9010/Rev.1, chap. IV, sect. B, para. 13 of the commentary to article 4.

character can be emphasized by introducing in each individual article, as appropriate, an opening clause such as that included in brackets at the beginning of draft article 16: "Unless the treaty otherwise provides or it is otherwise agreed"⁴¹³ It can also be expressly recognized in an article of general application to all those provisions which are of the same nature. The Commission expects at its next session to take a decision on one of the two alternative approaches just outlined.

118. The Commission is 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. The Commission, however, confined itself to the field 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.

B. Draft articles on the most-favoured-nation clause

119. The text of articles 1 to 21 as adopted by the Commission at the twenty-fifth session and at the present session and the text of articles 8 to 21 and the commentaries thereto as adopted by the Commission at the present session are reproduced below for the information of the General Assembly.

1. TEXT OF ARTICLES 1 TO 21 AS ADOPTED BY THE COMMISSION AT ITS TWENTY-FIFTH AND TWENTY-SEVENTH SESSIONS

Article 1. Scope of the present articles

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

Article 2. Use of terms

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 grants most-favoured-nation treatment;

(c) "beneficiary State" means a State which has been granted most-favoured-nation treatment;

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

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

The fact that the present articles do not apply (1) to a clause on most-favoured-nation treatment contained in an international agreement between States not in written form, or (2) to a clause contained in an international agreement by which a State undertakes to accord to a subject of international law other than a State treatment not less favourable than that accorded to any subject of international law, or (3) to a clause contained in an international agreement by which a

subject of international law other than a State undertakes to accord most-favoured-nation treatment to a State, shall not affect:

(a) The legal effect of any such clause;

(b) 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;

(c) The application of the provisions of the present 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.

Article 4. Most-favoured-nation clause

"Most-favoured-nation clause" means a treaty provision whereby a State undertakes to accord most-favoured-nation treatment to another State in an agreed sphere of relations.

Article 5. Most-favoured-nation treatment

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

Article 6. 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 ground of a legal obligation.

Article 7. The source and scope of most-favoured-nation treatment

The right of the beneficiary State to obtain from the granting State treatment extended by the latter to a third State or to persons or things in a determined relationship with a third State arises from the most-favoured-nation clause in force between the granting State and the beneficiary State.

The treatment to which the beneficiary State is entitled under that clause is determined by the treatment extended by the granting State to the third State or to persons or things in the determined relationship with the latter State.

Article 8. Unconditionality of most-favoured-nation clauses

A most-favoured-nation clause in a treaty is unconditional unless that treaty otherwise provides or the parties otherwise agree.

Article 9. Effect of an unconditional most-favoured-nation clause

If a most-favoured-nation clause is not made subject to conditions, the beneficiary State acquires the right to most-favoured-nation treatment without the obligation to accord material reciprocity to the granting State.

Article 10. Effect of a most-favoured-nation clause conditional on material reciprocity

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

Article 11. Scope of rights under a most-favoured-nation clause

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

⁴¹³ See below, para. 9 of the commentary to article 16.

2. The beneficiary State is entitled to the rights under paragraph 1 only in respect of those categories of persons or things which are specified in the clause or implied from the subject-matter of that clause.

Article 12. Entitlement to rights under a most-favoured-nation clause

1. The beneficiary State is entitled to the rights under article 11 for itself only if the granting State extends to a third State treatment which is within the field of the subject-matter of the most-favoured-nation clause.

2. The beneficiary State is entitled to the rights in respect of persons or things within categories under paragraph 2 of article 11 only if they (a) belong to the same category of persons or things as those which benefit from the treatment extended by the granting State to a third State and (b) have the same relationship with the beneficiary State as those persons or things have with that third State.

Article 13. Irrelevance of the fact that treatment is extended gratuitously or against compensation

The beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, acquires under a most-favoured-nation clause the right to most-favoured-nation treatment independently of whether 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 gratuitously or against compensation.

Article 14. Irrelevance of restrictions agreed between the granting and third States

The beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended under an agreement limiting its application to relations between the granting and third States.

Article 15. Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement

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.

Article 16. Right to national treatment under a most-favoured-nation clause

[Unless the treaty otherwise provides or it is otherwise agreed,] 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.

Article 17. Most-favoured-nation treatment, national [or other] treatment with respect to the same subject-matter

If a granting State has undertaken by treaty to accord to a beneficiary State most-favoured-nation treatment and national [or other] treatment with respect to the same subject-matter, the beneficiary State shall be entitled to whichever treatment it prefers in any particular case.

Article 18. Commencement of enjoyment of rights under a most-favoured-nation clause

1. The right of the beneficiary State to any treatment under a most-favoured-nation clause not made subject to the condition of material reciprocity arises at the time when the relevant treatment is extended by the granting State to a third State.

2. The right of the beneficiary State to any treatment under a most-favoured-nation clause made subject to the condition of material reciprocity arises at the time of the communication by the beneficiary State to the granting State of its consent to extend material reciprocity in respect of the treatment in question.

Article 19. Termination or suspension of enjoyment of rights under a most-favoured-nation clause

1. The right of the beneficiary State to any treatment under a most-favoured-nation clause is terminated or suspended at the time when the extension of the relevant treatment by the granting State is terminated or suspended.

2. The right of the beneficiary State to any treatment under a most-favoured-nation clause made subject to the condition of material reciprocity is also terminated or suspended at the time when the termination or suspension of the material reciprocity in question is communicated by the beneficiary State to the granting State.

Article 20. The exercise of rights arising under a most-favoured-nation clause and compliance with the laws of the granting State

The exercise of rights arising under a most-favoured-nation clause for the beneficiary State and for persons or things in a determined relationship with that State is subject to compliance with the relevant laws of the granting State. Those laws, however, shall not be applied in such a manner that the treatment of the beneficiary State and 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 21. Most-favoured-nation clauses in relation to treatment under a generalized system of preferences⁴¹⁴

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.

2. TEXT OF DRAFT ARTICLES 8 TO 21 AND COMMENTARIES THERETO AS ADOPTED BY THE COMMISSION AT ITS TWENTY-SEVENTH SESSION

Article 8. Unconditionality of most-favoured-nation clauses

A most-favoured-nation clause in a treaty is unconditional unless that treaty otherwise provides or the parties otherwise agree.

Article 9. Effect of an unconditional most-favoured-nation clause

If a most-favoured-nation clause is not made subject to conditions, the beneficiary State acquires the right to most-favoured-nation treatment without the obligation to accord material reciprocity to the granting State.

Article 10. Effect of a most-favoured-nation clause conditional on material reciprocity

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

⁴¹⁴ The Commission provisionally adopted the present text for article 21 subject to further consideration and possible improvement in first reading in the course of next year's session.

Commentary to articles 8, 9 and 10

The conditional form and the conditional interpretation

(1) For the explanation of the necessity of a provision like that stated in article 8, reference has to be made to the history of the so-called "conditional" most-favoured-nation clauses 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 this treaty read as follows:

The Most Christian King and the United States engage mutually not to grant any particular favor to other nations, in respect of commerce and navigation, which shall not immediately become common to the other Party, who shall enjoy the same favor, freely, if the concession was freely made, or on allowing the same compensation, if the concession was conditional.⁴¹⁵

It is 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 peculiarly suited the political and economic interests of the United States for a long period.⁴¹⁶

(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.⁴¹⁷

(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 Department of State in 1940:

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

reciprocal concessions; it is obligated to extend such advantages only if and when the other party grants concessions "equivalent" to the concessions made by such third countries...⁴¹⁸

(5) The conditional form of the clause was dominant also 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.⁴¹⁹ The conditional form was virtually abandoned with the conclusion of the treaty of commerce between Great Britain and France of 23 January 1860, often called the Cobden treaty or Chevalier-Cobden treaty after the main English negotiator, Richard Cobden, a passionate advocate of free trade and *laissez-faire*, and his counterpart, Michel Chevalier, the economic adviser to Napoleon III.⁴²⁰ In this treaty England and France reduced their tariffs substantially, abolished import prohibitions and granted each other unconditionally the status of a most favoured 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.⁴²¹

(7) The conditional clause served the purposes of the United States so long as it was a net importer and its primary aim was to protect a growing industrial system. When the position of the United States in the world economy changed after the First World War, the conditional clause was inadequate. The essential condition for successful penetration of international markets, that is, the elimination of discrimination against American products, could only be achieved through the unconditional clause.⁴²²

(8) The departure of the United States from the practice of employing the conditional type of the most-favoured-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,

⁴¹⁸ United States of America, Department of State, *Bulletin No. 58* of 3 August 1940, quoted in M. Whiteman, *Digest of International Law*, vol. 14 (Washington, U.S. Government Printing Office, 1970), p. 751.

⁴¹⁹ 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, IInd series, vol. IV (1902), pp. 66, 159 and 270. Quoted by R.C. Snyder, *The Most-Favoured-Nation Clause: An Analysis with Particular Reference to Recent Treaty Practice and Tariffs* (New York, King's Crown Press, Columbia University, 1948), p. 41.

⁴²⁰ *British and Foreign State Papers, 1859-1860*, vol. 50 (London, Ridgway, 1867), p. 13.

⁴²¹ A. Nussbaum, *A Concise History of the Law of Nations*, rev. ed., (New York, MacMillan, 1954), p. 202.

⁴²² Snyder, *op. cit.*, p. 243; and E.T. Usenko, chapter on commercial treaties in State Institute of Law of the Soviet Academy of Sciences [F.I. Kozhevnikov et al eds.] *Kurs mezhdunarodnogo prava*, vol. IV (Moscow, Nauka, 1968), p. 251.

⁴²³ Quoted by Hyde, *op. cit.*, p. 1506, foot-note 13.

⁴¹⁵ W.M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909* (Washington, D.C., U.S. Government Printing Office, 1910) vol. I, p. 468.

⁴¹⁶ 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.

⁴¹⁷ 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.

and, if it is persisted in, will continue to occasion frequent controversies between the United States and European countries.⁴²³

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

While we were persevering in the following of the policy of conditional most-favored-nation treatment, the leading commercial countries of Europe, and in fact most of the countries of the world, adopted and pursued the policy of unconditional most-favored-nation treatment: Each concession which one country made to another became generalized in favor of all countries to which the country making the concession was obligated by treaty to extend most-favored-nation treatment ... As we seek pledges from other foreign countries that they will refrain from 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.⁴²⁴

(10) The use of the conditional clause, as practised until 1923 by the United States, completely disappeared from the international scene. The reasons for this are stated by M. Virally 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.⁴²⁵

(11) Because of the general abandonment of this conditional form of the clause, it is now of historical significance only. All available sources agree that this form of the clause has definitely fallen into disuse.⁴²⁶

The conditional interpretation of an unconditional clause

(12) In the last century and in the first decades of the present one, international doctrine and practice were divided on the interpretation of a most-favoured-nation clause which does not explicitly state whether it is con-

ditional or unconditional.⁴²⁷ The division was due to the then constant practice of the United States that even if the character of the clause was not spelled out explicitly it was construed as conditional.⁴²⁸

(13) The American position can be traced back to the time of the Louisiana Purchase, the treaty of 30 April 1803 by which France ceded Louisiana to the United States. Article 8 of this 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 this 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. This 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 upon 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-favoured-nation, according to the article in question, but upon a footing more favoured 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 this position and maintained her claim in diplomatic correspondence until 1831, when it was settled by a treaty which practically accepted the American interpretation.⁴²⁹

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

There is one apparent misapprehension which I should like to remove. It may be argued that by the most-favoured-nation clauses in the pending treaty with Germany we would automatically extend

⁴²⁴ G.H. Hackworth, *Digest of International Law*, vol. V (Washington, D.C., U.S. Government Printing Office, 1943), p. 273.

⁴²⁵ M. Virally, "Le principe de réciprocité en droit international contemporain", *Recueil des cours de l'Académie de droit international de La Haye, 1967-III* (Leiden, Sijthoff, 1969), vol. 122, p. 74.

⁴²⁶ Snyder, *op. cit.*, p. 56. See also G. Jaenicke, "Meistbegünstigungsklausel" in K. Strupp, *Wörterbuch des Völkerrechts*, 2nd ed. (Schlochauer), vol. II, (Berlin, de Gruyter, 1961), p. 498; P. Level, "Clause de la nation la plus favorisée", in *Encyclopédie Dalloz—Droit international* (Paris, Dalloz, 1968), vol. I, p. 333, para. 5; E. Sauvignon, *La clause de la nation la plus favorisée* (Grenoble, Presses Universitaires de Grenoble, 1972), p. 23.

⁴²⁷ 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.

⁴²⁸ 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.

⁴²⁹ J.B. Moore, *A Digest of International Law* (Washington, D.C., U.S. 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.

privileges given to German 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-favoured-nation treatment which she gives to us. We do not give unconditional most-favoured-nation treatment to other Powers unless they are willing to make with us the same treaty, in substance, that Germany has made. Most-favoured-nation treatment would be given to other Powers only by virtue of our treaties with them, and these treaties, so far as we have them, do not embrace unconditional most-favoured-nation treatment. We cannot make treaties with all the Powers at the same moment, but if the Senate approves the treaty which we have made with Germany we shall endeavour to negotiate similar treaties with other Powers and such other Powers will not obtain unconditional most-favoured-nation treatment unless they conclude with us treaties similar to the one with Germany.⁴³⁰

(15) Ten years later, however, Secretary of State Hull took the less rigid position that the according of a benefit to a country pursuant to an unconditional most-favoured-nation clause constitutes 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 this interpretation, when in 1946 the United States sought waivers from most-favoured-nation clauses in existing treaties, for tariff preferences to be accorded on the basis of reciprocity to most Philippine products following Philippine independence, such waivers were sought from countries with which the United States had treaties containing clauses which were conditional as well as from those countries the treaties with which contained clauses which were unconditional.⁴³¹ 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.

(16) 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 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.⁴³²

⁴³⁰ M. Whiteman, *op. cit.*, p. 754.

⁴³¹ *Ibid.*, p. 753.

⁴³² Basdevant, *loc. cit.*, pp. 479-480, para. 77, quoting, *inter alia*, P. L. E. Pradier-Fodéré, *Traité de droit international public européen et américain, suivant les progrès de la science et de la pratique contemporaines*, (Paris, Durand et Pédone-Lauriel), 1888, vol. IV, p. 394.

More recent practice and doctrinal views

(17) 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:

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.

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 *factum 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*.⁴³³

⁴³³ *Yearbook... 1969*, vol. II, pp. 175 *et seq.*, document A/CN.4/213, annex I.

(18) 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.⁴³⁴

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

If there is any doubt, the most-favoured-nation clause should be considered unconditional.⁴³⁵

Since it is liable to limit the application of the clause, the condition cannot be implied.⁴³⁶

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 ...⁴³⁷

... If it is not expressly stated that the clause is conditional, it is agreed ... that it shall be considered unconditional.⁴³⁸

(20) 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.⁴³⁹

(21) 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".⁴⁴⁰

The same writer adds:

This rule of interpretation must, however, be qualified by the exception that it cannot be applied against a country which, as a matter of common knowledge, has adopted the conditional type of m.f.n. clause as part and parcel of its national treaty policy.⁴⁴¹

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

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.⁴⁴²

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.⁴⁴³

Conditions not related to the treatment accorded by the granting State to the third State

(23) In the previous paragraphs of the commentary to the present article, as in the literature and practice concerning most-favoured-nation clauses generally, a clause was meant to be 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 been abandoned, does not mean that States cannot agree to couple their most-favoured-nation agreement with other types of conditions, conditions which are not related to the treatment accorded by the granting State to a third State.

(24) An agreement by which, e.g., unconditional 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 the beneficiary States.

⁴³⁴ *Ibid.*, p. 181, document A/CN.4/213, annex II.

⁴³⁵ P. Guggenheim, *Traité de droit international public*, 2nd ed., rev. and augmented (Geneva, Georg, 1967), vol. I, p. 211.

⁴³⁶ P. 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.*

⁴³⁷ P. Level, *loc. cit.*, p. 338, para. 35.

⁴³⁸ D. Vignes, "La clause de la nation la plus favorisée et sa pratique contemporaine", *Recueil des cours ... 1970-II* (Leyden, Sijthoff, 1971), vol. 130, p. 219, who quotes in support of this view also D.P. O'Connell, *International Law*, 2nd ed. (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 Etats tiers et de leurs ressortissants)* (Paris, Éditions techniques, 1959), vol. 5, p. 7, para. 15.

⁴³⁹ See State Institute of Law of the Soviet Academy of Sciences, *Kurs ... (op. cit.)*, 1968, vol. IV, p. 251.

⁴⁴⁰ G. Schwarzenberger, *International Law and Order* (London, Stevens, 1971), p. 137, quoting *British and Foreign State Papers, 1885-1886*, vol. 77 (London, Ridgway, 1893), p. 796.

⁴⁴¹ *Ibid.*

⁴⁴² Rejoinder of 26 July 1952 (*I.C.J. Pleadings, Morocco Case (France v. U.S.A.)*), vol. II, p. 318. For a fuller reference, see *Yearbook... 1970*, vol. II, p. 208, document A/CN.4/288 and Add.1, para. 52.

⁴⁴³ G. Hackworth, *op. cit.*, p. 279.

(25) The articles adopted by the Commission do not deal explicitly with the so-called American form of the conditional clause which has become obsolete nor with other "independent" conditions which 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".⁴⁴⁴ Nevertheless, there is one type of conditional clause to which the Commission paid special attention, namely, the most-favored-nation clause coupled with the condition of material reciprocity.

The clause and formal reciprocity

(26) When speaking of reciprocity in relation to the most-favored-nation clause, it has to be kept in mind that normally most-favored-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-favored-nation treatment in a defined sphere of relations. This formal reciprocity is a normal feature of the unconditional most-favored-nation clause; it could be said to be the clause's essential ingredient. Unilateral most-favored-nation clauses occur only exceptionally at the present time.

(27) A case in point is the treaty of 13 October 1909 in which Switzerland granted unilaterally most-favored-nation treatment to Germany and Italy regarding the use of the railway built on the Gotthard in Switzerland.⁴⁴⁵ Such a unilateral clause can occur, for example, in a treaty by which most-favored-nation treatment is accorded to the ships of a land-locked State in the ports and harbours of the granting State. The land-locked State not being in the position to reciprocate in kind, the clause remains unilateral; the same treaty may of course provide for another type of compensation for the granting of most-favored-nation treatment. Thus in article 11 of the Treaty of Trade and Navigation between the Czechoslovak Republic and the German Democratic Republic of 25 November, 1959, the latter State granted unilaterally most-favored-nation treatment to "Czechoslovak merchant vessels and their cargoes ... on entering and leaving, and while lying in, the ports of the German Democratic Republic".⁴⁴⁶ 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 most-favored-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:

The Republic of Cyprus shall, by agreement on appropriate terms, accord most-favored-nation treatment to the United Kingdom, Greece and Turkey in connexion with all agreements whatever their nature.⁴⁴⁷

⁴⁴⁴ R. C. Snyder, *op. cit.*, p. 21.

⁴⁴⁵ P. Guggenheim, *op. cit.*, p. 207.

⁴⁴⁶ United Nations, *Treaty Series*, vol. 374, p. 120.

⁴⁴⁷ *Ibid.*, vol. 382, p. 144.

(29) Unilateral most-favored-nation clauses, coupled with formal reciprocity, were included in the Peace Treaties which the Allied and Associated Powers concluded in 1947 with Bulgaria⁴⁴⁸ (article 29); Hungary⁴⁴⁹ (article 33); Romania⁴⁵⁰ (article 31); Finland⁴⁵¹ (article 30); and Italy⁴⁵² (article 82). The same clause was included in the State Treaty for the re-establishment of an independent and democratic Austria (article 29).⁴⁵³

(30) By the mere stipulation of formal reciprocity a unilateral clause does not become bilateral (as seen by the Rapporteur of the Institute of International Law⁴⁵⁴). 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-favored-nation treatment; ...⁴⁵⁵

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

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

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

(32) It was indicated by one member at the twentieth session of the International Law Commission⁴⁵⁶ that the shift in the policy of the United States from conditional to unconditional most-favored-nation treatment with regard to commercial matters in the early 1920s had not been accompanied by a shift in relation to consular rights and privileges, with respect to which the use of the conditional clause (or rather the clause conditional on material reciprocity) continued.

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

⁴⁴⁸ *Ibid.*, vol. 41, p. 21.

⁴⁴⁹ *Ibid.*, p. 135.

⁴⁵⁰ *Ibid.*, vol. 42, p. 3.

⁴⁵¹ *Ibid.*, vol. 48, p. 203.

⁴⁵² *Ibid.*, vol. 49, p. 3.

⁴⁵³ *Ibid.*, vol. 217, p. 223.

⁴⁵⁴ 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.

⁴⁵⁵ United Nations, *Treaty Series*, vol. 41, p. 204.

⁴⁵⁶ *Yearbook... 1968*, vol. I, p. 186, 976th meeting, para. 8.

mittee that most of the consular agreements concluded by the United States of America contain a criminal immunity provision which is applicable to the consular personnel if the sending State concerned agrees to give reciprocal treatment to American consular officers.⁴⁵⁷

(34) An example of this kind of clause based on material reciprocity is article 14 of the Italo-Turkish Consular Convention of 9 September 1929.⁴⁵⁸ 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.

(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.⁴⁵⁹

(36) Another recent example can be found in the Consular Convention between the Polish People's Republic and the Federal People's Republic of Yugoslavia, signed at Belgrade on 17 November 1958, 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.⁴⁶⁰

(37) The clause conditional upon material reciprocity can be considered a simplified form of the traditional conditional clause.⁴⁶¹ According to Alice Piot:

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

...

From the purely logical point of view, this is quite satisfying intellectually, but not very satisfactory in practice. Quite apart from the difficulties which the interpretation of reciprocity always entails, this system has the disadvantage of reducing the benefits, if any, of the most-favoured-nation clause, without eliminating the resulting disadvantages for the granting State. Of course, the beneficiary State cannot bring the clause into operation without offering the very advantages which it claims, but the unilateral nature of that step will almost always mean that the reciprocal benefits, although theoretically equivalent, will be very different in practice ...⁴⁶²

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

The most-favoured-nation clause combined with the condition of reciprocity does not seem to be conducive to the unification and simplification of international relations, a fact which deprives the clause of the few merits formerly attributed to it.⁴⁶³

The text of the articles adopted by the Commission on the ground of the preceding considerations

(39) Article 8 adopted by the Commission states, in conformity with the general rules of the law of treaties, that a most-favoured-nation clause in a treaty is unconditional unless that treaty otherwise provides or the parties otherwise agree. Articles 9 and 10 describe the effect of an unconditional most-favoured-nation clause and that of a most-favoured-nation clause conditional on material reciprocity. According to article 9, in the case of an unconditional most-favoured-nation clause the beneficiary State acquires the right to most-favoured-nation treatment (as defined in article 5)⁴⁶⁴ and the obligation to accord material reciprocity to the granting States does not arise for the beneficiary State. Article 10, on the other hand, states that in the case of a most-favoured-nation clause conditional on material reciprocity the beneficiary State acquires the right to most-favoured-nation treatment only upon according material reciprocity to the granting State.

(40) A most-favoured-nation clause can be made subject to the condition of material reciprocity 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 the beneficiary State.

(41) The meaning of material reciprocity is a 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 a *cautio judicatum solvi*, this constitutes material reciprocity, or similarly if they permit each other's

⁴⁵⁷ M. Whiteman, *op. cit.*, pp. 752-753.

⁴⁵⁸ League of Nations, *Treaty Series*, vol. CXXIX, p. 195.

⁴⁵⁹ United Nations, *Treaty Series*, vol. 228, p. 141.

⁴⁶⁰ *Ibid.*, vol. 432, p. 332.

⁴⁶¹ *Yearbook... 1969*, vol. II, pp. 166-167, document A/CN.4/213 para. 58.

⁴⁶² A. Piot, "La clause de la nation la plus favorisée", *Revue critique de droit international privé* (Paris), vol. 45 (January-March 1956), No. 1, pp. 9-10 [translation from French].

⁴⁶³ Level, *loc. cit.*, p. 338, para. 37 (translation from French).

⁴⁶⁴ See above, section B,1 of the present chapter.

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 18, 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 accorded by the granting State to a third State only after assuring the granting State that it will extend to it or to persons and things in a determined relationship with its 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.⁴⁶⁵ This inherent difficulty, however, does not alter the validity of the rule.

(43) The commencement and the termination or suspension of the functioning of a most-favoured-nation clause combined with material reciprocity are dealt with later in the draft.⁴⁶⁶

Article 11. Scope of rights under a most-favoured-nation clause

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

2. The beneficiary State is entitled to the rights under paragraph 1 only in respect of those categories of persons or things which are specified in the clause or implied from the subject-matter of that clause.

Article 12. Entitlement to rights under a most-favoured-nation-clause

1. The beneficiary State is entitled to the rights under article 11 for itself only if the granting State extends to a third State treatment which is within the field of the subject-matter of the most-favoured-nation clause.

2. The beneficiary State is entitled to the rights in respect of persons or things within categories under paragraph 2 of article 11 only if they (a) belong to the same category of persons or things as those which benefit from the treatment extended by the granting State to a third State and (b) have the same relationship with the beneficiary State as those persons or things have with that third State.

Commentary to articles 11 and 12

The 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

⁴⁶⁵ H. Batiffol, *Droit international privé*, 4th ed. (Paris, Librairie générale de droit et de jurisprudence, 1967), pp. 213-214, No. 188.

⁴⁶⁶ See below, articles 18 and 19 and the commentaries thereto.

by the jurisprudence of international tribunals and national courts and by diplomatic practice. The essence of the rule is explained by A.D. McNair in the following graphic way:

Suppose that a most-favoured-nation clause in a commercial treaty between State A and State B entitled State A to claim from State B the treatment which State B gives to any other State, that would not entitle State A to claim from State B the extradition of an alleged criminal on the ground that State B has agreed to extradite alleged criminals of the same kind to State C, or voluntarily does so. The reason, which seems to rest on the common intention of the parties, is that the clause can only operate in regard to the subject-matter which the two States had in mind when they inserted the clause in their treaty.⁴⁶⁷

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.⁴⁶⁸

(3) In the *Ambatielos case*⁴⁶⁹ the Commission of Arbitration held, in its award of 6 March 1956, 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", 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.*

⁴⁶⁷ A.D. McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961), p. 287.

⁴⁶⁸ *Anglo-Iranian Oil Co. Case* (Jurisdiction), Judgment of July 22nd 1952 (*I.C.J. Reports* 1952, p. 93). For the facts and other aspects of the case, see *Yearbook... 1970*, vol. II, pp. 202-205, document A/CN.4/228 and Add.1, paras. 10-30.

⁴⁶⁹ *The Ambatielos Case* (merits: obligation to arbitrate), Judgment of 19 May 1953 (*I.C.J. Reports* 1953, p. 10).

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

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

It is true that "the administration of Justice", when viewed in isolation, is a subject-matter other than "commerce and navigation", but this is not necessarily so when it is viewed in 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.⁴⁷⁰

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 opinion:

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

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

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

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

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

... the Commission [of Arbitration] is of opinion that "free access to the Courts", which is vouchsafed to Greek nationals in the United Kingdom by Article XV of the Treaty of 1886, includes the right to use the Courts fully and to avail themselves of any procedural remedies or guarantees provided by the law of the land in order that

justice may be administered on a footing of equality with nationals of the country.

The Commission [of Arbitration] is therefore of opinion that the provisions contained in other Treaties relied upon by the Greek Government do not provide for any "privileges, favours or immunities" more extensive than those resulting from the said Article XV, and that accordingly the most-favoured-nation clause contained in Article X has no bearing on the present dispute ...⁴⁷¹

(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 signed at Frankfurt on 10 May 1871. The Franco-German Treaty guaranteed most-favoured-nation treatment in their commercial relations including the "admission and treatment of subjects of the two nations". The decision of the Court was based in part on the following propositions: that "these provisions pertain exclusively to the commercial relations between France and Germany, considered from the viewpoint of the rights under international law, but they do not concern, either expressly or implicitly, the rights under civil law, particularly, the rules governing jurisdiction and procedure that are applicable to any disputes that develop in commercial relations between the subjects of the two States"; and that further: "The most-favoured-nation clause may be invoked only if the subject of the treaty stipulating it is the same as that of the particularly favourable treaty the benefit of which is claimed".⁴⁷²

(5) In *Lloyds Bank v. De Ricqlés and De Gaillard* before the Commercial Tribunal of the Seine, Lloyds Bank, which as the plaintiff had been ordered to give security for costs (*cautio judicatum solvi*) invoked article I of an Anglo-French Convention of 28 February 1882.⁴⁷³ That Convention intended, according to its Preamble, "to regulate the commercial and maritime relations between the two countries, as well as the status of their subjects", and article I provided, with an exception not relevant here, that:

...each of the High Contracting Parties engages to give the other immediately and unconditionally the benefit of every favour, immunity or privilege in matters of commerce or industry which have been or may be conceded by one of the High Contracting Parties to any third nation whatsoever, whether within or beyond Europe.⁴⁷⁴

On the basis of that article Lloyds Bank claimed the benefit of the provisions of a Franco-Swiss Treaty of 15 June 1889, which gave Swiss nationals the right to sue in France without being required to give security for costs. The court rejected this claim, holding that a party to a con-

⁴⁷¹ *Ibid.*, pp. 109-110.

⁴⁷² M. Whiteman, *op. cit.*, pp. 755-756, quoting the decision of the French Court of Cassation, 22 December 1913, in the case of *Braunkohlen Briquet Verkaufsverein Gesellschaft c. Goffart, ès qualités*. The decision is also quoted by P. Level, *loc. cit.*, p. 338, para. 38, and H. Batiffol, *op. cit.*, p. 216, No. 189.

⁴⁷³ *British and Foreign State Papers, 1881-1882*, vol. 73 (London, Ridgway, 1889), p. 22.

⁴⁷⁴ *Ibid.*, pp. 23-24.

⁴⁷⁰ United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), pp. 106-107.

vention of a general character such as the Anglo-French Convention regulating the commercial and maritime relations of the two countries could not claim under the most-favoured-nation treatment clause the benefits of a special Convention such as the Franco-Swiss Convention, which dealt with one particular subject, namely freedom from the obligation to give security for costs.⁴⁷⁵

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

(7) The 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-favoured-nation treatment in all matters concerning the Customs duties and subsidiary charges of every kind and in the method of levying duties, and, further, in all matters concerning the rules, formalities and charges imposed in connection with the clearing of goods through the Customs, and with respect to all laws or regulations affecting the sale or use of imported goods within the country.⁴⁷⁶

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-favoured-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-favoured-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 ...⁴⁷⁷

(8) In the following examples the question of the application of the rule arose under extraordinary circumstances.

⁴⁷⁵ H. Lauterpacht, ed., *Annual Digest of Public International Law Cases, 1929-30*, London, vol. 5 (1935), Case No. 252, p. 404; *Journal du droit international* (Paris), 58th year (1931), p. 1018, digested by A. D. McNair, *op. cit.*, p. 287. Other cases before French courts based on the *ejusdem generis* rule are cited by A.-Ch. Kiss, "La convention européenne d'établissement et la clause de la nation la plus favorisée", *Annuaire français de droit international*, 1957 (Paris), vol. III, p. 478; cases before American courts, by H. H. Hackworth, *op. cit.*, pp. 292-293.

⁴⁷⁶ League of Nations, *Treaty Series*, vol. CLXI, p. 111.

⁴⁷⁷ Legal Adviser Fisher, Department of State, 3 November 1949, MS. Department of State, quoted by M. Whiteman, *op. cit.*, p. 760.

In the case of *Nyugat-Swiss Corporation Société Anonyme Maritime et Commerciale v. State* (Kingdom of the Netherlands) the facts were as follows: on 13 April 1941, the steamship *Nyugat* was sailing outside territorial waters of the former Dutch East Indies. She sailed under the Hungarian flag. The Netherlands destroyer *Kortenaer* stopped her, searched her and took her into Surabaya, where she was sunk in 1942. The plaintiffs claimed that the action taken with regard to the *Nyugat* was illegal. The vessel was Swiss property. She had formerly belonged to a Hungarian company, but the Swiss Corporation became the ship's owner in 1941, when it already held all shares in the Hungarian company. The Hungarian flag was a neutral flag. Defendant relied upon the fact that on 9 April 1941, diplomatic relations between the Netherlands and Hungary were severed, that on 11 April 1941, Hungary, as an ally of Germany, attacked Yugoslavia and that consequently on the basis of certain relevant Dutch decrees the capture of the ship was legal. Plaintiffs contended that these decrees were in conflict with the Treaty of Friendship, Establishment and Commerce, concluded with Switzerland at Berne on 19 August 1875⁴⁷⁸ and with the Treaty of Commerce, concluded with Hungary on 9 December 1924,⁴⁷⁹ and notably the most-favoured-nation clause contained in these treaties. Plaintiffs referred to the Treaty of Friendship, Navigation and Commerce signed on 1 May 1829, with the Republic of Colombia, providing that "if at any time unfortunately a rupture of the ties of friendship should take place" the subjects of the one party residing in the territory of the other party "will enjoy the privilege of residing there and of continuing their business . . . as long as they behave peacefully and do not violate the laws; their property . . . will not be subject to seizure and attachment".⁴⁸⁰ The Court held:

The invoking of this provision fails, since it is unacceptable that a rupture of friendly relations, as understood in the year 1829, can be assimilated to a severance of diplomatic relations as it occurred during the Second World War; in the present case the determination of the flag was also based upon the assumption by Hungary of an attitude contrary to the interests of the Kingdom by collaborating in the German attack against Yugoslavia. This case surely does not fit in 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.⁴⁸¹

(9) According to A. D. McNair, "some authority exists" for the view that rights and privileges obtained in the course of a territorial and political arrangement or a peace treaty "cannot be claimed under a most-favoured-nation clause". "The reason", he believes, "presumably is that such concessions are not commercial, while most-favoured-nation clauses are usually concerned with trade and commerce".⁴⁸² He quotes an opinion of a law

⁴⁷⁸ Netherlands, *Staatsblad van het Koninkrijk der Nederlanden*, No. 137, 1878, Decree of 19 September 1878.

⁴⁷⁹ *Ibid.*, No. 36, 1926, Decree of 3 March 1926.

⁴⁸⁰ *British and Foreign State Papers, 1829-1830* (London, Ridgway, 1832), p. 902.

⁴⁸¹ Judgment of 6 March 1959 by the Supreme Court of the Netherlands (*Nederlandse Jurisprudentie* 1962, No. 2, pp. 18-19) [original text: Dutch].

⁴⁸² McNair, *op. cit.*, p. 302.

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

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

I consider that these privileges were conceded to France and the United States of America as part of a Territorial and Political Arrangement *extorted** from Great Britain at the termination of a War which had been successfully carried on against her by those Nations.⁴⁸³

(10) There is no writer who would deny the validity of the *ejusdem generis* rule which derives from the very nature of the most-favoured-nation clause. It is generally admitted that a clause conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can only attract the rights conferred by other treaties (or unilateral acts) in regard to the same matter or class of matter.⁴⁸⁴

(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.⁴⁸⁵ Thus the rule follows clearly from the general principles of treaty interpretation. States cannot be regarded as being bound beyond the obligations they have expressly undertaken.

(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.⁴⁸⁶ The granting

State cannot evade its obligations, unless an express reservation so provides, on the ground that the relations between itself and the third country are friendlier or "not similar" to those existing between it and the beneficiary. It is only the subject-matter of the clause which must belong to the same category, the *idem genus*, and not the *relation* between the granting State and the third State on the one hand and the relation between the granting State and the beneficiary State on the other. It is also not proper to say that the *treaty* including the clause must be of the same category (*ejusdem generis*) as that of the benefits which are claimed under the clause.⁴⁸⁷ To hold otherwise would seriously diminish the value of a most-favoured-nation clause.

The scope of the most-favoured-nation clause regarding persons and 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 matter⁴⁸⁸ and second by the right conferred by the granting State on the third State.

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

(15) The beneficiary State may claim most-favoured-nation treatment only for that category of persons or things (merchants, commercial travellers, persons taken into custody, companies, vessels, distressed or wrecked vessels, products, goods, textiles, wheat, sugar, etc.) which receives or is entitled to receive certain treatment, certain favours under the right of a third State. And, further, the persons and things in respect of which most-favoured-nation treatment is claimed must be in the same relationship with the beneficiary State as are the comparable persons and things with the third State (nationals, resident nationals, companies having their seat in the country, companies established under the law of the country, companies controlled by nationals, imported goods, goods manufactured in the country, products originating in the country, etc.).⁴⁸⁹

⁴⁸³ *Ibid.*, p. 303.

⁴⁸⁴ See *Yearbook... 1970*, vol. II, p. 210, document A/CN.4/228 and Add.1, para. 68.

⁴⁸⁵ *Ibid.*, p. 211, document A/CN.4/228 and Add.1, para. 72.

⁴⁸⁶ In connexion with the problem of "like products", see the relevant passage in the excerpts from the conclusions of the Economic Committee of the League of Nations in regard to the most-favoured-nation clause annexed to the Special Rapporteur's first report (*Yearbook... 1969*, vol. II, p. 178, document A/CN.4/213, annex 1); and articles I, II and XIII of the General Agreement on Tariffs and Trade (United Nations, *Treaty Series*, vol. 55, pp. 196-200, 204-208 and 234-238; *ibid.*, vol. 62, pp. 82-86 and 90; *ibid.*, vol. 138, p. 336). Notable efforts are being made to facilitate the identification and comparison of products by setting up uniform standards for the purpose; these efforts include the Brussels Convention of 15 December 1950 establishing a Customs Co-operation Council (*ibid.*, vol. 157, p. 129) and the Convention on the Nomenclature for the Classification of Goods in Customs Tariffs of 15 December 1950 (*ibid.*, vol. 347, p. 127).

⁴⁸⁷ Vignes, *loc. cit.*, p. 282.

⁴⁸⁸ With very rare exceptions, there is no clause in modern times which would not be restricted to a certain sphere of relations, e.g. commerce, establishment and shipping. See paras. 14 and 15 of the commentary to article 4 (*Yearbook... 1973*, vol. II, p. 217, document A/9010/Rev.1, chap. IV, B).

⁴⁸⁹ *Ibid.*, pp. 218-219, document A/9010/Rev. 1, chap. IV, sect., para. 3 of the commentary to article 5.

(16) The following French case can 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. Against this *ex parte* decision Serebriakoff appealed, claiming *inter alia* that he was exempt from furnishing security by the terms of the Franco-Russian agreement of 11 January 1934. The Court held that the appeal must be dismissed. The Court said:

Whereas the Decree of 23 January 1934 ordering the provisional application of the trade agreement concluded on 11 January 1934 between France and the USSR ... is not applicable in the current case; and Alexander Serebriakoff is not entitled to claim the benefit of that agreement; and, while the agreement does provide, on the basis of reciprocity, free and unrestricted access by Russian subjects to French courts, the privilege thus granted to such subjects is limited strictly to merchants and industrialists; and this conclusion results inevitably from both the agreement as a whole and from the separate consideration of each of its provisions; and the agreement in question is entitled "Trade Agreement"; and the various articles of which it is composed confirm that description, and its article 9, on which Serebriakoff specifically relies, in determining the beneficiaries of the provisions in question, begins with the words: "Save in so far as may be otherwise provided subsequently, French merchants and manufacturers, being natural or legal persons under French law, shall not be less favourably treated ... than nationals of the most-favoured-nation ..."⁴⁹⁰

(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, a clause that would entitle the British subjects to rely on treaties stipulating the assimilation of foreigners to nationals, applied solely to British subjects settled in France. The Tribunal said:

... [a] British national domiciled in Switzerland may not rely on a treaty of establishment which grants the benefit of the most-favoured-nation clause only to British Nationals established in France and therefore entitled to carry on a remunerative activity there on a permanent basis.⁴⁹¹

(18) The present article, 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.⁴⁹² 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 favoured 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, H. C. Hawkins has this to say:

One test in such cases is a comparison of the intrinsic characteristics of the goods concerned. Such a test would prevent the classification of articles on the basis of external characteristics. If products are intrinsically alike, they should be considered to be like products, and differing rates of duty on them would contravene the most-favoured-nation clause. For example, in the Swiss Cow case⁴⁹³ 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 favor of a particular country.

In other situations the application of the intrinsic characteristic test would show clearly that a classification was *not* objectionable. To invent such a case: under the tariff law of the United States, apples are dutiable and bananas are free of duty. If Canada and the 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.⁴⁹⁴

(20) As 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".¹³⁷ In 1904 Germany granted a duty reduction to Switzerland on

"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

⁴⁹⁰ See *Yearbook... 1973*, vol. II, p. 132, document A/CN.4/269, para. 40.

⁴⁹¹ *Ibid.*, p. 145, document A/CN.4/269, para. 78.

⁴⁹² See article I, para. 1 of the General Agreement on Tariffs and Trade, quoted in the Special Rapporteur's second report (*Yearbook... 1970*, vol. II, pp. 220–221, document A/CN.4/228, and Add.1, para. 144).

⁴⁹³ See para. 20 above.

⁴⁹⁴ H. C. Hawkins, *Commercial Treaties and Agreements: Principles and Practice* (New York, Rinehart, 1951), pp. 93–94.

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.”⁴⁹⁵

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

¹³⁸ League of Nations, Economic and Financial Section, *Memorandum on Discriminatory Classifications* (Ser. L.o.N.P. 1927.II.27), p. 8.

¹³⁹ H.C. Hawkins, *Commercial Treaties and Agreements: Principles and Practice* (New York, Rinehart, pp. 93–94; J.E.S. Fawcett, “Trade and Finance in International Law”, ... *Recueil des cours ... 1968* (Leyden, Sijthoff, 1969), vol. 123, p. 263.

(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.”⁴⁹⁶

(22) The Commission is aware that the application of the rule contained in articles 11 and 12 can, in certain cases, cause great 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.⁴⁹⁷ 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

⁴⁹⁵ *Yearbook... 1970*, vol. II, pp. 221–222, document A/CN.4/228 and Add.1, para. 148.

⁴⁹⁶ John H. Jackson, *World Trade and the Law of GATT (A Legal Analysis of the General Agreement on Tariffs and Trade)* (Indianapolis, Bobbs-Merill, 1969), pp. 260–261. Excerpts from the reports of the Economic Committee of the League of Nations are annexed to the special Rapporteur’s first report (see *Yearbook... 1969*, vol. II, p. 175, document A/CN.4/213, annex I).

⁴⁹⁷ See *Yearbook... 1973*, vol. II, p. 219, document A/9010/Rev.1, chap. IV, B, para. 3 of the commentary to article 5.

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 which determines the nationality of those companies. That being so, could the State which 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 granted advantages were defined much more restrictively under the law of that third State? Hence, the granting State might refuse to extend the benefit of the clause, arguing that it had accorded to the third State a specific kind of advantage, which, if it were transposed into the law of another State, would become much more extensive.

(24) Some of the cases quoted above testify to the difficulties which are encountered when it comes to the question whether a particular right falls within the scope 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 11 and 12 which, as a general rule, state and elucidate the mechanism of the most-favoured-nation clause.

(25) On the basis of the foregoing, article 11 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 is entitled only to those rights which fall within the scope of the subject-matter of the clause and *paragraph 2* gives a further precision to the rule in stating that the beneficiary State can exercise its rights falling within the subject-matter of the clause only in respect of those categories of 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 is entitled to the rights in a most-favoured-nation clause.

(26) Article 12 which appears under the heading "Entitlement to rights under a most-favoured-nation clause" indicates the actual scope of the clause. *Paragraph 1* provides that even if the beneficiary State wishes to claim for itself rights falling within the scope of the subject-matter of the clause, it will be entitled to those rights only if a condition is fulfilled, namely that the granting State extends to a third State treatment which falls within the same subject-matter. *Paragraph 2* of the article provides that if the beneficiary State makes claim to rights in respect of persons or things which are specified in the clause or implied from the subject-matter, it will be entitled to the rights under the clause only if the persons or things in question: (a) fall into the same category of persons or things as those which benefit from the treatment extended by the granting State to a third State, and (b) have the same relationship with the beneficiary State as those persons or things have with that third State.

Article 13. Irrelevance of the fact that treatment is extended gratuitously or against compensation

The beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, acquires under a most-favoured-nation clause the right to most-favoured-nation treatment independently of whether 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 gratuitously or against compensation.

Commentary

(1) Not only the most-favoured-nation promises can be classified as unconditional or conditional on material reciprocity or on another kind of compensation; the favours accorded by the granting State to third States can be classified in a similar manner: they can be granted unilaterally as a gift—in theory at least—or they can be accorded against some kind of compensation. For example, 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 unilaterally 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 that reflected in article 13. Thus in 1919 the highest Court of Argentina rejected an appeal against a decision of the High Court of Sante 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 ...⁴⁹⁸

(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 subject. Section 110 of the German Code of Civil Procedure laid down that aliens appearing as plaintiffs before German courts must at the defendant's request deposit a security for costs. This provision did not apply to aliens whose own State did not demand security for costs from Germans appearing as plaintiffs. In article 291 (I) of the Treaty of Versailles Germany undertook

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

There existed between Germany and Bulgaria a treaty providing for the exemption, on the basis of reciprocity, from the duty to deposit security for costs. In a note, communicated to Germany in April 1921, the French Government informed the German Government that it wished to avail itself of the relevant provisions of the Treaty between Germany and Bulgaria. The plaintiff did not prove that in France subjects were exempt from depositing security for costs in actions brought against French subjects. The Upper District Court held that the appeal must be dismissed. Article 291 of the Treaty of Versailles, according to the Court, did not oblige Germany to grant to French subjects wider privileges than those granted to the subjects of the former Central Power. The Court said that the treaty with Bulgaria was based on reciprocity and that, as France did not grant such reciprocal treatment, its nationals were not entitled to an exemption from the duty to deposit security for costs.⁴⁹⁹

(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 subjects, in 1917 leased certain premises in Paris for commercial use. The lease expired in 1926. The lessors refused to renew the lease, whereupon the plaintiffs claimed 200,000 francs as damages for eviction. Their claim was based on the provisions of the Law of 30 June 1926, which granted certain privileges to those engaged in business activities. In support

⁴⁹⁸ See *Yearbook... 1973*, vol. II, p. 118, document A/CN.4/269, foot-note 2.

⁴⁹⁹ *Security for Costs (Treaty of Versailles) Case*, Germany, Upper District Court, Frankfurt-on-the-Main, 11 December 1922 (*ibid.*, p. 128, document A/CN.4/269, paras. 24–25).

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, the Franco-Danish Convention of 9 February 1910, Denmark being in this regard the most-favoured-nation. Article 19 of the Law of 1926 provided that aliens should be entitled to its privileges only subject to reciprocity. The Civil Tribunal of the Seine held for the plaintiffs and said that through the operation of the most-favoured-nation clause, Greek subjects in France enjoyed the same privileges in commerce and industry as Danish subjects. The Franco-Danish Convention stipulated that in the exercise of their commercial activities Danes enjoyed all the privileges granted to French nationals by subsequent legislation. The law of 30 June 1926, undoubtedly conferred privileges upon those who were engaged in commerce. Although the terms of article 19 of the 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 only enjoy the rights and privileges stipulated in so far as those rights and privileges were compatible with the existing legislation of the two States, and Danish legislation did not recognize the rights of foreigners to hold commercial property in Denmark.⁵⁰⁰

(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.⁵⁰¹

(6) A convincing motivation for the solution proposed in article 13 can be found in a Greek decision reported as

⁵⁰⁰ *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, document A/CN.4/269, paras. 28–30).

⁵⁰¹ Level, *loc. cit.*, p. 338, para. 36.

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

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

The appellant in this case, a Swiss company whose head office was situated in Geneva, claimed exemption from income tax, invoking in support of that claim the Anglo-Greek Convention of 1936 for the Reciprocal Exemption from Income Tax on Certain Profits or Gains Arising from an Agency. Under that Convention, the profits or gains arising in Greece to a person resident or to a body corporate whose business 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*:

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 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 ...⁵⁰²

(7) The Commission believes that the rule stated in article 13 is in conformity with modern thinking on the operation of the most-favoured-nation clause. If the

⁵⁰² Fiscal Exemption Case in Greece; Greece, Conseil d'Etat, 1954 (*ibid.*, p. 138, document A/CN.4/269, paras. 58–59).

clause is unconditional, then the beneficiary State and the persons or things in a determined relationship with it acquire automatically the favours accorded by the granting State to third States or to persons or things in a determined relationship with it in the manner and under the conditions described in articles 11 and 12. If the most-favoured-nation clause in question is explicitly termed unconditional or if it is silent concerning conditions then, in the view of the Commission, the beneficiary State cannot be refused the treatment accorded by the granting State to a third State on the ground that that treatment has been given against material reciprocity or against any other compensation. This is obvious if it is considered that the American form of conditional clause has completely gone out of practice. It seems to be evident also in fields other than trade. In these fields the parties to a most-favoured-nation clause can freely agree on granting each other most-favoured-nation treatment subject to material reciprocity. 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 accorded gratuitously but against reciprocity 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 whether the treatment granted to a third State was accorded gratuitously or against compensation. This rule 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 14. Irrelevance of restrictions agreed between the granting and third States

The beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is extended under an agreement limiting its application to relations between the granting and third States.

Commentary

(1) This rule clearly follows from the general rule regarding third States of the Vienna Convention (articles 34–35) and also from the nature of the most-favoured-nation clause itself. The statement of the rule is, however, warranted by the fact that there exist a number of agreements aiming more or less clearly at a result of the kind referred to in the article, notwithstanding the doubts about the effect of such agreements upon the right of third States, beneficiaries of a most-favoured-nation clause. Such agreements can take the form of treaty provisions (*clauses réservées*) or they may purportedly 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 material reciprocity. 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.⁵⁰³

(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 of the International Convention. At the Conference it was soon realized, however, that this question could not be answered in the Convention which could not affect the contents of bilateral agreements based on the most-favoured-nation clause. In the Economic Committee, a proposal was made to adopt a provision designed to restrict the stipulations of the Convention to the contracting parties.⁵⁰⁴

(4) There are a number of conventions which contain clauses by which the parties intend to restrict certain benefits to the relation 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, 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.⁵⁰⁵

The following remark is made concerning this provision by Vignes:

Such a provision has the disadvantage of failing to release contracting States from their obligations under previous clauses, of having the status of *res inter alios acta* for the other States which are parties to those clauses and thus placing the States which subscribe to it in the position of being potential violators of the clause.⁵⁰⁶

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 has been inserted in the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages signed at Brussels, also on 10 April 1926.⁵⁰⁷ 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

⁵⁰³ *Yearbook...* 1969, vol. II, p. 181, document A/CN.4/213, annex II.

⁵⁰⁴ *Ibid.*, pp. 179–180, document A/CN.4/213, annex I, under the heading "Relations between bilateral agreements based on the most-favoured-nation clause and economic plurilateral conventions".

⁵⁰⁵ League of Nations, *Treaty Series*, vol. CLXXVI, p. 209.

⁵⁰⁶ Vignes, *loc. cit.*, p. 291.

⁵⁰⁷ League of Nations, *Treaty Series*, vol. CXX, p. 209.

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) read as follows:

Nothing in this Charter shall be interpreted to require a Member to accord to non-Member countries treatment as favourable as that which it accords to Member countries under the provisions of the Charter, and failure to accord such treatment shall not be regarded as inconsistent with the terms or the spirit of the Charter.⁵⁰⁸

Although this provision is not a “*clause réservée*” it was severely criticized as long ago as 1948. The representative of the Soviet Union, Mr. Arutiunian, 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 ...⁵⁰⁹

(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 propaganda 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 GATT, 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 ...⁵¹⁰

(8) The idea of the provision contained in article 98 of the Havana Charter is, according to Hawkins,⁵¹¹ 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) The Convention on Transit Trade of Land-Locked States of 8 July 1965 contains the following provision (article 10) on the relation to the most-favoured-nation clause:

⁵⁰⁸ *United Nations Conference on Trade and Employment* (Havana, Cuba, November 1947-March 1948), *Final Act and Related Documents* (United Nations publication, Sales No. 1948.II.D.4), p. 51.

⁵⁰⁹ See *Official Records of the Economic and Social Council, Seventh Session, 195th meeting*, p. 329.

⁵¹⁰ GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1), p. 49. For a contrary view, see J.H. Jackson, *op. cit.*, p. 118.

⁵¹¹ Hawkins, *op. cit.*, p. 85.

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

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

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

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

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

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

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

⁵¹² United Nations, *Treaty Series*, vol. 597, p. 42.

⁵¹³ *Ibid.*, p. 46.

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

needs to be made concrete in the practice of individual States before it can acquire the character of a fully fledged rule of international law?⁵¹⁵

(11) There is no author expressly denying the rule proposed in article 14. 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.⁵¹⁶

The same writer tries to distinguish between two situations:

... If the treaty granting the privileged advantages and making them the subject of a "clause réservée" predates the convention according most-favoured-nation treatment, it could be argued, taking into account the publicity necessarily given to treaties, that the beneficiary State could not have been unaware of the commitments entered into by the granting State and the "clause réservée" relating to those commitments. In such circumstances, the beneficiary State may be regarded as implicitly acceding to the "clause réservée". However, in the case of a "clause réservée" laid down after the most-favoured-nation clauses, the granting State, which has not attached to the latter clauses any accompanying provision limiting their scope, cannot, *a posteriori*, avoid their application by virtue of a commitment entered into with the favoured State to which the granting State has not been a party ...⁵¹⁷

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

... We know the solution ... given by the International Court of Justice [in the *Anglo-Iranian Oil Co. case*]. The legal basis for most-favoured-nation treatment lies in the treaty which provides for such treatment, and the advantages accorded to the third State apply to the beneficiary State only by reference. Consequently, the "clause réservée" cannot be invoked against the State which is a beneficiary of the most-favoured-nation clause, since the rights of that State do not derive from the treaty containing the "clause réservée" ...⁵¹⁸

Article 15. Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement

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.

⁵¹⁵ See M. Virally, "Le rôle des 'principes' dans le développement du droit international" and S. Bastid, "Observations sur une 'étape' dans le développement progressif et la codification des principes du droit international", in *Faculté de droit de l'Université de Genève and Institut universitaire de hautes études internationales, Genève, Recueil d'études de droit international: en hommage à Paul Guggenheim*, (Geneva, Imprimerie de la Tribune de Genève, 1968), pp. 531 and 532 [original text: French].

⁵¹⁶ Level, *loc. cit.*, p. 336, para. 20.

⁵¹⁷ *Ibid.*, para. 21 [original text: French].

⁵¹⁸ *Ibid.*

Commentary

(1) The Commission has already stated that

It is not necessary ... that the treatment actually granted to the third State, with respect to itself or the persons and things concerned, be based on a former 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.⁵¹⁹

It would seem obvious that unless the clause otherwise provides or the parties to the treaty otherwise agreed, the beneficiary of the clause is entitled to its benefits irrespective of whether the granting State extended the favoured treatment to a third State by a mere fact or by a bilateral or multilateral agreement.

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 a matter of discussion already 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

⁵¹⁹ *Yearbook... 1973*, vol. II, p. 219, document A/9010/Rev.1, chap. IV, B, para. 5 of the commentary to article 5.

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.

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.⁵²⁰

(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

⁵²⁰ 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.

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 afore-mentioned conditions, or if the Party claiming such benefits is prepared to grant reciprocal treatment.⁵²¹

(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.⁵²² Such proposals met with strong opposition from the United States. The situation changed somewhat at the 1933 Conference, where the United States Secretary of State, Mr. Cordell Hull, outlined the conditions under which the United States would be willing to accept the exception of multilateral arrangements from most-favoured-nation commitments. The provision proposed by Mr. Hull for adoption by the Conference read as follows:

The participating Governments urge the general acceptance of the principle that the rule of equality shall not require the 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.⁵²³

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".⁵²⁴ Later in 1933, at the

⁵²¹ League of Nations, *Treaty Series*, vol. CV, p. 13.

⁵²² 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.*

⁵²³ League of Nations, Monetary and Economic Conference, *Reports Approved by the Conference on July 27th, 1933, and Resolutions Adopted by the Bureau and the Executive Committee*, document C.435.M.220.1933.II [Conf. M.E.22(1)], p. 43.

⁵²⁴ J. Viner, *op. cit.*, p. 36.

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

(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.⁵²⁵ 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.

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 Hull, quoted in the Commission,⁵²⁶ this Agreement can hardly be interpreted otherwise than as an expression of the view that a most-favoured pledge, unless otherwise provided, extends the benefits granted under a multilateral agreement. (It seems that the position taken by the United States at the time is similarly interpreted by M. Whiteman.)⁵²⁷ 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.⁵²⁸ What the Belgian Ambassador considered settled law in 1935 was put forward by the Belgian Premier in

⁵²⁵ Agreement between the United States of America, Economic Union of Belgium and Luxemburg, Colombia, Cuba, Greece, Guatemala, Nicaragua and Panama to refrain from invoking the Obligations of the Most-favoured-nation clause for the purpose of obtaining the Advantages or Benefits established by Certain Economic Multilateral Conventions (League of Nations, *Treaty Series*, vol. CLXV, p. 9).

⁵²⁶ Secretary of State Cordell Hull to President Roosevelt, 10 May 1935, M.S. Department of State, File 710G, Commercial Agreement /108 (see *Yearbook... 1968*, vol. I, p. 186, 976th meeting, par. 11 and foot-note 4).

⁵²⁷ *Op. cit.*, p. 765.

⁵²⁸ G.H. Hackworth, *op. cit.*, p. 293.

1938 as a proposal. M. van Zeeland in his report submitted upon the request of the British and French Governments recommended that

Exceptions to M.F.N. to be admitted in order to allow the formation of group agreements aimed at lowering tariff barriers, provided these are open to the accession of other States.⁵²⁹

(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;⁵³⁰

(8) In the field of theory it was a Japanese writer, N. Ito, who proposed that a distinction be made in the field of international trade and customs tariffs between "collective treaties of special interest" and "collective treaties of general interest".⁵³¹ 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, these treaties being open to all States their advantages could be easily acquired by accession. In this way acceding States assume also the obligations imposed by the treaty and put themselves in a position of equality with the other parties to it, whereas through the operation of a most-favoured-nation clause they would claim only the advantages of the multilateral treaty without submitting to its obligations.⁵³²

(9) The above theory received strong criticism from E. Allix. Referring to the argument based on the openness of the multilateral treaties in question he wrote:

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

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

⁵²⁹ League of Nations, *Commercial Policy in the Interwar Period: International Proposals and National Policies* (Ser.L.o.N.P. 1942. I.I.A.6), p. 84.

⁵³⁰ *Yearbook... 1969*, vol. II, p. 181, document A/CN.4/213, annex II.

⁵³¹ *La clause de la nation la plus favorisée*, Paris, Les Editions internationales, 1930.

⁵³² Similarly: G. Scelle, *Précis de droit des gens : Principes et systématique* (Paris, Sirey, 1934), vol. II, p. 390.

become parties but whose terms are such that, in practice, they could only be fulfilled by the original signatories.

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

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

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

We are thus led to conclude that the most-favoured-nation clause is indeed an obstacle to the negotiation of plurilateral treaties and that that obstacle can be removed only by an express reservation in the instrument embodying the clause or by the amicable agreement of the States beneficiaries of the clause.⁵³³

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

... whatever the arguments in favour of the opportuneness of excluding [from the advantages of a collective treaty] the State party to the bilateral treaty, such exclusion is difficult to reconcile with the most-favoured-nation clause and clearly contradicts the guarantees of equality previously given to the State which is the beneficiary of that clause. While the ostensible purpose of such action would be to thwart the selfish designs of a State wishing to obtain tariff advantages cheaply, would it not be even more immoral to deny a 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 wills of States, which is the only sound basis for positive law ...⁵³⁴

GATT and non-member States

(11) The General Agreement on Tariffs and Trade does not include a provision on the lines of article 98, paragraph 4 of the Havana Charter.⁵³⁵ 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 this is how certain authors⁵³⁶ interpret the text of article XXXIII, which reads as follows:

⁵³³ E. Allix, "Les aspects juridiques de la clause de la nation la plus favorisée", *Revue politique et parlementaire* (Paris), vol. 148, July-September 1931, pp. 231-232.

⁵³⁴ Ch. Rousseau, *Principes généraux du droit international public* (Paris, Pédone, 1944), vol. I, pp. 777 and 778.

⁵³⁵ See above, para. 6 of the commentary to article 14.

⁵³⁶ E. Sauvignon, *op. cit.*, p. 267.

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.⁵³⁷

(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, J. H. Jackson, who has written:

Any advantage granted by a GATT contracting party to any other country may 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 to greatly 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 agreement.¹⁰

⁹ U.N. doc. EPCT/C.II/3 at 14 (1946).

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.⁵³⁸

(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 this situation, the majority consensus was that the attitude which the contracting party wished to adopt in this respect was a matter for each contracting party to decide.⁵³⁹

(14) According to the Soviet textbook of international law, Austria after its accession to the GATT did not immediately extend GATT rates of customs duties to the Soviet Union notwithstanding the most-favoured-nation treaty in force between the two countries. The extension of such rates took place only upon the express demand of the USSR. Other Western European countries having most-favoured-nation treaties with the Soviet Union extended GATT benefits to Soviet products automatically.⁵⁴⁰

⁵³⁷ United Nations, *Treaty Series*, vol. 62, p. 34.

⁵³⁸ J. H. Jackson, *op. cit.*, pp. 257-258.

⁵³⁹ GATT document L/237, quoted in K. Hyder (Hasan), *Equality of Treatment and Trade Discrimination in International Law* (The Hague, Nijhoff, 1968), p. 78, foot-note 2. See also *Yearbook... 1970*, vol. II, p. 230, document A/CN.4/228 and Add.1, para. 187.

⁵⁴⁰ State Institute of Law of the Soviet Academy of Sciences, *Kurs ... (op. cit.)*, p. 270.

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),⁵⁴¹ 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 U.S. exports of scientific equipment have been put by the Italian Government's action, it is suggested that the Embassy take the matter up informally with the proper Italian authorities. The objective of such discussions should be to obtain duty-free treatment of such equipment if imported from the United States for sale to approved institutions. In its approach to the Italian Government, the Embassy might point out that article XIV-1 of our FCN Treaty with Italy⁵⁴² and article I:1 of GATT⁵⁴³ provide for unconditional most-favoured-nation treatment of U.S. products. Although such treatment is subject to specified exceptions, the Florence Agreement does not appear to fall within any of these exceptions. If Italy accords duty-free treatment under certain circumstances to scientific equipment of any other country, then it must accord the same treatment to imports of U.S. scientific equipment.⁵⁴⁴

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.⁵⁴⁵

(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.⁵⁴⁶

(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".⁵⁴⁷

(18) The following three cases further illustrate the point. In a 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 *cautio judicatum solvi*. The plaintiffs opposed the application. The Court held that the order for the *cautio* must be refused. This followed from article 24 of the Netherlands-Indonesian Union Statute agreed upon on 2 November 1949, which promised the subjects of each partner to the Union treatment on a footing of substantial equality with the other's own subjects, and in any case most-favoured-nation treatment. The latter provision guaranteed to Indonesians exemption from the *cautio judicatum solvi*, because the Netherlands had previously exempted other foreigners and foreign countries from the *cautio* under the Hague Convention on Procedure in Civil Cases of 17 July 1905.⁵⁴⁸

(19) A 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 1905.⁵⁴⁹ The

⁵⁴⁶ UNESCO/MC/34/SR.I-II, p. 9, as quoted by M. Whiteman, *op. cit.*, p. 768.

⁵⁴⁷ United Nations, *Treaty Series*, vol. 131, p. 30.

⁵⁴⁸ *Asia Trading Co., Limited v. Biltimex, Netherlands District Court of Amsterdam, 17 October 1951*, See *Yearbook... 1973*, vol. II, p. 137, document A/CN.4/269, para. 55.

⁵⁴⁹ 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

(Continued on next page.)

⁵⁴¹ United Nations, *Treaty Series*, vol. 131, p. 25.

⁵⁴² Treaty of Friendship, Commerce and Navigation signed at Rome on 2 February 1948 (*ibid.*, vol. 79, pp. 190 and 192).

⁵⁴³ *Ibid.*, vol. 55, p. 196 and vol. 138, p. 336.

⁵⁴⁴ See M. Whiteman, *op. cit.*, pp. 766-767.

⁵⁴⁵ *Ibid.*, p. 767.

appellant further relied on article III, section I, of the Netherlands-United States Treaty of Friendship, Commerce and Navigation of 27 March 1956.⁵⁵⁰ 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 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.⁵⁵¹

(20) In a third case, it has been expressly recognized that privileges provided pursuant to a "multiple or bipartite international treaty" can be claimed on the basis of a most-favoured-nation clause.⁵⁵²

(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

(Foot-note 549 continued.)

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."

⁵⁵⁰ 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 favourable 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 favourable than that accorded nationals of any third country or that required by international law."

⁵⁵¹ *McLane v. N.V. Koninklijke Vleeswarenfabriek B. Linthorst en Zonen*, Netherlands, Court of Appeal of The Hague, 4 February 1959. See *Yearbook...* 1973, vol. II, p. 142, document A/CN.4/269, para. 68.

⁵⁵² *Taxation Office v. Fulgor (Greek Electricity Company) Greece, Council of State, Decision of 28 May 1969. Ibid.*, p. 148, document A/CN.4/269, para. 87.

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.⁵⁵³

(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 reason (although a false one—cf. in this regard E. Allix, quoted above⁵⁵⁴) 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 assume also 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 15, which states that the beneficiary State is entitled to treatment extended by the granting State to a third State whether or not such treatment is accorded under a bilateral or a multilateral agreement. The Commission, however, reserved its position with respect to the case of customs unions and similar associations of States, which it intends to consider separately.

The submissions of the Special Rapporteur on the case of customs unions and similar associations of States

(24) In his sixth report (A/CN.4/286 and Corr.1),⁵⁵⁵ the Special Rapporteur on the topic submitted a short study on the question of whether a most-favoured-nation clause does or does not attract benefits granted within customs unions and similar associations of States. The Commission, for the reason given below,⁵⁵⁶ decided to include in paragraphs 25 to 65 of the commentary to the present article some of the materials contained in the Special Rapporteur's report as well as a summary of the findings of the Special Rapporteur on the subject.

(25) For the Special Rapporteur, "similar associations of States" besides customs unions are the following: (a) a free trade area; (b) any interim régime leading to the formation of a customs union or a free trade area; and (c) any other association or grouping of States which is based upon a customs union, a free trade area, or an interim régime leading or intended to lead to a customs union or a free trade area.

⁵⁵³ E. Sauvignon, *op. cit.*, pp. 267–268.

⁵⁵⁴ See para. 9 of the commentary to the present article.

⁵⁵⁵ See p. 1 above.

⁵⁵⁶ See para. 71.

(26) Many commercial and other treaties contain explicit exceptions as to the favours granted within a customs union or other associations. Other treaties do not contain exceptions at all and again others do contain exceptions but not those pertaining to customs unions and similar associations. An important multilateral treaty, the GATT, contains in article XXIV a very detailed exception pertaining to customs unions and free trade areas. The interpretation of this exception has given rise to much discussion and many difficulties.⁵⁵⁷

(27) The question to be answered was formulated by the Special Rapporteur as follows: If the parties to a most-favoured-nation clause do not expressly agree that benefits granted by one member of a customs union or a similar association to another member will be excepted from the operation of the clause, will the clause attract such benefits or is the said exception to be implied when it comes to the interpretation of the clause?

Examples of different types of treaties from the point of view of customs union—exceptions

(28) The Trade Agreement between the Government of the Union of Soviet Socialist Republics and the Government of the Commonwealth of Australia, signed at Moscow on 15 October 1965, contains exceptions from the operation of the clause but they do not relate to customs unions. The text of article 5 of the Agreement, which contains the exceptions, is as follows:

Article 5

The provisions of Articles 1 and 2 of this Agreement shall not apply to:

(a) preferences or advantages accorded by the Union of Soviet Socialist Republics to countries immediately adjacent to the Union of Soviet Socialist Republics;

(b) preferences or advantages, accorded by the Commonwealth of Australia within the framework of the Commonwealth of Nations or to Ireland.⁵⁵⁸

(29) The following are examples of clauses which explicitly except favours granted within a customs union or similar associations: The Trade Agreement between the Government of the Republic of the Philippines and the Government of the Commonwealth of Australia, signed at Manila on 16 June 1965, contains numerous exceptions to the clause, including explicitly the association of one of the parties in a customs union or a free trade area. The exception clause of this Agreement reads as follows:

Article V

The provisions of Articles III and IV of this Agreement shall not apply to:

(a) tariff preferences or other advantages accorded at present by the Republic of the Philippines to the United States of America;

(b) tariff preferences or other advantages accorded by the Commonwealth of Australia to its external territories or to any country at present a member of the Commonwealth of Nations, including its external territories or to Ireland;

⁵⁵⁷ See below, paras. 35 *et seq.*

⁵⁵⁸ United Nations, *Treaty Series*, vol. 553, p. 243.

(c) tariff preferences or other advantages accorded by either Government to any third country which are not inconsistent with the General Agreement on Tariffs and Trade or which conform to any international agreement concluded under the auspices of the United Nations, including preferences and advantages resulting from the association of one of the parties in a customs union or free trade area;

(d) such measures as either Government may consider necessary to safeguard its external financial position and balance of payments;

(e) such measures either Government may take to carry out its obligations under any multilateral commodity agreement which is open to participation by the parties to this Agreement.⁵⁵⁹

(30) In the Trade Agreement between the Union of Soviet Socialist Republics and the Republic of Dahomey, signed at Porto-Novo on 10 July 1963, the exception clause reads as follows:

Article 1

...

The provisions of this article shall not apply to:

...

(c) Advantages resulting from agreements concerning a customs union which have been or may hereafter be concluded by either Contracting Party.⁵⁶⁰

(31) In the Trade Agreement between the Government of Greece and the Government of Pakistan, signed at Athens on 17 January 1963, the exception clause reads as follows:

Article IV

The advantages set out in Article III above of this agreement shall not apply to:

(i) Preferences which either of the two countries grants to facilitate frontier traffic;

(ii) Advantages resulting from a customs union which either of the two Contracting Parties had previously concluded or shall conclude, or resulting from a free exchange system as in the cases of the Free Trade Area;

(iii) Preferences and advantages permitted by GATT, particularly those covered by Article I and paragraph II of Article XXIV of GATT.⁵⁶¹

(32) In the Treaty of Commerce, Establishment and Navigation between the United Kingdom of Great Britain and Northern Ireland and Japan, signed at London on 14 November 1962, the exception clause reads as follows:

Article 29

...

(3) The provisions of the present Treaty relative to the grant of treatment not less favourable than that accorded to any other foreign country shall not be construed so as to oblige one Contracting Party to extend to the other the benefit of any treatment, preference or privilege which may be extended by the former Contracting Party by virtue of:

(a) the formation of a customs union or a free trade area, or

(b) the adoption of an agreement designed to lead to the formation of such union or area within a reasonable length of time.⁵⁶²

⁵⁵⁹ *Ibid.*, vol. 541, p. 34.

⁵⁶⁰ *Ibid.*, vol. 528, p. 176.

⁵⁶¹ *Ibid.*, vol. 538, p. 178.

⁵⁶² *Ibid.*, vol. 478, pp. 120 and 122.

(33) The most notable customs union exception clause is article XXIV of GATT which will be dealt with below.⁵⁶³

Definitions

(34) According to the Permanent Court of International Justice the requirements of a customs union are as follows:

uniformity of customs law and customs tariff; unity of the customs frontiers and of the customs territory vis-à-vis third States; freedom from import and export duties in the exchange of goods between the partner States; apportionment of the duties collected according to a fixed quota.⁵⁶⁴

(35) While the definition of the Court was intended to be of a general validity, that embodied in the General Agreement on Tariffs and Trade serves only the purpose of that Agreement and it is quite different also. According to article XXIV, paragraph 8 of GATT:

(a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that:

(i) duties and other restrictive regulations of commerce (except where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and

(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.⁵⁶⁵

(36) Other parts of article XXIV, however, contain further conditions which have to be fulfilled in order that a customs union or a free-trade area meet the requirements that are necessary for constituting a full-fledged exception to the most-favoured-nation clause of the Agreement. Most of these provisions were quoted in the Special Rapporteur's second report and are reproduced here for the sake of convenience as follows:

...

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an

⁵⁶³ See paras. 35 *et seq.*

⁵⁶⁴ Customs régime between Germany and Austria, Protocol of 19 March 1931, *P.C.I.J.*, Series A/B, No. 41, Advisory Opinion of 5 September 1931, p. 51.

⁵⁶⁵ GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No. GATT/169-1), p. 43.

interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided that*:

(a) with respect to a customs union, or an interim agreement leading to the formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;

(b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement, as the case may be; and

(c) any interim agreement referred to in subparagraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

6. If, in fulfilling the requirements of subparagraph 5 (a) a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reductions brought about in the corresponding duty of the other constituents of the union.

7. (a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

(b) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of subparagraph (a), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

(c) Any substantial change in the plan or schedule referred to in paragraph 5 (c) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.⁵⁶⁶

(37) As explained by Jackson, article XXIV grants

an exception to GATT obligations for three types of regional arrangements: (1) A customs union, (2) a free-trade area and (3) an "interim agreement" leading to the formation of either a customs union or free-trade area. The expressed rationale behind this exception is the recognition stated in article XXIV, paragraph 4, that regional arrangements can "increase freedom of trade" through "closer integration between economies". But the danger of "raising

⁵⁶⁶ *Ibid.*, pp. 41-42.

barriers to the trade of other contracting parties" is also recognized.⁵⁶⁷

However, nothing is said against barriers to the trade of non-parties.

The philosophy of article XXIV is that if the particular legal requirements and prerequisites of one of the three arrangements mentioned are fulfilled, then the exception to GATT obligations (to the most-favoured-nation clause) is automatic—no special action is required by GATT.⁵⁶⁸ According to paragraph 10 of article XXIV exceptional cases may be approved by the Contracting Parties by a two-thirds majority. For the present purposes it is of special interest that the terms of paragraph 5 of article XXIV, which established the exception, apply only to regional arrangements between territories of contracting parties; thus, if a non-party to GATT belongs to the customs union, free-trade area or interim agreement in question, the arrangement is not eligible for the "automatic exception" in GATT.⁵⁶⁹

(38) Innumerable GATT documents and a vast literature have analysed in one way or another the provisions of article XXIV.⁵⁷⁰ Suffice it here to indicate briefly some of the most controversial problems: what are the criteria for "trade creation" and "trade diversion" as these terms are understood to express tersely the idea of paragraph 4? what is the meaning of the following expressions?: "... shall not on the whole be higher or more restrictive ..." (para. 5 (a)); "... general incidence of the duties and regulations of commerce applicable ..." (para. 5 (a)); "... a plan and schedule ..." (para. 5 (c)); "... reasonable length of time ..." (para. 5(c)); "... substantially all the trade ..." (para. 8(a), (i)), etc.

(39) It is interesting to note that not a single customs union or free-trade area agreement which has been submitted to the Contracting Parties has conformed fully to the requirements of article XXIV. Yet the Contracting Parties have felt compelled to grant waivers of one kind or another for every one of the proposed agreements.⁵⁷¹ The Contracting Parties have not been able to say whether the major schemes examined by them qualified as customs unions or free-trade areas under the GATT rules. The formal action in the case of the European Economic Community was to lay aside "for the time being" questions of law and the compatibility of the Treaty with the General Agreement. In the case of the European Free Trade Association and the Latin American Free Trade Area it was concluded that the legal question could not be fruitfully discussed further at this stage and that "at

this juncture" it would not be "appropriate to make any formal legal findings".⁵⁷²

The practice of States

(40) States parties to a treaty granting most-favoured-nation rights are by virtue of their sovereignty free to agree to a limitation of such rights. They can and generally do limit the clause to certain fields (trade, customs duties, consular rights etc.) and can—and very often do—exclude from the operation of the clause certain advantages accorded to specified third States or in specific contexts, or maintain their freedom to withhold most-favoured-nation rights in definite circumstances.⁵⁷³

(41) Stipulations excluding the concessions accorded within customs unions or similar associations of States are frequent. R.C. Snyder, who analysed the economic treaties concluded between the two world wars found 280 customs union exception clauses in that period. He states that the Treaty of Rapallo is indicative of the general type of provision covering this matter: it excludes from the normal operation of the most-favoured-nation clause "favours granted by one of the contracting parties to a third State on account of a customs union already established or to be established". Occasionally, "economic union" or "economic understanding" is apparently substituted for customs union, even though they are not necessarily identical.⁵⁷⁴ This situation has not changed in essence since the Second World War. It is believed that a majority of trade agreements, i.e., those dealing with customs tariffs and related matters contain an explicit customs union exception to the most-favoured-nation clause. The phenomenon, however, is not a new one.

The League of Nations Economic Committee

(42) In a League of Nations paper entitled "Recommendations of the Economic Committee relating to tariff policy and the most-favoured-nation clause", of 16 February 1933, the following is stated:

The most-favoured-nation clause frequently includes a provision allowing for the possibility of each of the parties concluding a complete Customs union with a third power. In such a case, the economic unit becomes in practice something different from the political unit, and the Customs union may be regarded rather as the abolition of a Customs frontier than as a form of discrimination between competing foreign purveyors.

In such cases, the exception to the most-favoured-nation clause takes the form of a reservation covering the privileges accorded to a third power in virtue of a Customs union which has been or may hereafter be concluded. The clause may be drawn up in different ways, but the variations do not involve substantial differences. It appears in a large number of treaties.

⁵⁶⁷ Jackson, *op. cit.*, p. 581.

⁵⁶⁸ *Ibid.*, pp. 581–582. See also the numerous documentary sources cited by Jackson.

⁵⁶⁹ *Ibid.*, p. 582.

⁵⁷⁰ Jackson, *op. cit.*; T. Flory, *Le GATT, droit international et commerce mondial* (Paris, Librairie générale de droit et de jurisprudence, 1968); K.W. Dam, *The GATT, law and international economic organization* (Chicago, University of Chicago Press, 1970), etc.

⁵⁷¹ K.W. Dam, "Regional economic arrangements and the GATT: The legacy of a misconception", in *The University of Chicago Law Review*, vol. 30, No. 4 (Summer 1963), pp. 660–661.

⁵⁷² G. Patterson, *Discrimination in International Trade: The Policy Issues, 1945–1965* (Princeton, N.J., Princeton University Press, 1966), pp. 157–158. For details of these cases see: G. Verbit, "Preferences and the Public Law of International Trade: The End of Most-Favoured-Nation Treatment?" in Hague Academy of International Law, *Colloquium, 1968: International Trade Agreements* (Leiden, Sijthoff, 1969), pp. 48–49.

⁵⁷³ See, e.g., article 5 of the Australia-USSR agreement or article V of the Australia-Philippines agreement, quoted in paras. 28 and 29 above.

⁵⁷⁴ *Op. cit.*, p. 160.

...it is sufficient to declare that Customs unions constitute exceptions, recognized by tradition, to the principle of most-favoured-nation treatment.⁵⁷⁵

The reference to a "recognized . . . tradition" of the customs union exception—as is evident from the context—clearly points to the traditional insertion of such an exception into clauses on customs matters. The Economic Committee clearly intended to encourage the continuance of this "tradition", as under the heading "Wording of the clause" it recommended a text for clauses on customs matters with the inclusion of the following passage:

Nevertheless, the advantages now accorded or which may hereafter be accorded to other adjacent countries in order to facilitate frontier traffic, and advantages resulting from a Customs union already concluded or hereafter to be concluded by either Contracting Party, shall be excepted from the operation of this article.⁵⁷⁶

The 1936 resolution of the Institute of International Law

(43) It was the frequency of stipulation of customs unions exceptions which led B. Nolde to far-fetched conclusions. In his report to the Institute of International Law he cites the passage from the text of the model clause recommended by the League Economic Committee quoted above and continues as follows:

The two cases envisaged in this reservation—frontier traffic and customs unions—are very different, but it is equally evident it could never be considered that either of the special customs régimes to which they refer could be acquired by virtue of the most-favoured-nation clause. Moreover, trade conventions which go into any detail at all always contain these two reservations, and we may consider them as belonging to general international law.

...

In fact, it has never been disputed that customs unions do not require any privilege to be granted by virtue of the clause. A very great number of trade treaties state this explicitly, and those which do not do so must be interpreted in this way.⁵⁷⁷

The relevant text of the resolution adopted by the Institute at its Brussels session in 1936 on the effects of the most-favoured-nation clause in matters of commerce and navigation reads as follows:

Paragraph 7

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

...

to the treatment resulting from a Customs union which has been or may hereafter be concluded;⁵⁷⁸

...

It seems that the conclusions of the Institute at that time did not reflect the practice and official views of a number of States.

⁵⁷⁵ League of Nations document E.805.1933.II.B.1, quoted in *Yearbook... 1969*, vol. II, p. 179, document A/CN.4/213, annex I, under "Customs unions".

⁵⁷⁶ *Ibid.*

⁵⁷⁷ *Annuaire de l'Institut de Droit International, 1934*, vol. 38 (Brussels), pp. 452-454.

⁵⁷⁸ For the full text of the resolution see *Yearbook... 1969*, vol. II, p. 181, document A/CN.4/213, annex II.

Official views on an alleged implied exception before the Second World War

(44) In the notable affair of the customs régime between Austria and Germany which came up before the Council of the League of Nations in 1931 and with which the Permanent Court of International Justice was also concerned, the Solicitor for the Department of State of the United States of America expressed the view that the establishment of a customs union between Austria and Germany would not constitute an exception to the most-favoured-nation provisions in the Treaty of friendship, commerce and consular relations of 8 December 1923 with Germany⁵⁷⁹ and that of 19 June 1928 with Austria.⁵⁸⁰ He stated:

It must be apparent that this Government, at the time of the conclusion of commercial treaties with Germany and Austria, never contemplated that a customs union would be an implied exception to the most-favoured-nation clause, particularly since certain specific exceptions to the clause were expressly stated. Nor can this Government be held to any recognition of such an exception as a principle of international law. This Government has never taken cognizance of the alleged continental tradition of customs unions as implied exceptions; indeed, it is doubtful if such a tradition was ever recognized by other than a few nations. International law does not find its present growth in the traditional habits of continental nations alone ... Seemingly the exponents of this idea content themselves with the citation of treaties in which specific exception has been made. It might follow that the specific inclusion of the exception is the tradition and that this established procedure reflects the true legal nature thereof.

The logical conclusion, therefore, would seem to be that, since certain exceptions to the most-favoured-nation provisions were made in the treaties [concluded by the U.S.] with Germany and Austria and such exceptions do not include customs unions, we would be entitled to claim from Germany whatever advantages she may extend to Austrian trade and commerce, and to claim from Austria whatever advantages may be extended by that country to trade and commerce with Germany.

The fact that the contracting parties undertook to make exceptions to the obligation to extend unconditional most-favoured-nation treatment in customs matters and made no exception with respect to a possible customs union would seem to preclude the possibility of regarding such an arrangement as an exception to the most-favoured-nation provisions on the basis of the principle *inclusio unius exclusio alterius*.⁵⁸¹

(45) The position taken by France was very similar to that of the United States. According to the French memorandum of 14 May 1931 submitted to the Council of the League, as quoted by a French author:

... The fact that certain Powers did not include an exception relating to customs unions in the treaties based on the most-favoured-nation treatment which they concluded with Austria and Germany would give these Powers "the strongest legal grounds for claiming in the present circumstances the full benefit of most-favoured-nation treatment".

... It would be purposeless to refute this argument by relying on the "recommendations relating to commercial policy" which the Economic Committee of the League of Nations addressed to the Council in 1929, in which it is said that:

⁵⁷⁹ League of Nations, *Treaty Series*, vol. LII, p. 133.

⁵⁸⁰ *Ibid.*, vol. CXVIII, p. 241.

⁵⁸¹ G. H. Hackworth, *op. cit.*, pp. 295-296.

"Customs unions constitute exceptions, recognized by tradition, to the principle of most-favoured-nation treatment." But the report immediately adds: "But [the Committee] does not propose to offer an opinion on the more controversial topic of their formation."

This constitutes a recognition by the Economic Committee that any Customs union that may be formed would give rise from the outset to political or economic objections, sometimes fundamental, on the part of third States. As an example, there might be quoted the intervention of Austria-Hungary in 1905 based on the most-favoured-nation treatment which caused a proposed Customs union between Bulgaria and Serbia to fail.⁵⁸²

The same author adds:

It appears from this memorandum that France, at that moment, reserved the right to use the clause to justify in law its possible political or economic opposition to a Customs union. In other words, France did not intend to be legally bound by any contrary customary usage.⁵⁸³

The Ouchy Convention 1932

(46) This is again an instance which throws some light on the practice of States in the interwar period. According to J. Viner:

... Under this Convention, negotiated at Ouchy but signed at Geneva, July 18, 1932, by Belgium, Luxembourg, and the Netherlands, the parties agreed that there should be no increases in existing duties or application of new duties on imports from each other; that no new duties on imports from other countries with which there were treaty relations should be levied unless those States had previously raised their own trade barriers; that existing duties on imports from each other should be reduced by 10 per cent per annum until the total reduction reached 50 per cent; that there should be no new barriers other than import duties on imports from each other; and that there should be open entry to the Convention on the part of other countries and extension of its benefits to non-entering countries if they in fact carried out its terms.

Of all the serious projects up to that time for collective tariff agreements, it went furthest in the direction of a genuine lowering of trade barriers. Belgium and the Netherlands, however, both had commercial treaties containing the most-favoured-nation clause with the United Kingdom and other countries, and the Ouchy Convention provided that it should not come into effect until such countries had waived their rights. Great Britain refused to waive its rights; the Ottawa Conference held in the same year passed a resolution declaring that regional agreements could not be allowed to override most-favoured-nation obligations; and the United States made no reply to the request for a waiver. The Convention, in consequence, lapsed without ever coming into operation.⁵⁸⁴

The Hague Convention of 1937

(47) Also according to J. Viner, this Convention was signed on

... May 28, 1937. The participating countries were the Ouchy Convention countries plus Norway, Sweden, Denmark, and Finland. The Hague Convention provided for specified "bindings" of tariff rates, and for removals of specified existing quantitative restrictions on imports from participating countries and undertakings not to in-

roduce new ones on commodities not already subject to them. All non-participating States were declared eligible to adhere to the Convention in conformity with terms to be negotiated between them and the countries already parties thereto. It is to be noted that the Convention did not provide for reductions, preferential or otherwise, of ordinary import duties, and it was presumably on the strength of this that the participating countries hoped that it would surmount the obstacle of the most-favoured-nation clause.

The Hague Convention came into actual operation, but the Netherlands declined to renew it at the end of its first year of operation, and the other parties to it thereupon allowed it to lapse. The explanation offered by the Netherlands for its failure to renew its participation in the Convention was that other countries, and especially the United Kingdom, had insisted that most-favoured-nation obligations applied to quotas as well as to tariffs, that economic conditions had changed for the worse since the conclusion of the Convention, which made its requirements irksome, and that the expected adherence of additional countries had not occurred.⁵⁸⁵

Attitude of the USSR

(48) Under this heading, a study prepared by the League of Nations Secretariat, but published after the dissolution of that Secretariat by the United Nations in 1947 outlines the Soviet position in the period under consideration as follows:

If concrete evidence of the Soviet Union's attitude towards regional exceptions to most-favoured-nation is meagre because of the rarity and peculiar nature of her treaties, there is no doubt that she has been opposed to admitting such exceptions. She has been categorical in her insistence on the fullest possible interpretation of the most-favoured-nation clause and there appear to be no instances of Soviet acceptance of a regional exception.

... the USSR raised objections to the preferential agreements negotiated by Germany with certain Danubian countries in 1931. Evidence of her opposition to any "discrimination" is provided in the 1931 discussions in the European Commission on her proposed Economic Non-aggression Pact. Discussion arose on the relation between the principle of non-discrimination and the exceptions to the most-favoured-nation clause sanctioned by practice (frontier traffic, customs unions, regional clauses, etc.). The Soviet view was that non-discrimination tended to "forbid the creation of a commercial and financial régime which would be inflicted on a given country or on a small group of countries when the commercial and financial policy of the country establishing this régime was distinctly more favourable to other countries". To quote the report of the Special Committee set up to examine the Soviet proposal:

"By this declaration, the Soviet delegation considered that it had implicitly replied to a series of questions put by certain delegates in regard to the relation existing between the principle of non-discrimination and the exceptions to the most-favoured-nation clause sanctioned by practice such as those relating to frontier traffic, customs unions, regional clauses etc."

As regards the question of how the pact would affect possible preferential agreements, the Soviet delegation considered that these agreements would only be in contradiction with the draft if they were concluded without the consent of the parties entitled under their commercial treaties to claim the same advantage.⁵⁸⁶

A conclusion with regard to the pre-Second World War period

(49) The material presented above led the Special Rapporteur to the same conclusion which has been

⁵⁸² E. Sauvignon, *op. cit.*, p. 239. For the text of the French memorandum, see League of Nations, *Official Journal*, 12th year, No. 7 (July 1931), p. 1167.

⁵⁸³ E. Sauvignon, *op. cit.*, p. 239.

⁵⁸⁴ J. Viner, *op. cit.*, pp. 30-31.

⁵⁸⁵ *Ibid.*, pp. 31-32.

⁵⁸⁶ *Customs Unions: A League of Nations Contribution to the Study of Customs Union Problems* (United Nations publication, Sales No. 1948.II.D.3), p. 58.

reaches by Vignes: "... in fact, up to the war of 1939-1945, there was really no consistent practice of States with regard to the granting of full legal status to the [customs union] exception ...".⁵⁸⁷ In the view of the Special Rapporteur, this evaluation of the situation existing during the period in question can obviously be extended to free-trade areas, interim régimes and other groupings of States in regard to which there has also not developed, to say the least, a constant and uniform practice as to their exception—without an explicit provision to that effect—from the operation of a most-favoured-nation clause. Vignes, however, continues his sentence as follows: "... the most recent practice seems to show that customs unions are now unquestionably considered to be an exception". This part of D. Vignes' statement will be examined in the following paragraphs.

Recent developments

(50) The view of Vignes is not isolated. Several other authors hold the same or a similar view. It is intended here to review their arguments. The purpose of the exercise is to find out whether it is possible to establish a generally recognized custom whereby the beneficiary of a most-favoured-nation clause relating to trade in general and customs and other related matters in particular (here it is only this type of clause that is always dealt with) cannot claim from the granting State favours which the latter accords to its partner within a customs union, a free-trade area, an interim régime or another closed or open grouping of States, even if the clause—or the treaty embodying it—is silent on such eventualities. For the sake of brevity the question may be put in the following form: is there a rule of international law establishing, to clauses of the type mentioned, an implied customs union exception? (For the present purposes, by "customs unions" is meant the other types of grouping also.)

(51) The presumption obviously militates against such an exception. If States promise each other most-favoured-nation treatment, they are supposed to carry out their promise. They may limit such promise, but if they do not, they have to bear the consequences. To put it in another way:

As a matter of general principle, it should not be possible to imply exceptions to the most-favoured-nation clause, regardless of whether such an exception would be in favour of a customs union, a region or an economic union. The reason is, of course, that bargained-for advantages should not be denied a treaty partner because of the unilateral action of the other. The failure to stipulate the exception expressly, however, would make such a denial on the basis of implied exceptions nothing short of unilateral action.⁵⁸⁸

(52) The arguments that can be and are put forward for the purpose of rebutting the presumption may be dealt with one by one. According to one view:

It should be noted first of all that there are many treaties (the majority of trade treaties) which contain a provision exempting customs unions from the scope of the clause

the writer himself taking a stand for the implied exception. He adds, however:

Compared with the positions formerly taken by the major trading Powers, these explicit reservations can give the impression that the international Community sets aside any customary usage in the matter.⁵⁸⁹

Although the author later on argues against it this latter conclusion sounds to the Special Rapporteur more convincing. The reasoning goes further:

In reality there are two arguments which support the view that the frequency of the exclusion of customs unions amounts to a practice recognized as lawful and that a customary usage therefore exists.

The first argument is that the authors who adduce the diplomatic practice of the major States and demonstrate the reservations of those States with regard to customs unions (McNair, Hackworth, Kiss) generally base their opinion on old documents, clearly pre-dating the Second World War.⁵⁹⁰

This argument cannot be taken too seriously. What is to be established is the practice of States and their *communis opinio*. And as to modern practice, the situation is not always that the small States form customs unions and the big Powers insist upon their most-favoured nation rights, but often the opposite. In Europe, e.g., some smaller States complain about the infringement of their most-favoured-nation rights by the groupings of more powerful ones.

(53) The next argument relies upon article XXIV of the GATT:

GATT was established in 1947, and that is the second argument. Article XXIV of the General Agreement exempts customs unions from the scope of the clause. Eighty States have thus confirmed the exception, which the majority of them already recognized in their bilateral agreements. It is difficult not to see in this consensus a recognition on the part of the international community of the necessity and mandatory character of the exception.⁵⁹¹

Vignes follows the same line of thought:

We must recognize the support which this argument [i.e. the implied customs union exception] obtained with the signing of the General Agreement and thus with its recognition by the 95 States participating *de jure* or *de facto* in the General Agreement.⁵⁹²

It is difficult to agree with this type of reasoning. The General Agreement, however important, is one agreement among many. The parties to this Agreement conceded to each other certain most-favoured-nation rights and stipulated certain exceptions, such as that of article XXIV, which is a rather complicated arrangement. Can it be inferred from this fact that the parties to this Agreement, when they conclude treaties with non-parties containing the most-favoured-nation clause, have to be considered as bound by the terms of article XXIV in relation to their treaty partners and vice versa? And what about the treaties of a State which under article XXXI of GATT has withdrawn from the Agreement—treaties concluded after the withdrawal? And what about treaties between two or more non-parties to GATT? How will they be bound by

⁵⁸⁷ D. Vignes, *loc. cit.*, p. 278.

⁵⁸⁸ P. Hay, "European Common Market and the most-favoured-nation clause", *University of Pittsburgh Law Review*, vol. 23 (1962), p. 679.

⁵⁸⁹ E. Sauvignon, *op. cit.*, p. 241.

⁵⁹⁰ *Ibid.*

⁵⁹¹ *Ibid.*, pp. 241-242.

⁵⁹² *Loc. cit.*, p. 278.

the terms of a treaty which is for them *res inter alios acta*? Or does GATT possess a "radiation effect" which would impose upon non-parties the rule of article XXIV, as one which passed into the general *corpus* of international law on its acceptance by a *communis opinio Juris*?⁵⁹³

(54) Another argument considers a customs union as a new entity and perhaps a new subject of international law.⁵⁹⁴ If the association of States in such unions could be assimilated to a uniting of States, the argument goes, then most-favoured-nation rights based on favours accorded by one member of the union to the other could not be claimed by an outsider after the establishment of the union. However, since the States participating in such unions usually continue as independent and sovereign States, this view is difficult to accept. The International Law Commission, when preparing the draft articles on succession of States in respect of treaties, made it plain that associations of States having the character of international organizations such as, for example, the United Nations, could not be considered a uniting of States and the same applied to hybrid unions which might appear to have some analogy with a uniting of States but did not result in a new State.⁵⁹⁵ The Commission cited the example of EEC which—at least from the point of view of succession in respect of treaties—appeared to the Commission to keep on the plane of intergovernmental organizations. As stated in the Commission's report:

Thus, Article 234 of the Treaty of Rome⁴⁶³ [596] unmistakably approaches the question of the pre-Community treaties of member States with third countries from the angle of the rules governing the application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention). In other words, pre-Community treaties are dealt with in the Rome Treaty in the context of the compatibility of treaty obligations and not of the succession of States. The same is true of the instruments which established the other two European Communities.⁴⁶⁴

⁴⁶³ Treaty instituting the European Economic Community. See United Nations, *Treaty Series*, vol. 294, p. 17 (text in French).

⁴⁶⁴ Treaty instituting the European Coal and Steel Community, section 17 of the Convention on Transitional Provisions (United Nations, *Treaty Series*, vol. 261, pp. 297 and 299); and Treaty establishing the European Atomic Energy Community, articles 105 and 106, (*ibid.* vol. 298, p. 205).

Furthermore, the Treaty of Accession of 22 January 1972,⁴⁶⁵ which sets out the conditions under which four additional States may join EEC and EURATOM, deals with the pre-accession treaties of the candidate States on the basis of compatibility of treaty obligations—of requiring them to bring their existing treaty obligations into line with the obligations arising from their accession to the Communities. Similarly, the Treaty of Accession expressly provides for the new member States to become bound by various categories of pre-accession treaties concluded by the Communities or by their original members and does not rely on the operation of any principle of succession.

Numerous other economic unions have been created in various forms and with varying degrees of "community" machinery; e.g. EFTA, LAFTA and other free-trade areas and the Benelux. In general, the consultations of these economic unions leave in no doubt

⁵⁹³ See below para. 58 of the commentary to the present article.

⁵⁹⁴ P. Hay, *loc. cit.*, p. 680.

⁵⁹⁵ See *Yearbook... 1974*, vol. II (Part One), p. 253, document A/9610/Rev.1, chap. II, sect. D, paras. 3 and 4 of the commentary to articles 30, 31 and 32.

⁵⁹⁶ The text of article 234 of the Treaty of Rome is reproduced below in para. 56 of the present commentary.

their essential character as intergovernmental organizations. In the case of the Belgium-Luxembourg Economic Union, if Belgium may be expressly empowered to conclude treaties on behalf of the Union, the relationship between the two countries within the Union appears to remain definitively on the international plane. In practice all these economic unions, including the closely integrated Liechtenstein-Swiss Customs Union, have been treated as international unions and not as involving the creation of a new State.

⁴⁶⁵ Treaty concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community: Act concerning the conditions of accession and the adjustments to the treaties, article 4. See (*Official Journal of the European Communities—Legislation*, Special Edition, Luxembourg, 27 March 1972, No. L 73, pp. 14–15.⁵⁹⁷

This chain of reasoning leads to the conclusion that an economic association or "integration" of States, however close, but falling short of a uniting of States, does not by itself terminate previously existing agreements of participants in general and their most-favoured-nation obligations in particular. An argument admitting the continued existence of treaties but claiming that the formation of a new entity excepts certain areas from the application of those treaties is equally lacking in justification.⁵⁹⁸

(55) The approach of certain economic associations of States to the problem can be seen from the provisions included in their constitutional Treaties or related instruments. The Treaty instituting the European Coal and Steel Community⁵⁹⁹ does not contain a clause pertaining to the operation of most-favoured-nation clauses. However, the Convention containing the transitional provisions signed in Paris on 18 April 1951 provides as follows:

EXCEPTION TO THE MOST-FAVORED-NATION CLAUSE

Section 20

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

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

Should a country refuse its consent to the member States or to any one of them, the other member States agree to lend effective assistance, which may even extend to denunciation by all of the member States of the agreements concluded with the country in question.⁶⁰⁰

While the provision in the third paragraph can justly be criticized from the economic or political point of view as too "radical" or "threatening",⁶⁰¹ from the strictly

⁵⁹⁷ *Yearbook... 1974*, vol. II (Part One), p. 253, document A/9610/Rev.1, paras. 4–5 of the commentary to articles 30, 31 and 32.

⁵⁹⁸ P. Hay, *loc. cit.*, p. 681.

⁵⁹⁹ United Nations, *Treaty Series*, vol. 261, p. 140.

⁶⁰⁰ *Ibid.*, pp. 299 and 301.

⁶⁰¹ Kiss, *op. cit.*, p. 485.

legal point of view it clearly demonstrates that the commitment of the granting State under a most-favoured-nation clause cannot be terminated or modified by means other than those offered by the law of treaties.

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

Article 234

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

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

Member States shall, in the application of the conventions referred to in the first paragraph, take due account of the fact that the advantages granted under this Treaty by each Member State form an integral part of the establishment of the Community and are therefore inseparably linked with the creation of common institutions, the conferring of competences upon such institutions, and the granting of the same advantages by all other Member States.⁶⁰²

The first and second paragraphs voice the same ideas as those included in section 20 of the Convention containing the transitional provisions to the Treaty instituting the European Coal and Steel Community quoted in the preceding paragraph. Vignes calls the provision of paragraph 3 "an explanatory and incitant provision".⁶⁰³ This "incitant" element is viewed more seriously by the Soviet international law textbook, according to which:

the somewhat obscure formulation of Article 234 cannot conceal its meaning which lies in obliging every party to the Treaty to deny third countries the extension, in accordance with previously concluded agreements, of the same privileges as are enjoyed by members of the bloc.⁶⁰⁴

The approach of a French writer, T. Flory, is different:

How can the Member States of EEC reconcile the commitments resulting for them from the signing of the Treaty of Rome with the obligations which they had assumed previously by signing multilateral agreements such as GATT? Under Article 234 of the Treaty of Rome, the principle of fidelity to prior commitments should predominate. By submitting the Treaty of Rome for consideration by GATT and exhibiting a conciliatory attitude towards the contracting parties, the six have respected that principle.⁶⁰⁵

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

(57) Another argument refers to the changed circumstances created by the formation of a customs union or

another type of association of States. Here again, it seems untenable to maintain that, in the absence of a political union among the participants, the changed circumstances of one of the parties should justify a modification by implication. This follows from the general rule that any recognition of the effect of changed circumstances requires more than a voluntary and unilateral change of circumstances by one of the treaty partners.⁶⁰⁶ As expressed by one author:

... even if we suppose that the establishment of a multilateral preferential system constitutes a fundamental change in the circumstances and that this change had not been envisaged by the parties to the treaty providing for the most-favoured-nation treatment, the *clausula* would still not come into play: it cannot be invoked by a State when the State itself brought about the changed circumstances. (See J. Leca, *Les techniques de révision des conventions multilatérales*, in particular, p. 312). It rests entirely with the granting State to refuse to accede to the multilateral agreement establishing the preferential system.⁶⁰⁷

(58) What is necessary for the establishment of the existence of a customary rule of international law has been again examined quite recently by the International Court of Justice. In its judgment in the North Sea Continental Shelf Case the Court affirmed that rules, while only conventional or contractual in their origin, might pass into the general *corpus* of international law and might be accepted as such by the *opinio juris*, so as to become binding even for countries which had never been, and did not become, parties to the convention in question. According to the Court this process is perfectly possible and does from time to time occur. This result, however, is not lightly to be regarded as having been attained.⁶⁰⁸ According to the Court, for the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, "an indispensable requirement would be that . . . State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved".⁶⁰⁹ As to the nature of the required State practice the Court holds that it must be "settled" and moreover carried out in such a way "as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough".⁶¹⁰

(59) In the view of the Special Rapporteur, the alleged customary rule that there is an implied exception in the case of customs unions (and still more, that there is an exception in the case of other kinds of groupings), falls

⁶⁰² United Nations, *Treaty Series*, vol. 298, p. 91.

⁶⁰³ D. Vignes, *loc. cit.*, p. 293.

⁶⁰⁴ State Institute of Law of the Soviet Academy of Sciences, *Kurs* ... (*op. cit.*), p. 269.

⁶⁰⁵ T. Flory, *op. cit.*, p. 124.

⁶⁰⁶ P. Hay, *loc. cit.*, pp. 681–682.

⁶⁰⁷ E. Sauvignon, *op. cit.*, p. 254, foot-note 2.

⁶⁰⁸ *I.C.J. Reports 1969*, p. 42.

⁶⁰⁹ *Ibid.*, p. 44.

⁶¹⁰ *Ibid.*, p. 45.

far short of the requirements set out above. To remain in the orbit of the problems connected with EEC, which is based upon a customs union (article 9 of the Treaty of Rome), it seems to be clear that not only did the founders of EEC not rely upon a rule of exception in the case of customs unions, but, on the contrary, they "unmistakably" approached "the question of pre-Community treaties from the angle of the rules governing the application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention)".⁶¹¹ In these circumstances it is difficult to attribute sufficient weight to the official paper of the then Government of the Federal Republic of Germany which in 1957, replying on the customs union exception, interpreted Article 234 of the Rome Treaty in its explanations submitted to Parliament, to mean that the six member States have agreed that EEC benefits are excepted from the application of the most-favoured-nation clause.⁶¹² Nor can the fact that controversies, protests and diplomatic steps have led in several cases to more or less satisfactory compromises mostly to the detriment but sometimes to the benefit of outsiders be considered as sufficient to establish a general practice and *communis opinio* of States.⁶¹³

(60) No adherent of the implied customs union exception has ever offered a satisfactory solution to the formidable problem presented by those treaties which contain explicit provisions as to one or more exceptions to the clause without reference to customs unions or the like.⁶¹⁴ The implied customs union exception can hardly surmount the formidable difficulty of the *inclusio unius, exclusio alterius* principle.

(61) Mention should be made finally of the views of modern authors, who in recent times have adopted a negative position in regard to the implied customs union exception rule. In addition to those already mentioned, reference can be made to E.T. Usenko, who in the standard Soviet textbook writes as follows:

It is impossible to agree with the view that there exists a rule of international law which excepts from the scope of the principle of most-favoured-nation treatment advantages granted under a customs union. If such an exception existed in international law, it would not be necessary for States, whenever they wish to make this exception, to enter scrupulous reservations in trade agreements to the effect that the scope of the principle of most-favoured-nation treatment does not extend to any advantages resulting from the customs union.

...

Since there are no rules of a non-treaty nature in international law which might establish exceptions to the most-favoured-nation clause (see below for exceptions in the case of the developing countries), it follows that the only lawful exceptions are those which are made with the agreement of the country to which they are applied.⁶¹⁵

⁶¹¹ See above, para. 54 of the commentary to the present article.

⁶¹² See *Verhandlung des Deutschen Bundestages, 2. Wahlperiode 1953: Anlagen zu den stenographischen Berichten*, vol. 51 (Bonn, 1957), Drucksache [fascicle] 3440, p. 157. See also the remarks of E. T. Usenko, State Institute of Law of the Soviet Academy of Sciences, *Kurs ... (op. cit.)*, p. 268.

⁶¹³ E. Sauvignon, *op. cit.*, p. 246.

⁶¹⁴ See above, para. 28 of the commentary to the present article.

⁶¹⁵ State Institute of Law of the Soviet Academy of Sciences, *Kurs ... (op. cit.)*, p. 268.

The same view is held by a Polish scholar, T. Szurski.⁶¹⁶

(62) M. Guiliano, in his Hague lectures, after a thorough analysis of the relevant practice of States, comes to the following conclusion:

In the light of the facts of international practice which we have just considered, it seems clear that the doctrine in question [i.e. the implied customs union exception] is not established in international law. If a treaty does not contain an explicit provision to the contrary, the most-favoured-nation treatment must also be extended to the advantages resulting from a customs union between one or other of the contracting parties and a third State.

...

Nevertheless, an entirely different problem is that of the timeliness or, if you wish, the reasonableness of the limitations imposed on the operation of the clause which were discussed earlier. From this standpoint, there cannot be any room for doubt, since—as we have already had an opportunity to note—the problem of the equal treatment of nations in trade matters never arises in the abstract and as a principle having absolute validity. And it is precisely for that reason that Governments have always taken great care to insert these exceptions in trade treaties.⁶¹⁷

(63) The Special Rapporteur also tried to find an answer to the question whether the Commission should evaluate the situation as one where progressive development of international law is needed in the sense that the benefits of customs unions etc. become a full-fledged exception to the operation of the most-favoured-nation clause. His approach to this question is rather on the negative side for the following reason: the expression of such need would involve a value judgement as to the desirability of establishing customs unions, etc. Whether the formation of such groupings is desirable or not leads from the field of law to that of economics, which the Commission may not wish to enter. However, even economists are not entirely certain whether regional arrangements of the kind in question are beneficial and, if so, what characteristics differentiate the beneficial one from the detrimental ones.⁶¹⁸ How formidable are the economic questions involved has been dealt with a great length by a number of authors.⁶¹⁹

⁶¹⁶ *Zasada największego uprzywilejowania w Umowie Ogólnym w Sprawie Taryf Celnych i Handlu (GATT)* (Warsaw, 1970), chap. IV.

⁶¹⁷ M. Guiliano, "Quelques aspects juridiques de la co-opération intergouvernementale en matière d'échanges et de paiements internationaux", *Recueil des Cours ... 1968-II*, vol. 124 (Leiden, Sijthoff, 1969), pp. 601–602.

⁶¹⁸ Jackson, *op. cit.*, p. 621.

⁶¹⁹ Classics of this extensive literature are: J. Viner, *The Customs Union Issue (op. cit.)*; J. Meade, *The Theory of International Economic Policy*, vol. I, *The Balance of Payments* (London, Oxford University Press, 1951) and vol. II, *Trade and Welfare* (London, Oxford University Press, 1955) and *The Theory of Customs Unions* (Amsterdam, North-Holland Publishing Co., 1955); R.G. Lipsey and K. Lancaster, "The General Theory of Second Best", *Review of Economic Studies*, 1956–1957 (Edinburgh), vol. XXIV, No. 63, pp. 11–32; R.G. Lipsey, "The Theory of Customs Unions: A General Survey", *The Economic Journal* (London), vol. LXX, No. 279 (September 1960), pp. 496–513; J.M. Fleming, "On Making the Best of Balance of Payments Restrictions on Imports", *ibid.*, vol. LXI (March 1951), pp. 48–71; T. Scitovsky, *Economic Theory and Western European Integration* (London, Allen and Unwin, 1958); B. Balassa, *The Theory of Economic Integration* (London, Allen and Unwin, 1961). H.G. Johnson, *Money, Trade and Economic Growth: Surrey lectures in economic theory* (London, Allen and Unwin,

(Continued on next page.)

(64) If for one reason or another the Commission still wished to draft a rule establishing a general exception of customs unions and other like associations it would encounter tremendous difficulties. How should such a rule define a customs union, a free-trade area and other relevant groupings? Should it take over the terms of GATT which, as shown above, were not conducive to the legal solution of the difficulties which have arisen in regard to such unions? How would non-GATT members react to such proposal? There are still some 60 such States in the world, representing a considerable part of its population. Or should the rule simply refer to customs unions, free-trade areas etc. without elaborating further on the meaning of these notions, as is frequently done in bilateral treaties? This would give a result which—in the words of the Court—owing to “the very considerable, still unresolved controversies as to the exact meaning and scope of this notion, must raise further doubts as to the potentially norm-creating character of the rule”.⁶²⁰

(65) Under these circumstances the Special Rapporteur's conclusion was that, because no customary rule of international law establishing an implied customs union etc. exception can be ascertained; because, further, it is a general practice of States to insert in their treaties any exception they may wish to make in regard to their most-favoured-nation pledge; and because there is no compelling evidence as to the desirability of substituting a general rule for the particular arrangements of the parties, the best course of action is to leave matters where they are.

The Special Rapporteur has drawn attention to the fact that the importance of the question cannot be exaggerated. In the relation between States parties to GATT, article XXIV more or less settles the matter. In relations between them and outsiders and between outsiders *inter se* stipulations making exceptions to a most-favoured-nation clause are very frequent. Where such exceptions include a reference to a customs union or a free-trade area etc., the problem is settled more or less according to the precision of the stipulation. Where exceptions are stipulated in other matters but not in regard to customs unions, as e.g. in the USSR-Australia treaty of 1965, quoted above,⁶²¹ it is the feeling of the Special Rapporteur that the *inclusio unius, exclusio alterius* principle cannot be overruled. There remain the presumably not too numerous cases where the clause stands without any stipulated exception whatsoever. Hence it could be said that the problem—if one exists—is marginal even if in individual cases it is aggravated by the bitterness of the dispute between the party which was not circumspect enough when drafting the treaty and the one which feels that its rights and interests based on the clause are violated.

The Special Rapporteur, on the basis of the foregoing, has not proposed any rule excepting the favours granted

(Foot-note 619 continued.)

1962), pp. 46–74 gives an excellent short synthesis and extension of this literature. See also C. A. Cooper and B. F. Massell, “Toward a General Theory of Customs Unions for Developing Countries”, *The Journal of Political Economy* (Chicago, Ill.), vol. LXXIII, No. 5 (October 1965), pp. 461–476; and G. Patterson, “The most-favoured-nation clause and economic integration”, *European Yearbook, 1965* (The Hague), vol. XIII (1967), pp. 148–149.

⁶²⁰ North Sea Continental Shelf Cases, *I.C.J. Reports 1969*, p. 43.

⁶²¹ See para. 28 above.

within a customs union or a similar association of States from the operation of the most-favoured-nation clause. He considered the situation in terms of conflicting treaty obligations. These would be governed by the general provisions of the Law of Treaties (cf. paragraph 5 of article 30 of the Vienna Convention). He reserved, however, his position which he will review in the course of a further study on the operation of the most-favoured-nation clause in relation to developing countries. In this connexion he intends to take due account of the views of UNCTAD on the role of the most-favoured-nation clause in trade among developed countries.⁶²²

(66) Although the matter has not been discussed in depth by the Commission, some members expressed their agreement with the approach and the conclusions of the Special Rapporteur as reflected in the commentary to the present article.⁶²³

(67) Other members were not satisfied with these conclusions and reserved their position. It was stated that the unification of States might be accomplished in two ways, one being in a simple operation which meant the formation of a new State that by itself terminated the operation of the clause. The unification of States, however, could also take place by a gradualist approach which meant a number of intermediate steps not as yet clearly definable. It was the latter case which presented the problem. It was true that a regional union was most damaging to the most-favoured-nation clause or to a system of non-discrimination. For example, when the founder members of the European Communities had attempted to set up the European Coal and Steel Community they had come up against the obstacle of the commitments under GATT but since GATT law was relatively elastic they had succeeded in gaining acceptance for their economic agreements. By contrast, at the time of the conclusion of the Treaty of Rome the view had prevailed in GATT that that customs union so modified the general conditions of the operation of GATT that it was unacceptable; the United Kingdom and the members of the Commonwealth had formulated objections which had never been expressly withdrawn. The situation had been even more dramatic in the case of OEEC; when the United Kingdom had asked for a waiver of the quantitative restrictions which the “Six” had agreed upon themselves, the latter had refused and the tension inside OEEC had become so acute that eventually OEEC had disappeared. It was a very difficult problem—it was admitted—but States could not be refused the right to develop a centre of intensive regional life. The Commission should not adopt too rigid a position on so political a question.

(68) The view was also expressed that in the case of a most-favoured-nation clause the agreement was always drafted in a certain climate of expectation and within definite limits, so that when there occurred a change so profound as to go beyond the scope of the matters agreed upon, it was generally understood that most-favoured-nation treatment agreements would not constitute a restraint on the ordinary freedom of States to

⁶²² See *Yearbook... 1970*, vol. II, p. 237, document A/CN.4/228 and Add.1, annex I.

⁶²³ See paras. 25–65 above.

develop in various ways. That being so—it was stated—it seemed that both practice and a sense of what was reasonably suggested that when a State entered an economic union, obligations more limited than those it incurred thereby must yield to negotiation and amendment.

(69) The opinion was further held that while the conclusions of the Special Rapporteur might be agreed to, in whatever form the articles on the most-favoured-nation clause were adopted, a non-retroactivity clause would be added to the articles on the lines of the relevant provisions of the Vienna Convention. Hence States would have the opportunity to include in their most-favoured-nation clauses whatever exceptions they wished and they would be able to avoid any conflicting treaty obligations in the future.

(70) One member proposed the adoption of a draft article (A/CN.4/L.229 and Corr. 1), as follows:

None of the provisions of these articles prejudices:

(1) the special régimes which may prevail in the relations among developing countries and in the relations between developing and developed countries;

(2) the construction to be placed on a most-favoured-nation clause in the case of regional régimes limited to certain countries forming part of a particular economic or political union.

Paragraph 2 of this proposal was intended to serve as a safeguard for the cases in question.

(71) The Commission, however, as already stated, has not yet taken a definite stand on these matters partly because it wishes to take into account the reactions of the representatives of States. The Commission will consider the matter at its next session.

Article 16. Right to national treatment under a most-favoured-nation clause

[Unless the treaty otherwise provides or it is otherwise agreed,] 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.

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).⁶²⁴

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

the m.f.n. standard fulfils the function of generalizing the privileges granted under the national standard to any third State among the beneficiaries of m.f.n. treatment in the same field.⁶²⁵

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

Since national treatment generally embraces a maximum number of rights and the rights accorded are clearly defined, States often seek to have their nationals placed on an equal footing with those of other countries. If national treatment is thus granted to the most-favoured-nation, all other entitled States can also claim it for their nationals by invoking the most-favoured-nation clause.⁶²⁶

(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 1929⁶²⁷ 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.⁶²⁸

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

(5) This position manifests itself also in the practice of French courts. As has been expressed by one author:

[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.⁶²⁹

Thus—among many other cases—a French court, the Tribunal Correctionnel de la Seine, 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 ...",⁶³⁰

(6) The Supreme Court of the United States also had the occasion to discuss the effect of a most-favoured-nation clause when combined with a national treatment clause of another treaty. The most-favoured-nation

⁶²⁵ "The Most-Favoured-Nation Standard in British Practice", *The British Year Book of International Law*, 1945 (London), vol. 27, p. 119.

⁶²⁶ K. Becher, "Das Prinzip der Meistbegünstigung und die Völkerrechtskommission der Vereinten Nationen", *Deutschen Aussenpolitik* (East Berlin), 17th Year, No. 4 (July-August 1972), p. 774.

⁶²⁷ France, *Journal officiel de la République française, Lois et décrets* (Paris), 12–13 August 1929, 61st year, No. 189.

⁶²⁸ A. Piot, "Of Realism in Conventions of Establishment", *Journal du droit international*, 88th year, No. 1, January-March 1961, p. 45.

⁶²⁹ Level, *loc. cit.*, p. 338.

⁶³⁰ *In re: Sciama and Soussan*, France, Tribunal correctionnel de la Seine, 27 novembre 1962. See *Yearbook...* 1973, vol. II, p. 145, document A/CN.4/269, para. 77.

⁶²⁴ R. C. Snyder, *op. cit.*, pp. 11–12.

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, imports 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....⁶³¹

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 Argentina⁶³² 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...⁶³³

(7) The solution sustained in practice and proposed in article 16 has been questioned in the writings of several authors. According to Level:

It may be argued against the affirmative solution that, among the concessions mutually granted by the High Contracting Parties, the most-favoured-nation clause is of a lower order than the national treatment clause and that it is paradoxical for the former to produce the same effects as the latter. It may also be asked whether the special nature of the two clauses does not bar their cumulative application.

⁶³¹ *British and Foreign State Papers, 1880-1881*, vol. 72 (London, Ridgway, 1888), p. 1131.

⁶³² The national treatment clause (article IX) of the Treaty of Friendship, Commerce, and Navigation between the United States and the Argentine Confederation, of 1853 provided:

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

⁶³³ United States of America, *The Statutes at Large and Treaties of the United States of America from December 1925 to March 1927*, vol. X (Washington, D.C., U.S. Government Printing Office, 1927), p. 1009. Text also in *British and Foreign State Papers, 1852-1853*, vol. 42 (London, Ridgway, 1864), p. 722.

⁶³⁴ *Kolovrat et al. v. Oregon*, U.S. Supreme Court, 1 May 1961. See *Yearbook...* 1973, vol. II, p. 144, document A/CN.4/269, para. 73.

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.⁶³⁴

(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 favoured: if the best, the highest, favour accorded to a third State consists in national treatment, then it is this treatment which is in conformity with the promise due to the beneficiary. If a State wishes to exclude previous or future national treatment grants from its most-favoured-nation pledge, it is free to do so. If such exception is not written in the treaty, then the consequences are that the national treatment promise follows the most-favoured-nation treaty. This situation requires nothing but a certain circumspection from those involved in treaty-making.

(9) The rule stated in article 16 is of a residual character and it applies only in cases where the treaty does not otherwise provide or the parties have not otherwise agreed. Article 16 therefore begins with the words: "Unless the treaty otherwise provides or it is otherwise agreed". These words, however, were put into square brackets as a reminder that the Commission will later decide whether it will include this safeguarding phrase in the individual articles, as appropriate, or adopt an article of a general nature which will apply to those rules of the draft which are of the same dispositive nature.⁶³⁵

Article 17. Most-favoured-nation treatment and national [or other] treatment with respect to the same subject-matter

If a granting State has undertaken by treaty to accord to a beneficiary State most-favoured-nation treatment and national [or other] treatment with respect to the same subject-matter, the beneficiary State shall be entitled to whichever treatment it prefers in any particular case.

Commentary

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

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 Portu-

⁶³⁴ *Loc. cit.*, p. 338.

⁶³⁵ See above, para. 117 of the present report.

gal, in Europe], or other Subjects of any Nation whatsoever in league with the Portugals ...⁶³⁶

A more recent example is the provision of article 6, paragraph 1 of the Multilateral Convention on Co-operation 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:

1. Vessels flying the flags of the Contracting Parties shall enjoy in ports of the respective countries, on the basis of reciprocity, the most favourable treatment accorded to national vessels engaged in international traffic or, also on the basis of reciprocity, the most favourable treatment accorded to vessels of other countries in all matters relating to their entry into, stay in and departure from a port, the use of ports for loading and unloading operations, the taking-on and setting-down of passengers, and the use of navigation services.⁶³⁷

(2) In some clauses it is specified that the basis of the treatment in question shall be that of the granting country's nationals or the nationals of the most-favoured-nation "whichever is more favourable". See, e.g., article 38 of the Treaty on Friendship, Commerce and Navigation between the Federal Republic of Germany and Italy of 21 November 1957.⁶³⁸

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

... The problem of the compatibility of general most-favoured-nation treatment and the grant of "national treatment" to commercial shipping does not, in fact, appear to arise. Where both these systems exist side by side, the 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.⁶³⁹

(4) It is generally presumed that national treatment is at least equal or superior to the treatment of the most-favoured foreign country and therefore the former implies the latter. This has been explicitly stated in a protocol forming part of the Treaty of Commerce and Navigation

between the United Kingdom and Turkey, signed on 1 March 1930. The protocol reads:

It is understood that, wherever the present treaty stipulates national treatment, this implies the treatment of the most favoured foreign country, the intention of the high contracting parties clearly being that national treatment in their respective territories is at least equal or superior to treatment of the "most favoured foreign country".⁶⁴⁰

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, 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.⁶⁴¹

(5) According to a French 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.⁶⁴²

(6) According to Schwarzenberger:

... two or more of the standards may also be employed in the same treaty for the better attainment of the same or different objectives. Thus, the coupling of m.f.n. and national-treatment clauses may lead to treatment more advantageous to nationals of the other contracting party than could be achieved by the employment of one or the other standard in relation to, for instance, exemption from civil defence duties. In such cases, the typical intention of contracting parties is that the application of several standards should be cumulative. Therefore a presumption exists in favour of their cumulative interpretation.⁶⁴³

(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

⁶³⁶ 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.

⁶³⁷ *Sbornik deistvuyschchikh dogovorov, soglasheny i konventsy, zaklyuchennykh SSS s inostrannymi gosudarstvami*, vol. XXIX, *Deistvushchie dogovory, soglashenia i konventsii, vstupivshie v silu mezhdu 1 yanvarya 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 otnosheniya, 1975), pp. 364–365.

⁶³⁸ K. Strupp, *Wörterbuch des Völkerrechts*, 2nd ed. [Schlochauer] (Berlin, de Gruyter, 1961), vol. II, p. 500.

⁶³⁹ E/ECE/270, part II, para. 42 (h).

⁶⁴⁰ League of Nations, *Treaty Series*, vol. CVIII, p. 432.

⁶⁴¹ United Kingdom, Foreign Office, *Handbook of Commercial Treaties etc. with Foreign Powers*, 4th ed. (London, H.M. Stationery Office, 1931), p. 669.

⁶⁴² Sauvignon, *op. cit.*, p. 6.

⁶⁴³ "The principles and standards of international economic law", *Recueil des cours ... 1966-I* (Leiden, Sijthoff, 1967), vol. 117, p. 68.

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, e.g., 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 17 envisages this situation also by means of the expression "or other treatment". The article states the general rule 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 it prefers in any particular case.

(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 of the beneficiary State? Can, e.g., different shipping companies of the beneficiary State demand different types of treatment for their vessels? Can the advantages be demanded cumulatively? The Commission is aware that article 17 does not give a full answer to these questions. It has been adopted by the Commission provisionally and is subject to later revision. In particular, the words "or other" have been placed between brackets to indicate the Commission's intention to review the appropriateness of including in the article a reference to direct treatment other than national treatment.

(9) One member of the Commission stated that because of the difficulties involved it would be preferable that the rule should rather be formulated as a saving clause. He proposed the following text:

The right of the beneficiary State to any treatment under a most-favoured-nation clause shall not be prejudiced by the fact that the granting State has agreed to accord to the beneficiary State national [or any other] treatment with respect to the same subject-matter as that of the most-favoured-nation clause.

The Commission, however, decided to adopt provisionally the text of article 17 in its present form.

Article 18. Commencement of enjoyment of rights under a most-favoured-nation clause

1. The right of the beneficiary State to any treatment under a most-favoured-nation clause not made subject to the condition of material reciprocity arises at the time when the relevant treatment is extended by the granting State to a third State.

2. The right of the beneficiary State to any treatment under a most-favoured-nation clause made subject to the condition of material reciprocity arises at the time of the communication by the beneficiary State to the granting State of its consent to extend material reciprocity in respect of the treatment in question.

Commentary

(1) Article 18 deals with the time 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) a grant of favours by the granting State to a third State. A third element is needed in the case of a clause subject to material reciprocity: the extension of that reciprocity. If one of the necessary elements is lacking, there is no such thing as an operating or a functioning clause.⁶⁴⁴ The time of the beginning of the functioning is the one when the last element (the second in the case of an unconditional clause and the third in that of a clause subject to material reciprocity) comes into play. As to the first element, the validity and the being in force of the treaty are taken for granted and therefore they are not mentioned in article 18.

(2) A most-favoured-nation clause—unless otherwise agreed—obviously attracts benefits granted 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.⁶⁴⁵

(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 which were either neutral or allied to Belgium during the First World War eligible to share in its benefits, on condition of reciprocal treatment. The claimant complained that the privilege of the legal extension of her tenancy had been denied her because of her French nationality and of the lack of reciprocal treatment of Belgian nationals in France. The Court held for the claimant. Pursuant to the Franco-Belgium 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

⁶⁴⁴ As Schwarzenberger (*International Law and Order (op. cit.)*, p. 130) puts it, "In the absence of undertakings to third States, the standard is but an empty shell".

⁶⁴⁵ Sauvignon, *op. cit.*, p. 21, note 1. In the same sense Basdevant, *loc. cit.*, III, p. 488.

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 1927.⁶⁴⁶

(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 Level:

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 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.⁶⁴⁷

(5) In the same sense Christian Gavaldà writes:

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

⁶⁴⁶ *Trossy v. Dumortier*, Belgium, Brussels Civil Court (Chamber of Rent Restriction Appeals), 31 May 1928. See *Yearbook... 1973*, vol. II, p. 129-130, document A/CN.4/269, para. 31.

⁶⁴⁷ *Op. cit.*, p. 337.

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.⁶⁴⁸

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

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

Supposing that Great Britain is entitled to most-favoured-nation treatment under a treaty with State A, and by reason of a treaty between State A and State B the latter is or becomes entitled to claim for itself or its nationals certain treatment from A, e.g. exemption from income-tax or from some legislation affecting the occupation of houses, when is Great Britain entitled to claim from A the treatment due to B? At once or only when B has succeeded in asserting its treaty right to this treatment? In answer to this question two views are possible. The first is that Great Britain has no *locus standi* to claim the treatment until she can point to its actual exercise and enjoyment by B or B's nationals. This view places Great Britain at the mercy of the degree of vigilance exerted by B or the degree of importance of the matter to B; for instance, B might have no nationals residing in the territory of A and earning a taxable income. The second view is that the most-favoured-nation clause in the treaty with Great Britain, automatically and absolutely, invests her and her nationals with all rights in *pari materia* 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.⁶⁴⁹

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

⁶⁴⁸ *Revue critique de droit international privé* (Paris), No. 3 (July-September, 1961), p. 538, note to a decision of the Court of Cassation of 12 October 1960.

⁶⁴⁹ *Op. cit.*, pp. 278-279.

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".⁶⁵⁰

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 reference to such products.⁶⁵¹

(7) As provided for in article 18, it is the extension of benefits to the third State which 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 McNair:

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.⁶⁵²

(8) According to Nolde, "it is quite immaterial whether the advantages granted to 'any third country' derive from the domestic law of the other Contracting Party or from agreements concluded by the latter with 'any third country'".⁶⁵³ Further he calls this rule "a rule which has long been established and is absolutely unchallengeable".⁶⁵⁴

(9) The 1936 resolution of the Institute of International Law is also explicit:

The most-favoured-nation clause confers upon the beneficiary the régime granted by the other contracting party to the nationals, goods and ships of any third country by virtue of its municipal law and its treaty law.⁶⁵⁵

(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 wording of the clause is such that it refers purely and simply to most-favoured-nation treatment without containing details as to its functioning. It is believed that in such cases it can be presumed that the intention of the parties consists in bringing the beneficiary into the same legal position as the third State. This idea and the theory—already adopted by the Commission⁶⁵⁶ according to which the source of the beneficiary's right lies in the treaty containing the clause, sufficiently warranted the adoption of the rule as proposed in article 18.

(11) Paragraph 1 of article 18 accordingly provides that the right of the beneficiary State to the treatment enjoyed by the third State arises at the time 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 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 case of a most-favoured-nation clause made subject to material reciprocity 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 will become entitled to that right only at the time when it communicates to the granting State its willingness to extend material reciprocity in respect of the treatment in question. Unless it is otherwise agreed by the parties, it is at this moment when the right of the beneficiary State to favoured treatment under a most-favoured-nation clause subject to material reciprocity arises.

Article 19. Termination or suspension of enjoyment of rights under a most-favoured-nation clause

1. The right of the beneficiary State to any treatment under a most-favoured-nation clause is terminated or suspended at the time when the extension of the relevant treatment by the granting State is terminated or suspended.

2. The right of the beneficiary State to any treatment under a most-favoured-nation clause made subject to the condition of material reciprocity is also terminated or suspended at the time when the termination or suspension of the material reciprocity in question is communicated by the beneficiary State to the granting State.

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

⁶⁵⁰ *Ibid.*, pp. 279–280.

⁶⁵¹ M. Whiteman, *op. cit.*, p. 750.

⁶⁵² *Op. cit.*, p. 280.

⁶⁵³ *Loc. cit.*, p. 48.

⁶⁵⁴ *Ibid.* Similarly, E. Sauvignon, *loc. cit.*, p. 22.

⁶⁵⁵ See *Yearbook... 1969*, vol. II, p. 181, document A/CN.4/213, annex II.

⁶⁵⁶ *Yearbook... 1973*, vol. II, p. 221, document A/9010/Rev.1, chap. IV, B, article 7.

operation no longer exists, and therefore the clause ceases to have effect.⁶⁵⁷

(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.⁶⁵⁸

(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.⁶⁵⁹

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

When treaty provisions granting rights or privileges have been abrogated or renounced by the parties, such provisions can no longer be relied upon by a third State by virtue of a most-favoured-nation clause.⁶⁶⁰

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 in the case was contended by the American party before the International Court of Justice in the case concerning rights of nationals of the United States of America in Morocco.⁶⁶¹ 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.⁶⁶²

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 are governed by different rules of law. When provisions granting fiscal immunity in treaties between Morocco and third States have been abrogated or renounced, these provisions can no longer be relied upon by virtue of a most-favoured-nation clause.⁶⁶³

(5) A notable instance of changing the general pattern of the operation of the clause is that of GATT. 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 1.⁶⁶⁴

Article II, paragraph 1 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.⁶⁶⁵

According to G. Curzon:

It can even be maintained that Article II (i)—safeguarding of schedules—is of greater significance than the most-favoured-nation clause itself. This paragraph of article II is a completely new phenomenon in international commercial legislation and an addition to the most-favoured-nation clause of no mean import. The "Schedules" are the consolidated list of all concessions made by all contracting parties in their negotiations with their trading partners and maximum rates. The difference this addition makes to the most-favoured-nation clause is the protection it offers against the raising of the tariff on scheduled items. The traditional clause, while ensuring unconditional most-favoured-nation treatment, only provides equality of treatment against tariff changes ...⁶⁶⁶

According to Hawkins, GATT

goes beyond the most-favoured-nation principle in this respect. Each member giving a concession is directly obligated to grant the same concession to all other members in their own right; this is different from making the latter rely on continued agreement between the Party granting the concession and the Party that negotiated it.⁶⁶⁷

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

⁶⁵⁷ Snyder, *op. cit.*, p. 37; M. Sibert, *Traité de droit international public* (Paris, Dalloz, 1951), vol. II, p. 255.

⁶⁵⁸ 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 *Yearbook...* 1973, vol. II, p. 124, document A/CN.4/269, para. 13.

⁶⁵⁹ See *Yearbook...* 1969, vol. II, p. 181, document A/CN.4/213, annex II.

⁶⁶⁰ *Yearbook...* 1964, vol. I, p. 184, 752nd meeting, para. 1.

⁶⁶¹ *I.C.J. Reports* 1952, p. 176.

⁶⁶² *Ibid.*, pp. 191–192.

⁶⁶³ *Ibid.*, pp. 204–205.

⁶⁶⁴ See GATT, *op. cit.*, p. 2. The text is reproduced in *Yearbook...* 1970, vol. II, p. 221, document A/CN.4/228 and Add.1, para. 144.

⁶⁶⁵ GATT, *op. cit.*, p. 3.

⁶⁶⁶ *Multilateral Commercial Diplomacy: The General Agreement on Tariffs and Trade and Its Impact on National Commercial Policies and Techniques* (New York, Praeger, 1966).

⁶⁶⁷ *Op. cit.*, p. 226, note on chapter VIII.

... 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.⁶⁶⁸

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

(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 uphold 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 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".⁶⁶⁹

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 50.⁶⁷⁰

(8) Paragraph 1 of article 19 applies to all kinds of most-favoured-nation clauses whether or not made subject to material reciprocity. The right of the beneficiary State to the favoured treatment obviously expires or is suspended at the time when the relevant treatment by the granting State terminates or is suspended, as the case

may be. In cases where treatment which is within the field 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) Paragraph 2 of article 19 envisages the case of a most-favoured-nation clause made subject to the condition of material reciprocity. In such a case 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 grant material reciprocity. The communication on behalf of the beneficiary State will have the effect of terminating or suspending its own right notwithstanding the fact that the third State continues to enjoy the favoured treatment in question.

(10) The provisions of article 19 are not of an exhaustive character. Other events can also terminate the enjoyment of the rights of the beneficiary State: the expiration of the time-limit inserted in the clause; the agreement of the granting State and the beneficiary State as to termination; and the union of those States. Some members of the Commission were of the opinion that the termination or suspension of the material reciprocity without communication would also have the effect of terminating or suspending the enjoyment of the rights of the beneficiary State.

Article 20. The exercise of rights arising under a most-favoured-nation clause and compliance with the laws of the granting State

The exercise of rights arising under a most-favoured-nation clause for the beneficiary State and for persons or things in a determined relationship with that State is subject to compliance with the relevant laws of the granting State. Those laws, however, shall not be applied in such a manner that the treatment of the beneficiary State and 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 or the enjoyment of the rights indicated in the clause without compensation and without any conditions. These rights are exercised or enjoyed in ordinary cases by the nationals, ships, products, etc. of the beneficiary State. The meaning of the expression "without any conditions" in this context is that the right of the beneficiary State and the right of its nationals, ships, products, etc. derived therefrom cannot be made dependent on the right exercised or enjoyed by the granting State (its nationals, ships, products, etc.) in the beneficiary State. The element of unconditionality, however, cannot be stretched so wide as to absolve the beneficiary State, i.e. its nationals, ships, products, etc. from the duty of respecting the internal laws and regula-

⁶⁶⁸ Cf. 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.

⁶⁶⁹ Sauvignon, *op. cit.*, pp. 96-97.

⁶⁷⁰ *Ibid.* For details of the Ethiopian-Italian case see League of Nations, *Official Journal, Special Supplement No. 145*, p. 26 and *Special Supplement No. 150*, pp. 11-12.

tions of the granting State and to comply with them inasmuch as such compliance is expected from and exerted by any other State, i.e. from or by its nationals, products, etc.

(2) The following recent case, decided by the French Court of Cassation, explains fully the underlying idea of article 20. 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 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.⁶⁷¹

(3) In some cases the clause itself contains a reference to the laws of the granting State and expressly stipulates that the rights in question must be exercised "conformably with the laws" of that State. Such a case has been dealt with in the following instance: The decedent was at the time of his death a resident of New York State.

⁶⁷¹ *Corneli Case*, France, Court of Cassation, 2 July 1958. See *Yearbook... 1973*, vol. II, p. 139, document A/CN.4/269, para. 63.

He died intestate. He was a citizen and subject of the Kingdom of Italy, and all of his next of kin were residents of Italy. He left no next of kin residing in the State of New York, and it was alleged in the petition that there were no creditors. The consul-general of the Kingdom of Italy filed a petition to administer the decedent's estate. The public administrator, though 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 administration were granted. The court said:

Conceding that, under the most-favoured-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 [47] 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.⁶⁷²

⁴⁷ Article 9 of the treaty between the United States of America and Argentina reads:

If any citizen 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 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.

(4) In other cases the duty of respecting the internal laws of the granting State is laid down in a separate provision of the treaty containing the most-favoured-nation clause. Thus, e.g., the Long-Term Trade Agreement of 23 June 1962 between the Union of Soviet Socialist Republics and the United Arab Republic contained the following provision (article 6):

The circulation of goods between the USSR and the United Arab Republic shall take place in accordance with the provisions of this Agreement and with the import laws and regulations in force in the two countries provided that these laws and regulations are applied to all countries.⁶⁷³

(5) The rule proposed in article 20 is expressed by a German source in this way:

The conditions attaching to the grant of a specific type of more favourable treatment claimed under the most-favoured-nation clause are not to be confused with the conditional form of the most-favoured-nation clause. What is involved here is not reciprocal treatment within the meaning of the conditional form of the most-favoured-nation clause but requirements relating to the factual content of the more favourable treatment itself (e.g. a certificate of

⁶⁷² *In re: Logiorato's Estate*, United States of America, State of New York, New York County Surrogate's Court, February 1901. See *Yearbook... 1973*, vol. II, p. 149, document A/CN.4/269, para. 89.

⁶⁷³ United Nations, *Treaty Series*, vol. 472, p. 74.

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.⁶⁷⁴

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

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

(7) The rule proposed in article 20 is in a certain relationship with article 41 of the Vienna Convention on Diplomatic Relations,⁶⁷⁵ article 55 of the Vienna Convention on Consular Relations⁶⁷⁶ and article 47 of the Convention on Special Missions.⁶⁷⁷ Its roots, however, can be traced further and ultimately to the principle of sovereignty and equality of States. Obviously, beyond the limits of the privileges granted by the State, its laws and regulations must be generally observed on its territory.

(8) 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 20 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 20 states that the laws of the granting State shall not be applied in such a manner that the treatment of the beneficiary State and all 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 21. Most-favoured-nation clauses in relation to treatment under a generalized system of preferences⁶⁷⁸

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.

Commentary

(1) As stated in the introduction to this chapter of the Commission's report,⁶⁷⁹ the Commission from the early

⁶⁷⁴ G. Jaenicke, in K. Strupp, *op. cit.*, p. 497. Cf. above the Swiss Cow case, cited in para. 20 of the commentary to articles 11 and 12.

⁶⁷⁵ United Nations, *Treaty Series*, vol. 500, p. 120.

⁶⁷⁶ *Ibid.*, vol. 596, pp. 308-310.

⁶⁷⁷ General Assembly resolution 2530 (XXIV), annex.

⁶⁷⁸ The Commission provisionally adopted the present text for article 21 subject to further consideration and possible improvement on first reading in the course of next year's session.

⁶⁷⁹ See paras 113-114 above.

stages of its work has taken cognizance of the problem which the application of the most-favoured-nation clause creates in the field 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 quoted.⁶⁸⁰ This principle was adopted in 1964 by a roll-call vote of 78 to 11 with 23 abstentions.

(2) The secretariat of UNCTAD has 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?"

(3) What is of primary interest to the developing countries is, of course, 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 UNCTAD main ideas in this field are explained in the following way by 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."⁶⁸¹ In its recommendation A.III.5. the Conference recommended "... that the

⁶⁸⁰ See *Yearbook... 1970*, vol. II, p. 231, document A/CN.4/228 and Add.1, para. 188.

⁶⁸¹ 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.

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".⁶⁸²

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."⁶⁸³

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".⁶⁸⁴

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."⁶⁸⁵

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 the 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 the 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

⁶⁸² *Ibid.*, p. 39.

⁶⁸³ *Ibid.*, *Second Session*, vol. I and Corr.1 and 3 and Add.1-2, *Report and Annexes* (United Nations publication, Sales No. E.68.II.D.14), p. 38.

⁶⁸⁴ *Ibid.*, [First Session], vol. I, *Final Act and Report* (United Nations publication, Sales No. 64.II.B.11), p. 20.

⁶⁸⁵ *Ibid.*, p. 30.

least equivalent advantages for developing countries benefiting therefrom.⁶⁸⁶

(4) In the field of preferences a compromise agreement was reached unanimously at the second session of UNCTAD, in 1968 and embodied in resolution 21 (II). This 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 and these conclusions 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 1970.⁶⁸⁷

The following are excerpts from that very important document:

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.

⁶⁸⁶ UNCTAD, Research memorandum No. 33/Rev.1, paras. 19-27.

⁶⁸⁷ *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 15 (A/8015/Rev.1), pp. 265 et seq., Part Three, annex I.*

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 Organisation 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 by resolution 2626 (XXV):

(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) In the Special Rapporteur's second report a brief description was given of part IV of the General Agreement

which was added to the original text in 1966 with the intention of satisfying the trade needs of developing countries.⁶⁸⁸ 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 have 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 is 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-reciprocal and 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

Providing 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 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;

⁶⁸⁸ See *Yearbook... 1970*, vol. II, p. 232, document A/CN.4/228 and Add.1, para. 192.

(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.⁶⁸⁹

The functioning of the system of generalized preferences

(8) The Soviet Union was the first country which introduced as early as 1965 a unilateral system of duty-free imports from developing countries. Such duty-free treatment 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 would, in addition to according tariff preferences, 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.⁶⁹⁰

(9) Australia followed suit in 1966 with a more restricted unilateral system, and Hungary announced its own in 1968. According to the latter—as it has been amplified and improved in 1971 and 1974—the Hungarian preferential list of 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; 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 can, in collaboration with the President of the National Board for Materials and Prices, 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.⁶⁹¹ The Hungarian system allows preferences only provisionally for those countries which on 1 January 1972 extended special (reverse) preferences to certain developed countries. It is assumed that these reverse preferences will be eliminated by 31 December 1975.⁶⁹²

(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 which 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 1974.⁶⁹³ Its section 501 authorizes the President to extend preferences. Section 502 defines the notion of a “beneficiary developing country” excluding from that notion—with certain exceptions—“Communist countries” and others. 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, success or failure, of the generalized system of preferences. 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.⁶⁹⁴

⁶⁸⁹ GATT, *Basic instruments and Selected Documents, Eighteenth Supplement, Decisions, Reports, 1970-1971 and Twenty-seventh Session*, Geneva 1972, pp. 24-26.

⁶⁹⁰ *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. 56-57.

⁶⁹¹ See GATT, document L/3301 and L/4106.

⁶⁹² GATT document L/4106.

⁶⁹³ 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.

⁶⁹⁴ *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 15 (A/9015/Rev.1)*, part one, chap. I, paras. 89-90.

(12) The Charter of Economic Rights and Duties of States embodied in General Assembly resolution 3281 (XXIX) also contains provisions pertinent to the problems under consideration. Thus, articles 18 and 26, as regards the generalized system of preferences:

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 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.

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.

Article 12, para. 1, and article 21 on regional groupings:

Article 12

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

...

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.

(13) 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 a general agreement also that States will refrain from 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.⁶⁹⁵ Accordingly contracting parties to the GATT have, under the conditions described above,⁶⁹⁶ waived their rights to most-favoured-nation treatment under article I of the General Agreement.

(14) On the basis of the considerations mentioned in the preceding paragraph the Commission adopted article 21, which 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 generalized system of preferences established by that granting State.

(15) Some members of the Commission, however, voiced doubts concerning the merits of a provision of this kind. In their view, the generalized system of preferences as adopted by the Special Committee on Preferences was clearly a temporary measure. The countries establishing their own preferential system were free to withdraw their grants in whole or in part and the systems were conditional upon the necessary waiver or waivers in respect of their existing international obligations. This was, of course, not a weakness of the proposed rule but of the generalized system of preferences which had been adopted as a matter of compromise between developed and developing States. The individual national generalized systems of preferences were, in fact, discriminatory and the original idea of non-discriminatory preferences had not been reached. The continuation of this system was not assured for the future and therefore it was questionable whether it was advisable to include a rule of such ephemeral nature among articles which are intended to codify a certain area of the law for a longer period of time. It was asked whether it would not be more advisable to adopt a general article on the lines of the proposal already mentioned:

None of the provisions of these articles prejudices:

(1) the special régimes which may prevail in the relations among developing countries and in the relations between developing and developed countries;⁶⁹⁷

(16) The view was also expressed that article 21 was of limited effect. Most-favoured-nation clauses had far-reaching implications that were not always apparent. What was needed were provisions that might assist developing countries to avoid any adverse effects that could result from the mechanical application of the articles as drafted. Provisions which precluded the operation of the articles with regard to certain treaties entered into with developing countries, such as those contemplated under the proposal in the preceding paragraph, or at the very least which expressly reaffirmed a State's right to make specific exceptions and exclusions when concluding a clause, might go some way in this direction.

(17) Taking into consideration the remarks referred to in the preceding paragraphs and the specific nature of the provision in question, the Commission decided to review article 21 at its next session, in the context of its further study concerning the application of the most-favoured-nation clause to developing countries.

⁶⁹⁵ See above, section IX "Legal Status" of the agreed conclusions of the Special Committee on Preferences, quoted in para. 5 of the present commentary.

⁶⁹⁶ See para. 7 of the commentary.

⁶⁹⁷ See above, para. 70 of the commentary to article 15.

Chapter V

QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS
OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

A. Introduction

120. The circumstances in which the Commission came to undertake the study of treaties to which an international organization is a party are explained in their historical aspect in the Commission's report on its twenty-sixth session,⁶⁹⁸ which also describes in general outline the method it proposed to follow. Since that date, the General Assembly, in section I, paragraph 4 (*d*) of its resolution 3315 (XXIX), dated 14 December 1974, has recommended the International Law Commission to:

(*d*) Proceed with the preparation of draft articles on treaties concluded between States and international organizations or between international organizations.

...

121. At its preceding session, in 1974, the Commission had drawn up a number of provisions⁶⁹⁹ which corresponded, at least in part, to articles 1 to 6 of the Vienna Convention on the Law of Treaties.⁷⁰⁰ During the present session, it considered, at its 1344th to 1350th meetings, sub-paragraphs (*b*), (*c*) and (*g*) of paragraph 1 of article 2, together with articles 7 to 23 as submitted by the Special Rapporteur in his fourth report (A/CN.4/285),⁷⁰¹ and referred them all to the Drafting Committee. At its 1353rd meeting, it adopted at first reading, on the report of the Drafting Committee, the text of sub-paragraphs (*b*), (*b bis*), (*b ter*), (*c*), (*c bis*) and (*g*) of article 2, paragraph 1, and of articles 7 to 18, whose subject-matter corresponds to that of the similarly numbered articles of the Vienna Convention of 1969 on the Law of Treaties devoted to the *conclusion of Treaties*. For lack of time, it was unable to adopt any provisions for articles 19 to 23, but it held a broad exchange of views on the question considered in these articles, which refer to reservations, and as a result was able to establish certain trends which will enable the Special Rapporteur to prepare new proposals and will speed up work on this question at its next session.

122. The text of all the articles of the draft on treaties concluded between States and international organizations or between international organizations adopted by the Commission so far, and the text, adopted at the present session, of sub-paragraphs (*b*), (*b bis*), (*b ter*), (*c*), (*c bis*) and (*g*) of article 2, paragraph 1, of articles 7 to 18 and of

the commentaries thereto, is reproduced below for the General Assembly's information.⁷⁰²

123. In the new draft articles which it now submits, the Commission has sought to maintain a balance between sometimes conflicting realities and trends.

124. Treaties are based essentially on the equality of the contracting parties and this premise leads naturally to the assimilation, wherever possible, of the treaty situation of international organizations to that of States. The Commission has largely followed this principle in deciding generally to follow as far as possible the articles of the Vienna Convention referring to treaties concluded between States for treaties concluded between one or more States and one or more international organizations, and even for treaties concluded between two or more international organizations. The increasing number of treaties in which international organizations participate is evidence of the value of treaties to international organizations as well as to States.

125. However, even when limited to the field of the law of treaties, the comparison involved in the assimilation of international organizations to States is quickly seen to be far from exact. While all States are equal before international law, international organizations are the result of an act of will on the part of States, an act which stamps their juridical features by conferring on each of them strongly marked individual characteristics which limit its resemblance to any other international organization. As a composite structure, an international organization remains bound by close ties to the States which are its members; admittedly analysis will reveal its separate personality and show that it is "detached" from them, but it still remains closely tied to its component States. Being endowed with a competence which is always more limited than that of a State and often (especially in the matter of external relations), somewhat ill-defined, for an international organization to become party to a treaty occasionally requires an adaptation of some of the rules laid down for treaties between States.

126. First of all it may be wondered whether it would not be normal to use a different terminology for acts, instruments and procedures according to whether they relate to a State or to an international organization, even when there are no essential differences between the two situations. Such differentiation might indeed make matters clearer; and would also serve as a reminder that the nature of States is fundamentally different from that of international organizations. However, it must be recognized that international practice, as regards both States and international organizations, reveals an extreme variety of terminology in the matter of the conclusion of treaties.

⁶⁹⁸ *Yearbook... 1974*, vol. II (Part One), pp. 290 *et seq.*, document A/9610/Rev.1, chap. IV.

⁶⁹⁹ Articles 1-4 and 6. For the text of these articles and the commentaries thereto, see *Yearbook... 1974*, vol. II (Part One), pp. 294 *et seq.*, document A/9610/Rev.1, chap. IV, sect. B.

⁷⁰⁰ For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289. The Convention will be referred to hereafter as "the Vienna Convention".

⁷⁰¹ See p. 25 above.

⁷⁰² See sect. B below. Sub-section I contains the text of all the provisions hitherto adopted by the Commission. Sub-section II contains all the provisions adopted at the twenty-seventh session, with the commentaries thereto. For the commentaries to the articles adopted at the twenty-sixth session, see foot-note 699.

This variety, and the uncertainty which it can cause, were recognized in the case of States in the Vienna Convention, particularly in its article 11. Some measure of uniformity in the use of terms for both organizations and States might seem desirable, but, after a long study of the question, particularly as regards ratification, the Commission preferred in some cases to make a distinction between the terms applicable to international organizations and those applicable to States.

127. Similarly, with regard to the exercise by international organizations of their competence in the process of concluding treaties, the Commission considered that it was necessary to bear in mind that such competence, unlike that of States, is never unlimited and that the terms used in the Vienna Convention concerning the competence of organizations should be adapted accordingly. Again, the purpose of other changes in the use of terms is to bring out the fact that, as far as international organizations are concerned, their representation must be arranged in conformity with their constitutional rules.

128. This is also the reason why the principle was laid down that the representatives of organizations must possess *credentials*, while introducing into this rule all the nuances required by practice.

129. It is in the matter of the *adoption of the text of treaties*—and it seems likely to be the case later in the matter of *reservations*—that the Commission encountered the most serious problems in trying to adapt the provisions of the Vienna Convention to the case of organizations. The reason is that there is an important *de facto* difference between States and international organizations which must be emphasized. Although the treaties to which international organizations are parties are now numbered in thousands, very few of these treaties are open without restriction to a large number of participants.

130. Organizations are both too specialized and too different from each other for it to be possible to draw up a special régime for conferences of international organizations only. In the rare cases in which such conferences might be conceivable, the position of each organization would still be too individual for such conferences to be made subject to the same rules as conferences between States. If, on the other hand, we consider the established practice of conferences between States for the purpose of drawing up general multilateral treaties, it is conceivable that such conferences might be opened to certain international organizations representing interests similar to those of which, depending on the purpose of the conference, States are the exponents. There are plenty of examples to illustrate such a case. For instance, if an international conference were convened on Customs nomenclature, Customs unions, whose competence would extend to questions of nomenclature, could be invited in order that they might participate in the drafting of the text of a treaty and in its adoption, and become parties to a treaty relating to the object of the conference.

131. As has just been mentioned, however, there have been, up to the present, practically no examples of this kind⁷⁰³ to be found in international practice, and it is

⁷⁰³ See *Yearbook... 1972*, vol. II, pp. 172, 175, 183, 185 and 191, document A/CN.4/258, paras. 3, 12, 42, 48 and 64.

somewhat doubtful whether, in some of the cases occasionally quoted, an international organization really is a party to the treaty on the same footing as States.⁷⁰⁴

132. It must be recognized that the participation of an international organization in a multilateral convention raises problems, particularly when the States members of the organization also intend to become parties to the treaty. There must then be a clear distinction between the footing on which the organization may be a party and that on which the States intend to be parties;⁷⁰⁵ in other words, the competence of an organization and the competence of States must be clearly separate and capable of being exercised independently. If such is not the case, it must then be determined, by special rules necessarily peculiar to the case, how the organization and its members exercise their rights concurrently: that is the formula which was applied in the case of the treaties to which EEC is a party at the same time as its States members. It may then be said that *all* the rights and obligations attaching to the status of a party to a treaty do indeed belong to the Community and to its member States, but these rights and obligations are divided between the Community and its member States and it cannot be claimed that each member State and the Community really constitute separate parties.

133. It is possible, however, that in the future general multilateral treaties will be open to international organizations, either with the latter replacing their members or with the member States being parties as well but possessing quite different attributes. This is a situation which the Commission wished to provide for as a possibility by putting it in the form of an option; it is for the States and international organizations participating in a conference to determine in each specific case the possibility and advisability of such a course.

134. Because of this situation of a multilateral treaty being open to participation on a broad basis by a large number of States, the Vienna Convention laid down in article 9, paragraph 2, the principle that the adoption of the text of a treaty at an international conference should take place by a two-thirds majority, unless by the same majority it should be decided to apply a different rule, while providing in articles 19 and 20 a generous régime of reservations as a counterpart to the majority principle.

135. As regards agreements to which international organizations are parties, it was necessary in connexion with the rules on the adoption of the text of a treaty, and will doubtless be necessary in connexion with reservations, to take into account a practical situation which calls for a specific solution. As a general rule, international organizations are individualist entities, each having its own special

⁷⁰⁴ For the position of the United Nations in ITU or the position of EEC in the Fourth International Tin Agreement (1971), see *Yearbook... 1972*, vol. II, pp. 193–194, document A/CN.4/258, para. 73 and particularly foot-note 178.

⁷⁰⁵ On the question of the accession of the United Nations to the 1949 Geneva Conventions, see P. de Visscher, "Les conditions d'application des lois de la guerre aux opérations militaires des Nations Unies", *Annuaire de l'Institut de droit international*, 1971 (Basle, vol. 54, t. I, p. 43. See also *Yearbook... 1972*, vol. II, p. 193, foot-note 173 (for references)); and pp. 36 and 37 above, document A/CN.4/285, draft articles, part. II, sect. 2, general commentary, para. 4.

characteristics. The treaties in which they participate are concluded with special regard to the organizations destined to become participants; in that sense they are instruments *intuitu personae*. Thus, except in the case described above,⁷⁰⁶ the only rule applicable, for such treaties, to the adoption of the text is that of the unanimous consent of the participants. A similar rule will probably apply to the authorization of reservations, a question which the Commission was unable to consider during the present session except in certain general aspects. However, in the case of a treaty between States and one or more international organizations drawn up at a conference of States in which the organization or organizations concerned participate, it may seem reasonable to assume that, as regards the adoption of the text of the treaty, the rule in article 9, paragraph 2, of the Vienna Convention should be applied and that a two-thirds majority of all the participants, both States and international organizations, should suffice. With the same case in mind, the Commission may perhaps be able to consider in its future work the provision of a system of reservations which might be based on the liberal régime established in articles 19 and 20 of the Vienna Convention.

136. These are the general comments on the set of draft articles now submitted by the International Law Commission to the General Assembly and on the exchanges of views that took place on articles 19 to 23. They reflect the Commission's desire to remain faithful to the spirit of the Vienna Convention, and in particular to maintain its precision and flexibility, while giving due consideration to the specific character of international organizations participating in treaties. The Commission has taken into account the present conditions in the international community and has endeavoured to draft the articles in a manner sufficiently flexible to meet the needs of future developments.

B. Draft articles on treaties concluded between States and international organizations or between international organizations

137. The text of articles 1 to 4 and 6 to 18⁷⁰⁷ adopted by the Commission at its twenty-sixth and twenty-seventh sessions, and the text of articles 7 to 18 and of subparagraphs (b), (b bis), (b ter), (c), (c bis) and (g) of article 2, paragraph 1, and of the commentaries thereto, adopted by the Commission at its twenty-seventh session, is reproduced below for the General Assembly's information.

1. TEXT OF ARTICLES 1 TO 4 AND 6 TO 18 ADOPTED BY THE COMMISSION AT ITS TWENTY-SIXTH AND TWENTY-SEVENTH SESSIONS

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.

⁷⁰⁶ Para. 133.

⁷⁰⁷ The draft does not include provisions corresponding to article 5 of the Vienna Convention.

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;

(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" means 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;

...

(i) "international organization" means an intergovernmental 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 States 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.

2. TEXT OF ARTICLES 7 TO 18, AND OF ARTICLE 2, PARAGRAPH 1, SUB-PARAGRAPHS (b), (b^{bis}), (b^{ter}), (c), (c^{bis}) AND (g), ADOPTED BY THE COMMISSION AT ITS TWENTY-SEVENTH SESSION

Article 7. Full powers and powers⁷⁰⁸

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a

⁷⁰⁸ Corresponding provision of the Vienna Convention:

"Article 7

"Full powers

"1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the

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.

purpose of expressing the consent of the State to be bound by a treaty if:

"(a) he produces appropriate full powers; or

"(b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with 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;

"(b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

"(c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ."

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.

Commentary

(1) The first two paragraphs of this draft article deal with representatives of States and the last two paragraphs with representatives of international organizations. The former provisions concern only treaties between one or more States and one or more international organizations; the latter relate to treaties within the meaning of draft article 2, paragraph 1 (a), namely both to treaties between one or more States and one or more international organizations and to treaties between international organizations.

(2) In the case of representatives of States, the draft broadly follows article 7 of the 1969 Vienna Convention: as a general rule, these representatives are required to produce "appropriate full powers" 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. There are nevertheless exceptions to this rule. First of all, as in the Vienna Convention on the Law of Treaties, practice or other circumstances might result in a person being considered as representing a State despite the fact that full powers are not produced.

(3) Secondly, as in the Vienna Convention on the Law of Treaties, certain persons are considered as representing a State *in virtue of their functions*. The enumeration of these persons which is given in the Vienna Convention on the Law of Treaties has had to be altered to some extent. In the case of Heads of State and Ministers for Foreign Affairs (paragraph 2 (a)) there is no change, but some amendments have been made as regards other representatives. First, article 7, paragraph 2 (b), of the 1969 Vienna Convention, which refers to "heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited", was not required since it is inapplicable to the present draft article. In addition, account had to be taken not only of certain advances over the Vienna Convention represented by the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, of 14 March 1975⁷⁰⁹ but also of the limitations which affect certain representatives of States by virtue of their functions.

(4) Paragraph 2 (b) of the present draft article is therefore symmetrical with article 7, paragraph 2 (c), of the

Vienna Convention in its treatment of international conferences, but it replaces the latter paragraph's expression "representatives accredited by States to an international conference" by the more precise wording "heads of delegations of States to an international conference", which is based on article 44 of the Convention on the Representation of States.

(5) Paragraph 2 (c) deals with the case of heads of delegations of States to an organ of an international organization and restricts their competence to adopt the text of a treaty without producing full powers to the single case of a treaty between one or more States and the organization to the organ of which they are delegated. This is because their functions do not extend beyond the framework of the organization in question.

(6) Lastly, with regard to missions to international organizations, the wording "representatives accredited by States . . . to an international organization" used in the Vienna Convention has been dropped in favour of the term "head of mission" employed in the Convention on the Representation of States: *sub-paragraphs (d) and (e) of paragraph 2* of the present draft article are based on article 12, paragraphs 1 and 2, of the latter instrument, which contain the most recent rule drafted by representatives of States in the matter. Heads of permanent missions to an international organization are competent by the very fact of their functions to *adopt* the text of a treaty between one or more States and that organization. They may also be competent, but only by virtue of practice or other circumstances, to *sign*, or to sign *ad referendum*, the text of a treaty between one or more States and the organization concerned.

(7) The matter of representatives of international organizations raises new questions, and firstly one of principle. Should the rule be established that the representative of an organization is required, like the representative of a State, to prove by an appropriate document that he is competent to represent a particular organization for the purpose of performing certain acts relating to the conclusion of a treaty (the adoption and authentication of the text, consent to be bound by the treaty, etc.)? The Commission answered that question in the affirmative, since no reason exists for international organizations not to be subject to a rule which is already firmly and universally established with regard to treaties between States. It is perfectly true that in the practice of international organizations formal documents are not normally used for this purpose. The treaties at present being concluded by international organizations are bilateral treaties or are restricted to very few parties; they are preceded by exchanges of correspondence which generally determine beyond all doubt the identity of the individuals who will perform on behalf of the organization certain acts relating to the procedure for the conclusion (in the broadest sense) of the treaty. In other cases, the highest-ranking official of the organization ("the chief administrative officer of the Organization" within the meaning of article 85, paragraph 3, of the Convention on the Representation of States), with his immediate deputies, is usually considered in practice as representing the organization without further documentary evidence.

⁷⁰⁹ For the text of the Convention, see *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), document A/CONF.67/16. The Convention will be referred to hereafter as "the Convention on the Representation of States".

(8) These considerations should not, however, obscure the fact that in the case of organizations with a more complex institutional structure, such as EEC, formal documents are necessary for the above purposes. Moreover, the present draft articles provide for the possibility, with the consent of the States concerned, of participation by international organizations in treaties drawn up at an international conference composed mainly of States (article 9), and it seems perfectly proper that in such cases organizations should be subject to the same rules as States. It is nevertheless necessary that the general obligation thus imposed on international organizations should be made as flexible as possible and that authority should exist for a practice which is accepted by all concerned, namely that of making whatever arrangements are desirable; these ends are achieved by paragraphs 3 (b) and 4 (b), which apply the rule accepted for representatives of States to the case of representatives of international organizations. The Commission did not, however, think it possible to draw up a list of cases in which a person would be absolved *by reason of his functions* in an international organization from the need to furnish documentary proof of his competence to represent an organization in the performance of an act relating to the conclusion (in the broadest sense) of a treaty. If impossible complications are to be avoided, the present draft articles, unlike the Convention on the Representation of States, must apply to *all organizations*; and international organizations, taken as a whole, exhibit structural differences which rule out the possibility of making them the subject of general rules.

(9) There are other considerations to support this view which have more far-reaching consequences. No organization has the same treaty-making capacity as a State; the capacity of every organization is restricted, under the terms of *draft article 6*; no organ of an international organization has *general* competence to represent the organization in the way that a Head of State or Minister for Foreign Affairs has *general* competence to represent the State. These differences should be asserted through appropriate terminology, and the limited competence of representatives of international organizations by comparison with what applies to States should be spelt out.

(10) In this connexion, as will be established further by article 2, paragraph 1 (c), the term "full powers" is confined to documents produced by representatives of States and the term "powers" to those produced by representatives of international organizations. The Commission is aware of how much the terminology varies in practice (a situation exemplified by articles 12 and 44 of the Convention on the Representation of States), but it considers that the terminology which it proposes makes a necessary distinction.

(11) Moreover, in the case of representatives of international organizations, the Commission felt it necessary to distinguish between the adoption and authentication of the text of a treaty on the one hand and consent to be bound by a treaty on the other; the two cases are dealt with in paragraphs 3 and 4 of the present draft article respectively. With regard to the adoption or authentication of the text of a treaty, the formulation proposed corresponds to that of paragraph 1 (a) relating to repre-

sentatives of States. With regard to consent to be bound by a treaty, however, the Vienna Convention and paragraph 1 of the present draft article provide for a case in which "a person is considered as representing a State . . . for the purpose of *expressing* the consent of the State to be bound by such a treaty". The Commission believes that to apply the verb "express" to the representative of an international organization might give rise to some doubt; particularly in view of the rather frequent gaps and ambiguities in constituent instruments, the term might be understood as giving the representative of an international organization the right to determine by himself, as representative, whether or not the organization should be bound by a treaty. A means of avoiding that doubt seemed the use of the verb "communicate" instead of the verb "express", since the former indicates more clearly that the consent of an organization to be bound by a treaty must be established according to the constitutional procedure of the organization and that the action of its representative should be to transmit that consent; he should not, at least in the present draft article, be empowered to determine by himself the organization's consent to be bound by a treaty. In other articles of the present draft, care has likewise been taken to avoid the use of the verb "express" as regards representatives of international organizations and to employ other expressions, such as "establishing" consent to be bound by a treaty.

Article 2. Use of terms⁷¹⁰

1. For the purposes of the present articles:

...

(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.

⁷¹⁰ Provision of the Vienna Convention corresponding to subparagraphs (c) and (c bis):

"Article 2

"Use of terms

"1. For the purposes of the present Convention:

"...

"(c) 'full powers' means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty."

Commentary

The adoption of separate terms ("full powers" and "powers") for the documents which establish the capacity of a person to represent a State and an international organization respectively and the use of the term "communicating" instead of "expressing" in regard to the consent of an organization to be bound by a treaty have already been discussed.⁷¹¹

Sub-paragraph (*c bis*) is an addition by comparison with the corresponding text of the 1969 Vienna Convention on the Law of Treaties, while *sub-paragraph (c)* reproduced that text except for the drafting changes necessitated by the subject-matter of the present draft articles.

Article 8. Subsequent confirmation of an act performed without authorization⁷¹²

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.

Commentary

This article reproduces the corresponding text of the Vienna Convention except for the changes necessitated by the subject-matter of the present draft articles.

Article 9. Adoption of the text⁷¹³

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.

Commentary

(1) The corresponding article of the Vienna Convention establishes a rule, namely that the adoption of the text

⁷¹¹ See above, paras. 10 and 11 of the commentary to article 7.

⁷¹² Corresponding provision of the Vienna Convention:

"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 for that purpose is without legal effect unless afterwards confirmed by that State."

⁷¹³ Corresponding provision of the Vienna Convention:

*"Article 9**"Adoption of the text*

"1. The adoption of the text of a treaty takes place by the con-

of a treaty shall take place by the consent of all the States participating in its drawing-up, together with an exception concerning the adoption of the text of the treaty at an "international conference", but it does not define an "international conference". The general view, however, has always been that this term relates to a relatively open and general conference in which States participate without the final consent of one or more of them to be bound by the treaty being regarded by the other States as a condition for the entry into force of the treaty.

(2) The present draft article follows the same pattern; it avoids adding any qualification or definition of the term "conference", because that might upset the symmetry existing between the draft article and the text of the Vienna Convention and thus inevitably complicate the relationship between the latter and the draft articles. This would result in particular from the fact that article 3, paragraph (c), of the Vienna Convention reserves the application of the Convention "to the relations of States as between themselves under international agreements to which other subjects of international law are also parties". If the draft articles and the Vienna Convention are not to create two sets of rules each possessing a different scope, with the consequent possibility of difficulties, the same terminology must be used in both texts, and the draft articles must be kept as far as possible in line with the Vienna Convention.

(3) The present draft article nevertheless exhibits a number of particular aspects which derive from the specific characteristics of international organizations. In the first place, article 9, paragraph 1, of the Vienna Convention refers as regards a treaty to "all the States participating in its drawing-up"; no definition is given for this expression, the meaning of which is sufficiently clear when only States are involved. Where organizations are concerned, the words "all the participants in the drawing-up of the treaty" used in paragraph 1 of the present draft article must be understood to mean either one or more States and one or more organizations, or more than one organization, whichever is the case. In regard to organizations, however, it is only possible to regard as "organizations" participating in the drawing-up of the text those organizations which participate in the drawing-up on the same footing as States, and that excludes the case of an organization which merely plays a preparatory or advisory role in the drawing-up of the text. The Commission will decide later, when it considers the draft articles as a whole, whether or not a formal definition of the expression "participants in the drawing-up of the treaty" should be inserted in the opening provisions of the draft articles.

(4) In examining the possible place of international organizations in the development of the international

sent of all the States participating in its drawing-up except as provided in paragraph 2.

"2. The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule."

community, the Commission has had to decide whether a conference *consisting only of international organizations* is conceivable. The hypothesis, although exceptional, cannot be excluded; it is possible, for example, that international organizations might seek through an international conference to resolve certain problems or at least to bring uniformity into certain arrangements relating to the international civil service. It was felt, however, that even in an eventuality of that kind each organization would possess such specific characteristics by comparison with the other organizations that there would be little point in bringing such a "conference" within the scope of the rule in article 9, paragraph 2, of the Vienna Convention, which is manifestly not suited to the case in question. In the draft article proposed above, a "conference" consisting only of international organizations would fall under *paragraph 1* in regard to the adoption of the text of a treaty: the text would have to be adopted by all the participants unless a rule other than unanimous consent were established.

(5) The only specific hypothesis calling for the application of a rule symmetrical with the rule in article 9, paragraph 2, of the Vienna Convention would be that of a "conference" between States within the meaning of that Convention at which one or more international organizations also participated with a view to the adoption of the text of a treaty between those States and the international organization or organizations concerned. In such a case, it would be proper that the rule of the two-thirds majority laid down in the text of the Vienna Convention should apply, with the two-thirds majority meaning two thirds of all the participants, both States and international organizations. This is the aim of paragraph 2 of the present draft article. In the absence of such a provision, if States participating in the conference decided to invite one or two international organizations to participate in the conference on the same footing as States themselves, the rule in article 9, paragraph 2 of the Vienna Convention would be inapplicable, which would leave no alternative to the following of a rule of unanimous consent, possibly for the adoption of the text of a treaty and in any case for the adoption of the rule according to which the text of the treaty is to be adopted. It was not the intention of the Commission, in proposing paragraph 2 of draft article 9, to recommend the participation of one or more international organizations in the drawing-up of a treaty at an international conference; this is a question which must be examined case by case and is a matter for States to decide. The Commission merely wished to make provision for a possibility which, although without precedent in the past, even the recent past, might arise in the future. In particular, the setting-up of numerous Customs and economic unions raises the possibility that, at least in some cases, unions of this kind may be called on to participate as such in the drawing-up of conventions at international conferences. Nor was it the intention of the Commission that the provisions of paragraph 2 should be interpreted as impairing the autonomy of international conferences in the adoption of their own rules of procedure, which might prescribe a different rule for the adoption of the text of a treaty, or in filling any gaps in their rules of procedure on this subject.

Article 10. Authentication of the text⁷¹⁴

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.

Commentary

This draft article reproduces the corresponding text (article 10) of the Vienna Convention except for differences of presentation reflecting the two particular kinds of treaty with which it is concerned. The brief allusion at the end of paragraph 2 to a conference consisting only of international organizations should be regarded as providing for an exceptional case, as explained in connexion with *article 9*.⁷¹⁵ In paragraph 2 (a), the expression "the international organizations participating in its drawing-up" [i.e. the drawing-up of the treaty referred to in paragraph 2] eliminates doubts where an international organization assists and co-operates in preparing the text of a convention to which it is not to be a party. The hypothesis has been catered for, although it is even less frequent in the case of *sub-paragraph* (b).

Article 11. Means of establishing consent to be bound by a treaty⁷¹⁶

1. The consent of a State to be bound by a treaty between one or more States and one or more international

⁷¹⁴ Corresponding provision of the Vienna Convention:

"Article 10

"Authentication of the text

"The text of a treaty is established as authentic and definitive:

"(a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing-up; or

"(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text."

⁷¹⁵ See above, para. 4 of the commentary to article 9.

⁷¹⁶ Corresponding provision of the Vienna Convention:

"Article 11

"Means of expressing consent to be bound by a treaty

"The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."

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.

Commentary

(1) Paragraph 1 of this draft article reproduces, in respect of the consent of States to be bound by a treaty concluded between one or more States and one or more international organizations, the enumeration of the different means of expressing consent given in article 11 of the Vienna Convention as regards treaties between States. It is more difficult to enumerate the different means of establishing the consent of an international organization to be bound by a treaty to which it intends to become a party. There is no difficulty, as regards international organizations, in allowing signature, exchange of instruments constituting a treaty, acceptance, approval or accession. The Commission considers that the same principle could be accepted for international organizations as for States, namely the addition to this list of the expression "any other means if so agreed". This formulation, adopted by the United Nations Conference on the Law of Treaties, is of considerable significance since it introduces great flexibility in the means of expressing consent to be bound by a treaty; the freedom thus given to States, which it is proposed to extend to international organizations, bears on the terminology as well, since the Vienna Convention enumerates but does not define the means of expressing consent to be bound by a treaty. Practice has shown, however, that the considerable expansion of treaty commitments makes this flexibility necessary and there is no reason to deny the benefit of it to international organizations.

(2) As indicated above in article 7,⁷¹⁷ the verb "establish" has been preferred to the verb "express" in the case of the consent of an international organization to be bound by a treaty. Furthermore, the term "ratification" to designate a means of establishing the consent of an international organization to be bound by a treaty was discarded after long discussions in the Commission. To put the elements of the problem in clear perspective, it has to be remembered that in draft article 11, as in article 11 of the Vienna Convention, there is no question of the meaning which may be given to the terms of the article in the internal law of a State or in the rules of an international organization (draft article 2, paragraph 2, which reflects the rule laid down in article 2, paragraph 2, of the Vienna Convention). It is therefore irrelevant to ascertain whether an international organization employs the term "ratification" to designate a particular means of establishing its consent to be bound by a treaty. In point of fact, international organizations use the term only in

exceptional cases, which appear to be anomalous.⁷¹⁸ It is obvious, however, that the draft article does not set out to prohibit an international organization from using a particular vocabulary within its own legal order.

(3) At the same time, the draft articles, like the Vienna Convention on the Law of Treaties, make use of a terminology accepted "on the international plane" (article 2, paragraph 1 (b) of the Vienna Convention). The Commission considered in this connexion that the term "ratification" should be reserved for States, since in accordance with a long historical tradition it always denotes an act emanating from the highest organs of the State, generally the Head of State, and there are no corresponding organs in international organizations.

(4) Looking not at the organs from which the ratification proceeds, however, but at the technical mechanism of ratification, we find that ratification amounts to the definitive confirmation of a willingness to be bound which has, in the first instance, been manifested without commitment. Such a mechanism may sometimes be necessary in the case of international organizations, and there is no reason for denying it a place among the means of establishing their consent to be bound by a treaty. At present, however, there is no generally accepted international designation of such a mechanism in relation to an international organization. In the absence of an accepted term, the Commission has confined itself to describing this mechanism by the words "act of formal confirmation". When necessary, international organizations, using a different terminology, can thus establish on an international plane their consent to be bound by a treaty by means of a procedure which is symmetrical with that which applies to States.

Article 2. Use of terms⁷¹⁹

1. For the purposes of the present articles:

...

(b) "ratification" means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(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;

⁷¹⁸ See, for example, A/CN.4/285 [to be printed in *Yearbook...* 1975, vol. II] draft articles, para. 4 of the commentary to article 11, second foot-note.

⁷¹⁹ Provision of the Vienna Convention corresponding to subparagraphs (b), (b bis) and (b ter):

"Article 2

"Use of terms

"1. For the purposes of the present Convention:

..."

"(b) 'ratification', 'acceptance', 'approval' and 'accession' mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty."

⁷¹⁷ See above, para. 11 of the commentary to article 7.

(*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.

Commentary

The scope of the proposed definition can be gauged from the commentary to article 11.

Article 12. Signature as a means of establishing consent to be bound by a treaty⁷²⁰

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.

Commentary

The application to the case of international organizations of the rule established in respect of representatives

⁷²⁰ Corresponding provision of the Vienna Convention:

“Article 12

“Consent to be bound by a treaty expressed by signature

“1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

“(a) the treaty provides that signature shall have that effect;

“(b) it is otherwise established that the negotiating States 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. For the purposes of paragraph 1:

“(a) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;

“(b) the signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.”

of States in article 12 of the Vienna Convention involved a few changes. With regard to representatives of international organizations, the word “established” has been substituted for the word “expressed”. In respect of international organizations, paragraph 1 (*b*) of article 12 of the Vienna Convention has been deleted and accordingly paragraph 1 (*c*) of that article corresponds to paragraph 2 (*b*) of the present draft article 12. Article 12, paragraph 1 (*b*), of the Vienna Convention gives States considerable freedom in this matter by allowing them to conclude agreements without restriction as to form or particular circumstances. Such freedom is usual for States but gives rise to objections in the case of international organizations. Draft article 12, paragraph 2 (*b*), nevertheless allows international organizations sufficient latitude.

Article 13. An exchange of instruments constituting a treaty as a means of establishing consent to be bound by a treaty⁷²¹

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.

Commentary

This draft article reproduces article 13 of the Vienna Convention except for the changes necessitated by the two kinds of treaty to which it applies. The wording of this draft article reflects the fact, although cases of the kind are now rare, that a treaty may also be constituted by an exchange of instruments when there are more than two contracting parties.

⁷²¹ Corresponding provision of the Vienna Convention:

“Article 13

“Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty

“The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

“(a) the instruments provide that their exchange shall have that effect; or

“(b) it is otherwise established that those States 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 treaty⁷²²

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.

Commentary

This draft article deals separately, in *paragraph 1* with the consent of the State in the case of treaties between one or more States and one or more international organizations, and in *paragraph 2* with the consent of an international organization in the case of a treaty as defined

in article 2, paragraph 1 (a)—that is to say, a treaty between one or more States and one or more international organizations and a treaty between a number of international organizations. It does not call for any comment as regards the question of the use, for the case of international organizations, of the term “act of formal confirmation”, which has already been discussed.⁷²³ It will merely be noted that the wording of the title of this article, at least in the French version, makes it clear that the expression used there (“*un acte de confirmation formelle*”) is a verbal expression describing an operation which has not so far had any generally accepted term bestowed on it in international practice.

Article 15. Accession as a means of establishing consent to be bound by a treaty⁷²⁴

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.

Commentary

Two separate paragraphs deal respectively with the consent of the State and the consent of the international organization. The term “expressed” used in paragraph 1 of the draft article in respect of States, as in article 15 of the Vienna Convention, has been replaced in paragraph 2 by the terms “established” or “given” in respect of international organizations.

⁷²² Corresponding provision of the Vienna Convention:

Article 14

“Consent to be bound by a treaty expressed by ratification, acceptance or approval

“1. The consent of a State to be bound by a treaty is expressed by ratification when:

“(a) the treaty provides for such consent to be expressed by means of ratification;

“(b) it is otherwise established that the negotiating States 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 a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.”

⁷²³ See above, paras. 3 and 4 of the Commentary to article 11.

⁷²⁴ Corresponding provision of the Vienna Convention:

Article 15

“Consent to be bound by a treaty expressed by accession

“The consent of a State to be bound by a treaty is expressed by accession when:

“(a) the treaty provides that such consent may be expressed by that State by means of accession;

“(b) it is otherwise established that the negotiating States were agreed that such consent may 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.”

*Article 2. Use of terms*⁷²⁵

1. For the purposes of the present articles:

...

(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.

Commentary

Article 15 is the first of all the draft articles adopted so far in which the term "party" is used: it was therefore necessary to define the meaning of this term. Except for the addition of the words "or an international organization", the definition given above follows exactly the wording of the Vienna Convention. It therefore leaves aside certain problems peculiar to international organizations. But in this case the words "to be bound by a treaty" must be understood in their strictest sense—that is to say, as meaning to be bound *by the treaty itself* as a legal instrument, and not merely "to be bound by the rules of the treaty". For it can happen that an organization will be bound by legal rules contained in a treaty without being a party to the treaty, either because the rules have a customary character in relation to the organization, or because the organization has committed itself by way of a unilateral declaration (assuming that to be possible), or because the organization has concluded with the parties to treaty X a collateral treaty whereby it undertakes to comply with the rules contained in treaty X without, however, becoming a party to that treaty. Furthermore, the relatively simple definition given above should be understood as being subject to the comments already made regarding participation in the "drawing-up" of a treaty. This term, pending perhaps more precise definition by the Commission later, cannot be used in the case of international organizations which, at the time of the drawing-up of a treaty, lend their technical assistance in the preparation of the text of the treaty, but are never intended to become parties to it.

*Article 16. Exchange, deposit or notification of instruments of ratification, formal confirmation, acceptance, approval or accession*⁷²⁶

1. Unless the treaty otherwise provides, instruments of ratification, formal confirmation, acceptance, approval

⁷²⁵ Provision of the Vienna Convention corresponding to subparagraph (g):

*"Article 2**"Use of terms*

"1. For the purposes of the present Convention:

...

"(g) 'party' means a State which has consented to be bound by the treaty and for which the treaty is in force."

⁷²⁶ Corresponding provision of the Vienna Convention:

*"Article 16**"Exchange or deposit of instruments of ratification, acceptance, approval or accession*

"Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

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.

Commentary

The draft article follows the provisions of article 16 of the Vienna Convention, but has two paragraphs dealing separately with the two different categories of treaties which are the subject of this set of draft articles. In the case of an act of formal confirmation, the instrument establishing its existence has been described as an "instrument of formal confirmation", but the use of this term is no reason for not retaining the expression "an act of formal confirmation" in draft article 2, paragraph 1 (*b bis*), and in draft articles 11 and 14, since these terms help to avoid any confusion with the confirmation referred to in draft article 8 and, as has already been explained,⁷²⁷ they do not denominate but rather describe the operation referred to.

*Article 17. Consent to be bound by part of a treaty and choice of differing provisions*⁷²⁸

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.

"(a) their exchange between the contracting States;

"(b) their deposit with the depositary; or

"(c) their notification to the contracting States or to the depositary, if so agreed."

⁷²⁷ See above, para. 4 of the Commentary to article 11.

⁷²⁸ Corresponding provision of the Vienna Convention:

*"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 to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

"2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates."

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 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.

Commentary

This draft article deals with the two separate questions which are the subject of article 17 of the Vienna Convention. It deals with these questions in four paragraphs, giving separate consideration to the two categories of treaties which are the subject of the present set of draft articles. The reference in paragraphs 1 and 2 to articles 19 to 23 has been placed between square brackets because the Commission, for lack of time, was only able to have a general exchange of views on draft articles 19 to 23 and took no decision on the text. It will consider the revised draft articles on reservations at its next session.

*Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force*⁷²⁹

1. A State or an international organization is obliged to refrain from acts which would defeat the object and

⁷²⁹ Corresponding provision of the Vienna Convention:

Article 18

"Obligation not to defeat the object and purpose of a treaty prior to its entry into force"

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 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.

Commentary

This draft article follows the principle set forth in article 18 of the Vienna Convention, though there are some differences in wording and the two categories of treaties which are the subject of the present set of draft articles are dealt with separately.

"A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

"(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

"(b) it has expressed 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."

Chapter VI

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. The law of the non-navigational uses of international watercourses

138. At its twenty-sixth session, in 1974, the Commission, pursuant to a recommendation of the General Assembly contained in paragraph 4 of resolution 3071 (XXVIII) of 30 November 1973, set up a Sub-Committee to consider the question and report to the Commission, and appointed Mr. Richard D. Kearney as Special Rapporteur for the topic. The Commission adopted without change the report of the Sub-Committee and included it in the report on the work of that session.⁷³⁰

⁷³⁰ *Yearbook... 1974*, vol. II (Part One), pp. 301-304, document A/9610/Rev.1, chap. V, annex.

The Sub-Committee's report contained a series of questions intended to elicit the views of States on certain basic aspects of the subject with a view to facilitating the future study of the topic by the Commission. In accordance with the provisions of its Statute, the Commission decided to invite the comments and observations of Governments of Member States on those questions. These actions were endorsed by the General Assembly in section I of resolution 3315 (XXIX) of 14 December 1974. By a circular letter dated 21 January 1975, the Secretary-General transmitted to Governments the Commission's questionnaire and requested them to submit their replies by 1 July 1975. The comments and observations received by the Secretary-General will be communicated to the Special Rapporteur on the topic and will also be repro-

duced in a document to be circulated to the Commission. Pending the receipt of the answers from Governments of Member States, the Commission did not consider the topic at its present session.

B. Programme and organization of work

139. The Commission has under consideration in its current programme of work the following topics: State responsibility, succession of States in respect of matters other than treaties, the most-favoured-nation clause, the question of treaties concluded between States and international organizations or between two or more international organizations and the law of the non-navigational uses of international watercourses.

140. Following discussion in the Commission at its twenty-seventh session, a planning group was established in the Enlarged Bureau to study the functioning of the Commission and formulate suggestions regarding its work. The Group was composed of Mr. Taslim O. Elias, Mr. Richard D. Kearney (Chairman), Mr. José Sette Câmara, Mr. Senjin Tsuruoka and Mr. Nikolai A. Ushakov.

141. As an initial project the Group undertook a review of the existing work load of the Commission with a view to proposing general goals toward which the Commission might direct its efforts. On the basis of this review the Group concluded that work on the most-favoured-nation clause had reached the point at which it should be possible to complete work on the set of articles in first reading at the 1976 session. As that session will bring to an end the term of office of the present members of the Commission, the Group suggested that every effort be made to achieve the goal of the first reading of articles on this topic for submission to the General Assembly at its thirty-first session.

142. The Group devoted considerable study to the two priority topics on its agenda—State responsibility and succession of States in respect of matters other than treaties. As the introduction to chapter II of the present report points out,⁷³¹ three chapters of Part I of the articles on State responsibility remain to be considered. These are:

Chapter III—Breach of an International Obligation

Chapter IV—Participation by other States in the Internationally Wrongful Act of a State

Chapter V—Circumstances Precluding Wrongfulness and Attenuating or Aggravating Circumstances.

143. This Part I when completed will contain a complete statement of the most fundamental aspects of State responsibility and will constitute an integrated whole. The Group considered that, in view of the high priority assigned to this topic by the General Assembly, the first reading of this set of articles should be completed during the first part of the term of office of the members elected to the Commission in 1976. This would permit submission of the set of articles to Governments and the receipt of governmental comments in sufficient time to permit the

second and final reading of the articles to take place prior to the expiration of that term of office. This would mean final completion of these articles by 1981 at the latest, but with the possibility of earlier completion.

144. With regard to succession of States in respect of matters other than treaties, the Group's review of this topic resulted in the conclusion that the most important aspects of the topic, from the viewpoint of the present needs of international law, were public property, upon which considerable progress had already been achieved in the area of State property, and public debts. Concentration upon these aspects would permit the drafting of a balanced set of articles that, when adopted in treaty form, would provide a basis for dealing with the questions which ordinarily present most problems regarding non-treaty matters arising in the course of a succession of States. Having regard to the complicated and difficult issues involved in this work, the Group suggested that completion of a set of articles in respect of succession of States to public property and public debts in first reading should be the minimum goal for the 1976–1981 term of the Commission.

145. The fourth topic under active consideration, the question of treaties concluded between States and international organizations or between two or more international organizations, has been progressing at a good rate. The Group, therefore, considered that completion of the second reading of a set of articles on this subject by or prior to 1981 was a justifiable goal.

146. Response to the Commission's questionnaire on the non-navigable uses of international watercourses had not hitherto been sufficient to permit determination of the scope and content of the work on this topic. The Group suggested that consideration of any goal for this topic should be deferred until the twenty-eighth session of the Commission in 1976.

147. The Enlarged Bureau submitted these suggestions of the Group to the Commission for consideration. After reviewing them, the Commission reached the conclusion that while the adoption of any rigid schedule of operations would be impracticable, the use of the goals in planning its activities would afford a helpful framework for decision-making. The Commission also endorsed continued activity by a planning group to review periodically the progress of the Commission's work, as well as the suggestion that, in order to assist the Group in its work, members should submit proposals regarding the Commission's activities and needs for study by the Group.

C. Co-operation with other bodies

1. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

148. The Chairman of the twenty-sixth session, Mr. Endre Ustor, attended the sixteenth session of the Asian-African Legal Consultative Committee, held at Teheran in January 1975, as an observer for the Commission and made a statement (A/CN.4/287)⁷³² before the Committee.

⁷³¹ See above paras. 42, 45 and 49 to 51.

⁷³² See p. 45 above.

149. The Asian-African Legal Consultative Committee was represented at the twenty-seventh session of the Commission by its Secretary-General, Mr. B. Sen, who addressed the Commission at its 1310th meeting.

150. Mr. Sen said he looked forward to a steady increase in the co-operation between the Asian-African Legal Consultative Committee and the Commission, which were both engaged in the process of developing a legal order based on justice, equity and good conscience. He said that the Committee had advised its members of the Commission's work on various topics and hoped soon to be able to send its observations on the Commission's draft articles on succession of States in respect of treaties. In the future, Mr. Sen said the Committee would include all subjects discussed by the Commission in its programme of work, taking them up at an early stage in the Commission's deliberations. With the expansion of its membership, Mr. Sen said, the Committee had broadened the scope of its activities to include the study and preparation of material concerning all legal issues of interest to the United Nations and other international organizations, for the benefit of its members and other Asian and African Governments. He noted that the sixteenth session of the Committee had been devoted mainly to an evaluation of the Third United Nations Conference on the Law of the Sea and the discussion of specific questions on which further clarification and consultation had appeared necessary in preparation for the recent session of that Conference held in Geneva. He also stressed that the Committee co-operated closely with the United Nations Environment Programme, so far as the legal aspects of environmental problems were concerned, and with UNCITRAL, UNCTAD, ECE, EEC and other bodies, on questions relating to the international sale of goods, international commercial arbitration and shipping, all of them matters of vital interest to developing countries and matters with which the Committee had been concerned at its sixteenth session. Finally, he explained to the Commission that the Committee aided its member Governments by conducting training programmes, collecting legal material, and organizing seminars on common problems. It hoped to hold a seminar on problems of international law for government legal advisers in 1976.

151. The Commission was informed that the seventeenth session of the Committee, to which it had a standing invitation to send an observer, would be held at Kuala Lumpur in 1976. The Commission requested its Chairman, Mr. Abdul Hakim Tabibi, to attend the session or, if he was unable to do so, to appoint another member of the Commission for this purpose.

2. EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

152. The twenty-second and twenty-third sessions of the European Committee on Legal Co-operation were held at Strasbourg in December 1974 and June 1975 respectively. The Commission was unable to send an observer to those sessions of the Committee, which coincided with the twenty-ninth session of the General Assembly and the present session of the Commission.

153. The European Committee on Legal Co-operation was represented at the twenty-seventh session of the Com-

mission by Mr. H. Golsong, Director of Legal Affairs of the Council of Europe, who addressed the Commission at its 1333rd meeting.

154. Mr. Golsong emphasized that the Commission's work had always been followed with great interest by the European Committee on Legal Co-operation. In connexion with the topic of treaties concluded between States and international organizations or between two or more international organizations, he mentioned the arrangements made to enable the European Communities to become contracting parties to the future European convention for the protection of international watercourses against pollution (see A/CN.4/274, para. 377⁷³³). Also related to the law of treaties, he said, was the work undertaken with a view to adapting the European Convention on Extradition to current needs. He referred to recent efforts which had aimed in particular at reducing the number of reservations formulated by States to that Convention, the preparation of which went back about 20 years and which was now in force with regard to many States. Mr. Golsong also commented upon a recent case (the *Golder case*) decided by the European Court of Human Rights, which concerned the interpretation of a provision of the Convention for the Protection of Human Rights and Fundamental Freedoms nearly identical with a provision of the International Covenant on Civil and Political Rights. In order to interpret that provision and determine whether it implied a right of access to the courts, the Court had followed the method of interpretation provided for in articles 31 to 33 of the Vienna Convention on the Law of Treaties.⁷³⁴ In the field of criminal law, he referred to the European Convention on the International Validity of Criminal Judgements, which had recently entered into force, and to the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, which would soon enter into force. Finally, Mr. Golsong noted that the Committee had also under consideration the drafting of instruments relating to mutual administrative assistance and that work would soon begin on concerted acts of violence.

155. The Commission was informed that the next session of the Committee, to which it had a standing invitation to send an observer, would be held at a time and place to be notified later. The Commission requested its Chairman, Mr. Abdul Hakim Tabibi, to attend the session or, if he was unable to do so, to appoint another member of the Commission for this purpose.

3. INTER-AMERICAN JURIDICAL COMMITTEE

156. Mr. Alfredo Martínez Moreno attended the session of the Inter-American Juridical Committee held at Rio de Janeiro in February and March 1975, as an observer for the Commission.

157. The Inter-American Juridical Committee was represented at the twenty-seventh session of the Com-

⁷³³ See *Yearbook... 1974*, vol. II (Part Two), p. 346.

⁷³⁴ *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. 293.

mission by Mr. A. P. Ricaldoni, who addressed the Commission at its 1321st meeting.

158. Mr. Ricaldoni expressed the hope that the close and fruitful co-operation between the Commission and the Committee would continue to develop as an expression of the firm conviction that there could be no justice, peace or freedom without law. Turning to the Committee's work in 1974, he said that it had adopted a final, but not exhaustive, list, and a statement of reasons attached thereto, of 21 specific examples or "cases" of breaches by States of the principle of non-intervention. He explained to the Commission some of the items on the list and of the statement of reasons attached thereto and noted that the list had had its origin in a draft prepared by the Committee in 1959. Nine of the 21 cases had been taken virtually unchanged from the 1959 list. At its 1974 session, the Committee had added 12 new cases to the list. Mr. Ricaldoni reported that the Committee had also dealt at its 1974 session with the question of transnational undertakings. He emphasized that the Committee had for some years been considering questions relating to multinational corporations, and had received a number of interesting reports on the topic submitted by some of its members. He recalled certain decisions taken on the matter by the OAS Council, as well as views expressed thereon by the Committee. Concerning other topics, he said a study had been submitted by one Committee member on the immunity of States from jurisdiction, and another by another member concerning the settlement of disputes relating to the law of the sea, taking into account the work of the Third United Nations Conference on the Law of the Sea. Mr. Ricaldoni noted that the Committee had also carried on, in 1974, its usual activities relating to research and to the dissemination and teaching of international law through courses of study dealing with various topics of international law.

159. The Commission was informed that a session of the Committee was to be held in July 1975, during the present session of the Commission, but that the next session of the Committee, to which it had a standing invitation to send an observer, would be held at a time and place to be notified later. The Commission requested its Chairman, Mr. Abdul Hakim Tabibi, to attend that next session or, if he was unable to do so, to appoint another member of the Commission for this purpose.

D. Date and place of the twenty-eighth session

160. The Commission decided to hold its next session at the United Nations Office at Geneva from 3 May to 23 July 1976.

E. Representation at the thirtieth session of the General Assembly

161. The Commission decided that it should be represented at the thirtieth session of the General Assembly by its Chairman, Mr. Abdul Hakim Tabibi.

F. Gilberto Amado Memorial Lecture

162. In accordance with a decision taken by the Commission at its twenty-third session⁷³⁵ and thanks to another generous grant by the Brazilian Government, the third Gilberto Amado Memorial Lecture was given at the Palais des Nations on 11 June 1975.

163. The lecture was delivered by H.E. Mr. Manfred Lachs, President of the International Court of Justice, who presented "Some reflexions on the peaceful settlement of disputes". 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 and the University of Geneva, and participants in the International Law Seminar. The lecture was followed by a dinner. The Commission expressed the opinion that, as on the two previous occasions, it was desirable to print the above-mentioned lecture in English and French with a view to bringing it to the attention of the largest possible number of specialists in the field of international law.

164. The Committee of the Gilberto Amado Commemorative lecture met on 4 June 1975 under the Chairmanship of Mr. Taslim O. Elias. Mr. Richard D. Kearney, Mr. José Sette Câmara, Mr. Abdul Hakim Tabibi and Mr. Nikolai A. Ushakov, members of the Committee, attended the meeting.

165. The Committee decided to recommend that every effort should be made to organize another lecture in 1976 during the sessions of the International Law Commission and the International Law Seminar. Efforts should also be made, with the assistance of the Chairman of the Commission and Mr. Sette Câmara, to obtain, as in previous years, funds from the Brazilian Government.

166. The Commission endorsed the views of the Committee and expressed its gratitude to the Brazilian Government for its renewed gesture, which had made the third Gilberto Amado Memorial Lecture possible. It expressed the hope that the Government's financial assistance would be maintained so as to make possible the continuance of the series of lectures as a tribute to the memory of the illustrious Brazilian jurist who had been for many years a member of the International Law Commission. The Commission asked Mr. Sette Câmara to convey its views to the Brazilian Government.

G. International Law Seminar

167. Pursuant to General Assembly resolution 3315 (XXIX) of 14 December 1974, the United Nations Office at Geneva organized, during the Commission's twenty-seventh session, a session—the eleventh—of the International Law Seminar intended for advanced students and junior officials of government departments whose functions habitually include consideration of questions of international law.

⁷³⁵ See *Yearbook... 1971*, vol. II (Part One), pp. 334-335, document A/8410/Rev.1, paras. 164-169.

168. Between 26 May and 13 June 1975, the Seminar held 10 meetings devoted to lectures followed by discussion.

169. Nine members of the Commission generously gave their services as lecturers. The lectures dealt with various subjects, a number of these connected with the past, present or future work of the Commission, namely, the Vienna Convention on the Representation of States in their Relations with International Organizations of Universal Character (Mr. El-Erian, with the participation of Mr. Sette Câmara during the discussion), the present system of diplomatic and consular law (Mr. Ustor), the law of the non-navigational uses of international water-courses (Mr. Kearney) and succession of States in respect of treaties (Sir Francis Vallat). One lecturer (Mr. Elias) presented an analysis of the decisions of the International Court of Justice in the nuclear test cases, and another (Mr. Yasseen) spoke on the General Assembly's work on the definition of aggression. One lecture dealt with the frontiers of international law (Mr. Pinto), another with the legal and operational aspects of the Andean sub-regional integration process (Mr. Calle y Calle) and still another with energy problems and international law (Mr. Bedjaoui). In addition, the Director of the Department of Principles and Law of the International Committee of the Red Cross (Mr. Pilloud) spoke on the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.⁷³⁶ The Director of the Seminar (Mr. Raton) gave an introductory talk on the International Law Commission and its work.

170. Twenty students, each from a different country, took part in the Seminar; they also attended the third 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, free of charge, with copies of the publication entitled *The Work of the International Law Commission*,⁷³⁷ which is essential for those following the work of the Seminar, together with the basic docu-

ments necessary to allow them to follow 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 which are unavailable or difficult to find in their countries of origin.

171. None of the cost of the Seminar fell on the United Nations, which was not asked to contribute either to the travel or to the living expenses of participants. As at previous sessions, the Governments of Denmark, Finland, the Federal Republic of Germany, Israel, the Netherlands, Norway and Sweden made fellowships available to participants from developing countries. Such fellowships, ranging in value from \$US 1,200 to more than \$US 4,000, were awarded to 12 candidates. With the award of fellowships, it is now possible to achieve a much wider geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise be prevented from attending solely by lack of funds. It is worth recalling that, from 1965 to 1975, out of 248 participants of 87 different nationalities, 119 have been awarded fellowships, 100 of them provided by the States mentioned above, with the addition of Switzerland, and 19 by UNITAR.

172. Unfortunately, the continued fall of the dollar combined with the increased costs of air transport and of living in Geneva have greatly reduced the purchasing power of fellowships. If this trend continues, the Seminar will be in real difficulty. Most donor Governments have fully understood this and have raised the value of their fellowships to \$2,000 (Finland, Norway and Sweden), \$2,100 (Netherlands), nearly \$2,500 (Federal Republic of Germany) and to more even than \$4,000 (Denmark). For the twelfth session of the Seminar, Denmark has already sent 11,675 Swiss francs. This result, although gratifying, still needs to be improved upon. It is to be hoped that Governments already contributing will continue their generosity or increase it if possible, and that other Governments will also award fellowships so as to widen even further the geographical distribution of candidates and make it unnecessary to have to refuse candidates for lack of funds. It should be noted that it is the invariable practice of the organizers of the Seminar to inform donor Governments of the beneficiaries' names, and that the beneficiaries themselves are always told by whom their fellowships have been provided.

⁷³⁶ In conformity with paragraph 3 of General Assembly resolution 3032 (XXVII) of 18 December 1972.

⁷³⁷ United Nations publication, Sales No. E.72.I.17.

CHECK LIST OF DOCUMENTS REFERRED TO IN THIS VOLUME

NOTE. This list includes all United Nations documents identified by their symbols for which no detailed reference is given in a foot-note.

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
E/PC/T/C.II/3	Preparatory Committee of the International Conference on Trade and Employment—Committee II: Summary Record of Meetings—Second meeting held on Wednesday 23 October 1946	Mimeographed
TD/56	Report of the Special Group of the Organisation for Economic Co-operation and Development (OECD) on Trade with Developing Countries	See <i>Proceedings of the United Nations Conference on Trade and Development, Second Session</i> , vol. III, <i>Problems and policies of trade in manufactures and semi-manufactures</i> (United Nations publication, Sales No. E.68.II.D.16), p. 78.
TD/B/AC.5/24	Substantive documentation on the general scheme of preferences: note by the Secretary-General of UNCTAD transmitting OECD document C(69)142	Mimeographed

**CHECK LIST OF DOCUMENTS OF THE TWENTY-SEVENTH SESSION
NOT REPRODUCED IN VOLUME II**

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/284	Provisional agenda	Mimeographed. For the agenda as adopted, see p. 50 above, (A/10010/Rev.1, para. 7)
A/CN.4/L.226 and Add.1	Draft articles on succession of States in respect of matters other than treaties: texts adopted by the Drafting Committee—articles 3(e), 9, 11 and X	Texts reproduced in the summary record of the 1329th meeting (vol. I)
A/CN.4/L.227	<i>Idem.</i> Texts adopted by the Commission: articles 3(e), 9, 11 and X	See 1329th meeting (vol. I)
A/CN.4/L.228	Draft articles on the most-favoured-nation clause—additional article submitted by the Special Rapporteur: article 0	Text reproduced in the summary record of the 1341st meeting (vol. I)
A/CN.4/L.228/Rev.1	<i>Idem:</i> revised text	Text reproduced in the summary record of the 1342nd meeting (vol. I)
A/CN.4/L.229 and Corr.1	<i>Idem.</i> new article proposed by Mr. Reuter	<i>Idem.</i>
A/CN.4/L.230 and Corr.1	Draft articles on State responsibility: texts adopted by the Drafting Committee—articles 10, 11, 12, 12 <i>bis</i> , 12 <i>ter</i> and 13	Texts reproduced in the summary record of the 1345th meeting (vol. I)
A/CN.4/L.231 } A/CN.4/L.232 } and Add.1-6 } A/CN.4/L.233 } and Corr.1 } and Add.1-3 }	Draft report of the International Law Commission on the work of its twenty-seventh session (chaps. I, II and III)	Mimeographed. For the final text, see A/10010/Rev.1 (pp. 49-114 above)
A/CN.4/L.234	Draft articles on treaties concluded between States and international organizations or between two or more international organizations: new articles 19 and 20 proposed by the Special Rapporteur	Texts reproduced in the summary record of the 1350th meeting (vol. I)
A/CN.4/L.235 and Corr.1, and Add.1-3 Add.4 and Corr.1, Add.5-8, Add.9 and Corr.1	Draft report of the International Law Commission on the work of its twenty-seventh session (chaps. IV and V)	Mimeographed. For the final text, see A/10010/Rev.1 (pp. 115-183 above)
A/CN.4/L.236 and Add.1 and Corr.1-2 and Add.2		
A/CN.4/L.237	Draft articles on succession of States in respect of matters other than treaties: new article proposed by the Special Rapporteur	Text reproduced in the summary record of the 1351st meeting (vol. I)
A/CN.4/L.238	Draft articles on the most-favoured-nation clause: texts adopted by the Drafting Committee—articles 6 [8], 6 <i>bis</i> [9], 6 <i>ter</i> [10], 7 [11], 7 <i>bis</i> [12], 6 <i>ter/bis</i> [13], 8 [14], 8 <i>bis</i> [15], 13 [16], 14 [17], 15 [18], 16 [19], 6 <i>quater</i> [20], and 0 [21]	Text reproduced in the summary record of the 1352nd meeting (vol. I)
A/CN.4/L.239	Draft report of the International Law Commission on the work of its twenty-seventh session (chap. VI)	Mimeographed. For the final text, see A/10010/Rev.1 (pp. 183-187 above)

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.240	Draft articles on treaties concluded between States and international organizations or between two or more international organizations— texts adopted by the Drafting Committee: article 2, para. 1 (<i>b</i>), (<i>b bis</i>), (<i>b ter</i>), (<i>c</i>), (<i>c bis</i>) and (<i>g</i>), and articles 7 to 18	Texts reproduced in the summary record of the 1353rd meeting (vol. I)
A/CN.4/SR.1302 to SR.1359	Provisional summary records of the 1302nd to 1359th meetings of the International Law Commission	Mimeographed. For the final text, see vol. I

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