

## Draft Articles on Most-Favoured-Nation Clauses 1978

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The commentaries for the Draft Article on Most-Favoured-Nation Clauses are available at: [International Law Commission website](#)

### Draft Articles on Most-Favoured-Nation Clauses

#### **Article 1**

##### **Scope of the present articles**

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

#### **Article 2**

##### **Use of terms**

1. For the purposes of the present articles:
  - (a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;
  - (b) "granting State" means a State which has undertaken to accord most-favoured-nation treatment;
  - (c) "beneficiary State" means a State to which a granting State has undertaken to accord most-favoured-nation treatment;
  - (d) "third State" means any State other than the granting State or the beneficiary State;
  - (e) "condition of compensation" means a condition providing for compensation of any kind agreed between the granting State and the beneficiary State, in a treaty containing a most-favoured-nation clause or otherwise;
  - (f) "condition of reciprocal treatment" means a condition of compensation providing for the same or, as the case may be, equivalent treatment by the beneficiary State of the granting State or of persons or things in a determined relationship with it as that extended by the granting State to a third State or to persons or things in the same relationship with that third State.
2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

### Article 3

#### Clauses not within the scope of the present articles

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

- (a) the legal effect of such a clause;
- (b) the application to it of any of the rules set forth in the present articles to which it would be subject under international law independently of the present articles.

### Article 4

#### Most-favoured-nation clause

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

- (12) It follows from the notion of the most-favoured-nation clause, as described in article 4, that the undertaking of an obligation to accord most-favoured-nation treatment is the constitutive element of a most-favoured-nation clause. Consequently, clauses which do not contain this element will fall outside the scope of the present articles even if they aim at an effect similar to that of a most-favoured-nation clause. A case in point is article XVII, paragraph 2, of the General Agreement on Tariffs and Trade, where "fair and equitable treatment" is demanded from the contracting parties with respect to imports of products for immediate or ultimate consumption in governmental use.<sup>84</sup> Other examples are article XIII, paragraph 1, of the General Agreement, which requires that the administration of quantitative restrictions shall be "non-discriminatory",<sup>85</sup> and article 23 of the Montevideo Treaty.<sup>86</sup> While a most-favoured-nation clause insures the beneficiary against discrimination, a clause promising non-discrimination will not necessarily yield the same advantages as a most-favoured-nation clause. Cases in point are article 47 of the Vienna Convention on Diplomatic Relations, article 72 of the Vienna Convention on Consular Relations, article 49 of the Convention on Special Missions and article 83 of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.<sup>87</sup> These clauses, while assuring the States parties to the Conventions of non-discrimination by other parties to the treaty, do not give any right to most-favoured-nation treatment.
- (13) Whether a given treaty provision falls within the purview of a most-favoured-nation clause is a matter of interpretation. Most-favoured-nation clauses can be drafted in the most diverse ways, and that is why an eminent authority on the matter stated:

Although it is customary to speak of *the* most-favoured-nation clause, there are many forms of the clause, so that any attempt to generalize upon the meaning and

effect of such clauses must be made, and accepted, with caution.<sup>88</sup>

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

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

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

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

<sup>87</sup> See para. 50 above.

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

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

## Article 5

### Most-favoured-nation treatment

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

- (5) Article 5 describes the treatment to which the beneficiary State is entitled as "not less favourable" than the treatment extended by the granting State to a third State. The Commission considered whether it should not use the adjective "equal" to denote the relationship between the terms of the treatment enjoyed by a third State and those promised by the granting State to the beneficiary State. Arguments in favour of the use of the word "equal" are based on the fact that the notion of "equality of treatment" is particularly closely attached to the operation of the most-favoured-nation clause. It has been argued that the clause represents and is the instrument of the principle of equality of treatment and that the clause is a means to an end: the application of the rule of equality of treatment in international relations. The arguments against the use of the adjective "equal" admit that "equal" is not as rigid as "identical" and not as vague as "similar", and is therefore more appropriate than those expressions. However, although a most-favoured-nation pledge does not oblige the granting State to accord to the beneficiary State treatment more favourable than that extended to the third State, it does not exclude the possibility that the granting State may accord to the beneficiary State additional advantages beyond those extended to the most-favoured third State. In other words, while most-favoured-nation treatment excludes preferential treatment of third States by the granting State, it is fully compatible with preferential treatment of the beneficiary

State by the granting State, although it may be required to accord such preferential treatment under other most-favoured-nation clauses. Consequently, the treatment accorded to the beneficiary State and that accorded to the third State are not necessarily "equal". This argument is countered by the obvious truth that, if the granting State accords preferential treatment to the beneficiary State, i.e. treatment beyond that extended to the third State, which it need not do on the strength of the clause, such treatment will be accorded independently of the operation of the clause. Ultimately, the Commission accepted the term "not less favourable", because it believed it to be the expression commonly used in most-favoured-nation clauses.

- (6) Most-favoured-nation clauses may define exactly the conditions for the operation of the clause, namely, the kind of treatment extended by the granting State to a third State that will give rise to the actual claim of the beneficiary State to similar, the same, equal or identical treatment. If, as is the usual case, the clause itself does not provide otherwise, the clause begins to operate, i.e. a claim can be raised under the clause if the third State (or persons or things in the same relationship with the third State as are the persons or things mentioned in the clause with the beneficiary State) has actually been extended the favours that constitute the treatment. It is not necessary for the beginning of the operation of the clause that the treatment actually extended to the third State, with respect to itself or the persons or things concerned, be based on a formal treaty or agreement. The mere fact of favourable treatment is enough to set in motion the operation of the clause. However, the fact of favourable treatment may consist also in the conclusion or existence of an agreement between the granting State and the third State by which the latter is entitled to certain benefits. The beneficiary State, on the strength of the clause, may also demand the same benefits as were extended by the agreement in question to the third State. The mere fact that the third State has not availed itself of the benefits which are due to it under the agreement concluded with the granting State cannot absolve the granting State from its obligation under the clause. The arising and the termination or suspension of rights under the clause are dealt with in articles 20 and 21 below.

## **Article 6**

### **Clauses in international agreements between States to which other subjects of international law are also parties**

Notwithstanding the provisions of articles 1, 2, 4 and 5, the present articles shall apply to the relations of States as between themselves under an international agreement containing a clause on most-favoured-nation treatment to which other subjects of international law are also parties.

## **Article 7**

### **Legal basis of most-favoured-nation treatment**

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

international obligation undertaken by the latter State.

## **Article 8**

### **The source and scope of most-favoured-nation treatment**

1. The right of the beneficiary State to most-favoured-nation treatment arises only from the most-favoured-nation clause referred to in article 4, or from the clause on most-favoured-nation treatment referred to in article 6, in force between the granting State and the beneficiary State.
2. The most-favoured-nation treatment to which the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, is entitled under a clause referred to in paragraph 1 is determined by the treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.

### *Commentary*

- (1) This article sets out the basic structure of the operation of the most-favoured-nation clause. It states that the right of the beneficiary State to receive from the granting State most-favoured-nation treatment is anchored in the most-favoured-nation clause referred to in article 4 or, as the case may be, in the clause on most-favoured-nation treatment referred to in article 6, in other words, that any such clause is the source of the beneficiary State's rights. Paragraph 1 of the article emphasizes that, in either case, the essential factor is that the clause in question should be in force for both the granting and beneficiary States. The requirement of being "in force" explains the need to refer expressly in the text of the paragraph to the two kinds of clauses envisaged in articles 4 and 6 of the present draft contained, respectively, in treaties between States and in international agreements to which subjects of international law other than States are also parties. In the present and subsequent commentaries, however, when reference is made to a "most-favoured-nation clause" alone, it must be understood as also covering, as appropriate, a clause on most-favoured-nation treatment. The article also states that the treatment, i.e. the extent of benefits to which the beneficiary State may lay claim for itself or for persons or things in a determined relationship with it, depends upon the treatment extended by the granting State to a third State or to persons or things in the same relationship with a third State. The rule is important and its validity is not dependent on whether the treatment extended by the granting State to a third State, or to persons or things in a determined relationship with the latter, is based upon a treaty, another agreement or a unilateral, legislative, or other act, or mere practice.
- (3) The solution adopted by the Court is in accordance with the rules of the law of treaties relating to the effect of treaties on States not parties to a particular treaty. The view that the third-party treaty (the treaty by which the granting State extends favours to a third State) is the origin of the rights of the beneficiary State (a State not party to the third-party treaty) runs counter to the rule embodied in article 36, paragraph 1, of the Vienna Convention. As explained in the commentary of the

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

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

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

- (7) If there is no treaty or other agreement between the granting State and the third State, the rule stated in the article is even more evident. The root of the right of the beneficiary State is obviously the treaty containing the clause. The extent of the favours to which the beneficiary of that clause may lay claim will be determined by the actual favours extended by the granting State to the third State.

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

## **Article 9**

### **Scope of rights under a most-favoured-nation clause**

1. Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject matter of the clause.
2. The beneficiary State acquires the rights under paragraph 1 only in respect of persons or things which are specified in the clause or implied from its subject matter.

## **Article 10**

### **Acquisition of rights under a most-favoured-nation clause**

1. Under a most-favoured-nation clause the beneficiary State acquires the right to most-favoured-nation treatment only if the granting State extends to a third State treatment within the limits of the subject matter of the clause.
- 2.

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

- (a) belong to the same category of persons or things as those in a determined relationship with a third State which benefit from the treatment extended to them by the granting State and
- (b) have the same relationship with the beneficiary State as the persons and things referred to in subparagraph (a) have with that third State.

### *Commentary to articles 9 and 10*

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

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

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

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

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

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

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

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

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

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

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

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

- (1) that the Treaty concluded on 1st August 1911 by the United Kingdom with Bolivia cannot have the effect of incorporating in the Anglo-Greek Treaty of 1886 the "principles of international law", by the application of the most-favoured-nation clause;
- (2) that the effects of the most-favoured-nation clause contained in Article X of the said Treaty of 1886 can be extended to the system of the administration of justice in so far as concerns the protection by the courts of the rights of persons engaged in trade and navigation;

- (3) that none of the provisions concerning the administration of justice which are contained in the Treaties relied upon by the Greek Government can be interpreted as assuring to the beneficiaries of the most-favoured-nation clause a system of "justice", "right", and "equity" different from that for which the municipal law of the State concerned provides;
- (4) that the object of these provisions corresponds with that of Article XV of the Anglo-Greek Treaty of 1886, and that the only question which arises is, accordingly, whether they include more extensive "privileges", "favours" and "immunities" than those resulting from the said Article XV;
- (5) that it follows from the decision summarized in (3) above that Article X of the Treaty does not give to its beneficiaries any remedy based on "unjust enrichment" different from that for which the municipal law of the State provides.

... the Commission [of Arbitration] is of the opinion that "free access to the Courts", which is vouchsafed to Greek nationals in the United Kingdom by Article XV of the Treaty of 1886, includes the right to use the Courts fully and to avail themselves of any procedural remedies 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 the opinion that the provisions contained in other Treaties relied upon by the Greek Government do not provide for any "privileges, favours or immunities" more extensive than those resulting from the said Article XV, and that accordingly the most-favoured-nation clause contained in Article X has no bearing on the present dispute...<sup>119</sup>

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<sup>115</sup> McNair, *op. cit.*, p. 287.

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

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

<sup>119</sup> *Ibid.*, pp. 109 and 110.

- (10) No writer would deny the validity of the *ejusdem generis* rule which, for the purposes of the most-favoured-nation clause, derives from its very nature. It is generally admitted that a clause conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can attract the rights conferred by other treaties (or unilateral acts) only in regard to the same matter or class of matter.<sup>132</sup>
- (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.<sup>133</sup> Thus the rule follows clearly

from the general principles of treaty interpretation. States cannot be regarded as being bound beyond the obligations they have undertaken.

- (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.<sup>134</sup> The granting State cannot evade its obligations, unless an express reservation so provides,<sup>135</sup> on the ground that the relations between itself and the third country are friendlier than or "not similar" to those existing between it and the beneficiary. It is only the subject-matter of the clause that must belong to the same category, the *idem genus*, and not the *relation* between the granting State and the third State on the one hand and the relation between the granting State and the beneficiary State on the other. It is also not proper to say that the *treaty* or *agreement* including the clause must be of the same category (*ejusdem generis*) as that of the benefits that are claimed under the clause.<sup>136</sup> To hold otherwise would seriously diminish the value of a most-favoured-nation clause.

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

<sup>133</sup> *Ibid.*, p. 211, doc. A/CN.4/228 and Add.I, para. 72.

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

<sup>135</sup> See article 29 below, and commentary thereto.

<sup>136</sup> Vignes, *loc. cit.*, p. 282.

## Article 11

### **Effect of a most-favoured-nation clause not made subject to compensation**

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

## Article 12

### **Effect of a most-favoured-nation clause made subject to compensation**

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

## Article 13

## **Effect of a most-favoured-nation clause made subject to reciprocal treatment**

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

### **Article 14**

#### **Compliance with agreed terms and conditions**

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

### **Article 15**

#### **Irrelevance of the fact that treatment is extended to a third State against compensation**

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

### **Article 16**

#### **Irrelevance of limitations agreed between the granting State and a third State**

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

### **Article 17**

#### **Irrelevance of the fact that treatment is extended to a third State under a bilateral or a multilateral agreement**

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

### **Article 18**

## **Irrelevance of the fact that treatment is extended to a third State as national treatment**

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

### **Article 19**

#### **Most-favoured-nation treatment and national or other treatment with respect to the same subject matter**

1. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause is not affected by the mere fact that the granting State has agreed to accord as well to that beneficiary State national treatment or other treatment with respect to the same subject matter as that of the most-favoured-nation clause.
  2. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause is without prejudice to national treatment or other treatment which the granting State has accorded to that beneficiary State with respect to the same subject matter as that of the most-favoured-nation clause.
- (9) The Commission agreed that, at any rate, in the presence of most-favoured-nation treatment, national treatment and any other treatment accorded by the granting State with respect to the same subject-matter, the beneficiary State not only had an "either/or" choice, but might also be in a position to opt for the cumulative enjoyment of all, some, or parts of the various treatments concerned. The article has therefore been drafted in such a manner so as not to prejudge that second possibility, which may be open in practice to the beneficiary State. To this effect an appropriate reference has been made to the lack of effect on the beneficiary State's actual enjoyment of its right to most-favoured-nation treatment by the mere fact that national or other treatment had been accorded to it as well by the granting State. As now drafted, *paragraph 1* states the general rule, placing the emphasis on the right to most-favoured-nation treatment. As that rule is similar in character to those embodied in the four previous articles, that is to say that it amounts to an "irrelevancy" type of rule, the Commission deemed it appropriate to use for that paragraph the expression "is not affected by the mere fact". *Paragraph 2* relates to the converse aspect of the provision of paragraph 1, emphasizing that the right of the beneficiary State to most-favoured-nation treatment is without prejudice to national or other treatment accorded by the granting State to that beneficiary State with respect to the same subject-matter. The two paragraphs read together should make it clear that, whenever the beneficiary State is accorded different types of treatment with respect to the same subject-matter, it shall be entitled to whichever treatment or combination of treatments it prefers in any particular case.

## Article 20

### Arising of rights under a most-favoured-nation clause

1. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause not made subject to a condition of compensation arises at the moment when the relevant treatment is extended by the granting State to a third State or to persons or things in the same relationship with that third State.
  2. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of compensation arises at the moment when the relevant treatment is extended by the granting State to a third State or to persons or things in the same relationship with that third State and the agreed compensation is accorded by the beneficiary State to the granting State.
  3. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of reciprocal treatment arises at the moment when the relevant treatment is extended by the granting State to a third State or to persons or things in the same relationship with that third State and the agreed reciprocal treatment is accorded by the beneficiary State to the granting State.
- (2) A most-favoured-nation clause, unless otherwise agreed, obviously attracts benefits extended to a third State both before and after the entry into force of the treaty containing the clause. The reason for this rule has been explained as follows:

... since the purpose of the clause is to place the beneficiary State on an equal footing with third States, it would be an act of bad faith to confine that equality to future legal situations. A *pro future* 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.<sup>273</sup>

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<sup>273</sup> Sauvignon, *op. cit.*, p. 21, note 1. See, in the same sense, Basdevant, "Clause de la nation la plus favorisée" (*loc. cit.*), p. 488.

- (11) *Paragraph 1* of article 20 accordingly provides that the right of the beneficiary State under a most-favoured-nation clause not made subject to a condition of compensation to the treatment enjoyed by the third State arises at the moment when that treatment is extended by the granting State to a third State. It is to be understood that, if the third State enjoys that treatment already at the moment of the entry into force of the clause, i.e. the treaty or international agreement

containing it, then the beneficiary State becomes immediately entitled to the same treatment. If, however, the relevant treatment is extended to the third State later, it is at that later time that the right of the beneficiary State arises.

## **Article 21**

### **Termination or suspension of rights under a most-favoured-nation clause**

1. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause is terminated or suspended at the moment when the extension of the relevant treatment by the granting State to a third State or to persons or things in the same relationship with that third State is terminated or suspended.
2. The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of compensation is equally terminated or suspended at the moment of termination or suspension by the beneficiary State of the agreed compensation.
3. The right of the beneficiary State for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause made subject to a condition of reciprocal treatment is equally terminated or suspended at the moment of termination or suspension by the beneficiary State of the agreed reciprocal treatment.

## **Article 22**

### **Compliance with the laws and regulations of the granting State**

The exercise of rights arising under a most-favoured-nation clause for the beneficiary State or for persons or things in a determined relationship with that State is subject to compliance with the relevant laws and regulations of the granting State. Those laws and regulations, however, shall not be applied in such a manner that the treatment of the beneficiary State or of persons or things in a determined relationship with that State is less favourable than that of the third State or of persons or things in the same relationship with that third State.

## **Article 23**

### **The most-favoured-nation clause in relation to treatment under a generalized system of preferences**

A beneficiary State is not entitled, under a most-favoured-nation clause, to treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a scheme of generalized preferences, established by that granting State, which conforms with a generalized system of preferences recognized by the international community of States as a whole or, for the States members of a competent international organization, adopted in accordance with its relevant rules and procedures.

## **Article 24**

### **The most-favoured-nation clause in relation to arrangements between developing States**

A developed beneficiary State is not entitled under a most-favoured-nation clause to any preferential treatment in the field of trade extended by a developing granting State to a developing third State in conformity with the relevant rules and procedures of a competent international organization of which the States concerned are members.

## **Article 25**

### **The most-favoured-nation clause in relation to treatment extended to facilitate frontier traffic**

1. A beneficiary State other than a contiguous State is not entitled under a most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State in order to facilitate frontier traffic.
2. A contiguous beneficiary State is entitled under a most-favoured-nation clause to treatment not less favourable than the treatment extended by the granting State to a contiguous third State in order to facilitate frontier traffic only if the subject-matter of the clause is the facilitation of frontier traffic.

## **Article 26**

### **The most-favoured-nation clause in relation to rights and facilities extended to a landlocked third State**

1. A beneficiary State other than a landlocked State is not entitled under a most-favoured-nation clause to rights and facilities extended by the granting State to a landlocked third State in order to facilitate its access to and from the sea.
2. A landlocked beneficiary State is entitled under a most-favoured-nation clause to the rights and facilities extended by the granting State to a landlocked third State in order to facilitate its access to and from the sea only if the subject matter of the clause is the facilitation of access to and from the sea.

## **Article 27**

### **Cases of State succession, State responsibility and outbreak of hostilities**

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

## **Article 28**

### **Non-retroactivity of the present articles**

- 1.

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

2. Without prejudice to the application of any rule set forth in the present articles to which clauses on most-favoured-nation treatment would be subject under international law independently of these articles, they apply to the relations of States as between themselves only under a clause on most-favoured-nation treatment contained in an international agreement which is concluded by States and other subjects of international law after the entry into force of the present articles with regard to such States.

### **Article 29**

#### **Provisions otherwise agreed**

The present articles are without prejudice to any provision on which the granting State and the beneficiary State may otherwise agree.

### **Article 30**

#### **New rules of international law in favour of developing countries**

The present articles are without prejudice to the establishment of new rules of international law in favour of developing countries.