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INTERNATIONAL LAW

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being, this expanding field is likely to be more greatly enriched by patterns evolved in treaties and parallel national legislation, co-ordinated by international institutions such as the International Civil Aviation Organisation and regional organisations with complementary functions, than by way of judicial precedents on the international level.

CHAPTER 14

TERRITORIAL JURISDICTION:

LIMITATIONS UNDER INTERNATIONAL CONVENTIONAL LAW

II—INTERNATIONAL ECONOMIC LAW AND INTERNATIONAL LABOUR LAW

THE significance of functional limitations of territorial jurisdiction lies in their potentialities. In this way, sovereign States may agree on international co-operation in any field which, under international customary law, is in their exclusive jurisdiction. Moreover, this device enables two or more sovereign States to define the scope of their co-operation exactly as they desire and to adapt such relations to their own particular needs.

So long as these needs differ in the relations between various States, such co-operation tends to take the form of bilateral treaties. In treaties of this kind, States define the optional principles which they intend to apply in their mutual relations. Frequently, it is necessary to give a more precise meaning to such legal principles with the assistance of subsidiary principles or standards.[1] Once international integration has reached a relatively high degree, and the needs of a number of States are found to be parallel or complementary, more rational and effective co-operation can be attained by means of multilateral treaties and may then require further co-ordination with the assistance of international institutions.[2]

In any of these fields, co-operation on a footing of reciprocity offers the best chance of attaining some limitation of territorial jurisdiction. The element of mutuality adds substantive equality to the formal principle of the equality of States. The fact that so much of functional international co-operation is based on the working principle of reciprocity explains again[3] to some extent

[1] See above, p. 216, and below, pp. 231 *et seq.* and 239 *et seq.*
[2] See Vol. II, Part Seven.
[3] See above, pp. 119 and 198.

why, in spite of the importance of treaties of this kind, international judicial material in this field is not abundant. Still, it is sufficiently varied to permit systematic treatment.

By way of contrast, a short reference to a particular class of treaties may be advisable which, for purely pragmatic reasons, has been treated separately,[4] that is to say, capitulation treaties. At least on the surface, they lacked the element of reciprocity. Thus, they became increasingly incompatible with growing national self-consciousness in countries which had conceded, unilaterally and, especially in Muslim countries, without undue pressure, such far-reaching limitations of their territorial jurisdiction. The fact that Western States primarily attempted to attain in this way compliance with the minimum standard of their own civilisation which they themselves granted automatically to nationals of Eastern countries was not as apparent as was taken for granted by the Western parties to such treaties. Moreover, as had happened before in the days when Italian merchants had obtained similar concessions in the declining stages of the Byzantine Empire, such jurisdictional immunities were occasionally used as the thin end of a voluminous wedge. In any case, corresponding to the growth of nationalism outside Europe, this type of treaty became increasingly suspect of being liable to abuses of this kind.

The substance of the treaties in the field of functional international co-operation is as diffuse as territorial jurisdiction itself.[5] Order can be brought into this chaos only by an approach which itself puts the emphasis on the varied functions fulfilled by such treaties. Then whole new branches of international law emerge, some of greater, and others of lesser, significance.[6]

International judicial institutions have made contributions to four of these branches: International Economic Law, International Labour Law, International Criminal Law[7] and the Law of International Institutions.[8]

In this chapter, we shall be concerned with the first two of these branches of international law: International Economic Law and International Labour Law.

[4] See above, pp. 83 *et seq.*
[5] See above, pp. 183 *et seq.*
[6] See further 9 C.L.P. (1956), p. 234, at pp. 247 *et seq.*
[7] See below, pp. 254 *et seq.*
[8] See Vol. II, Part Seven.

1. INTERNATIONAL ECONOMIC LAW

In view of the importance of international trade from the point of view of State revenue, the evolution of international economic law has been co-extensive with that of international law as such. All the principles and standards of international economic law were developed in a protracted treaty practice.

Only one of these optional principles and one of these optional standards lost their optional character in the course of time and became compulsory. The principle thus affected was that of the freedom of the seas which is an abstraction, originally from treaty clauses with varying contents, and subsequently from the rules of international customary law in this field.[9]

The standard which underwent a similar transformation is the minimum standard of international law.[10] In this case, it is arguable that the law-creating process on which this standard now rests is either international customary law or the general principles of law recognised by civilised nations.

Both the principle of the freedom of the seas and the minimum standard of international law have shared not only this change-over from optional to compulsory character, but also an expansion in their radius of operation. They no longer serve exclusively economic purposes. The freedom of the seas may be enjoyed for any purposes which have not been made illegal by means of multilateral treaties, such as the treaties against slave trading or illicit traffic in women or children. Similarly, the minimum standard no longer protects foreign merchants only, but any foreigner whatever the reason for his stay in any country.

The classical principles of international economic law, which are still of an optional character, are rights of freedom and equality in the interest of commerce and communications. Such freedom or equality may be granted either in absolute or relative terms. In the latter case, seven classical standards assist in determining the scope of such freedom and equality as may be granted to foreigners by way of treaties. In addition to the minimum standard, five other standards, all of an optional character, serve the purposes of freedom and equality of both commerce and communications: the most-favoured-nation standard, the standard of national treatment, the standard of identical treatment,

[9] See below, pp. 338 *et seq.*, and further *Fundamental Principles*, Chap. 8.
[10] See above, pp. 200 *et seq.*

the standard of the open door and the standard of equitable treatment. In accordance with its nature, the standard of preferential treatment may assist in attaining freedom of commerce and communications, but is precluded from fulfilling the egalitarian function of all the other standards of international economic law.

The practice of international courts and tribunals has made some contribution to the elucidation of these principles and standards.[11]

The Principle of Commercial Equality

The *Oscar Chinn* case (1934) between Belgium and the United Kingdom is especially instructive for the understanding of the principle of freedom of commerce. In this case, the World Court interpreted primarily the Convention of St. Germain of September 10, 1919, by which the Congo Act of 1885 and the Brussels Declaration of 1890 had been revised.[12] Under this Convention, the parties are entitled to "complete commercial equality" in the contractual Congo Basin, that is to say, an area wider than the Belgian Congo and defined in the Congo Act of 1885.

The principle of commercial equality, as defined in these Treaties, has two characteristics of its own. It includes freedom of navigation. Thus, the principle of commercial equality is wider than the principle of freedom and equality of commerce, for these objects can be attained without freedom and equality of navigation. This is the explanation why, in the *Oscar Chinn* case, the World Court recognised the difference between these optional principles, but, for the purpose of deciding the particular case before it, found it unnecessary to distinguish between them.

Moreover, the grant of "complete" commercial equality means that the enjoyment of these rights is granted in absolute terms. This makes the application of any standards of relative freedom and equality of commerce, such as those of most-favoured-nation or national treatment, redundant. It imports automatically the benefits which any of the five egalitarian standards would give to a beneficiary. It should, however, be added that the majority of the Court accepted this interpretation only in relation to the Congo Act of 1885. In the Court's view,

[11] On freedom of navigation, see above, pp. 216 *et seq.*
[12] Hudson, 1 *International Legislation*, pp. 343 *et seq.* See also below, pp. 246 and 305.

the revision of the Act of 1885 by the Convention of St. Germain reduced the absolute principle to one of relativity on the footing of the open-door standard, because, as distinct from the Act, the Convention did not prohibit the imposition of customs duties in the Congo Basin.[13] Even if this interpretation were convincing,[14] it would not affect the absolute character of the principle of freedom of navigation as defined in the Convention of St. Germain.[15]

Thus, at least in the General Act of 1885, the principle of complete commercial equality means freedom and equality of commerce and communications in the Congo Basin in the most absolute form.[16] In its application to commerce, complete equality means freedom of commerce in its most extreme form, which the World Court has conveniently described as freedom of trade.[17] It is advisable to restrict the use of this term to this type of freedom of commerce; for freedom of commerce may have three very different objects: monopoly of trade, preference and equality.

From the point of view of a State which has obtained a monopoly of trade with another State, this is the most complete form of freedom of commerce that is obtainable. But to States which are excluded from such rights, the actual relativity of monopoly and freedom of commerce is less apparent. Preferential treatment is a less complete form of freedom of commerce, but still puts the beneficiary in a privileged position as compared with foreign competitors. Equality of commerce creates parity. Whether it is equality with other foreign competitors, with nationals of the State which grants equality on such a footing, or with both depends on whether such equality is granted on an absolute or relative footing. If freedom and equality of commerce are granted by reference to specific standards, they are compatible with any restrictions of trade which do not run counter to the particular standard selected. If the chosen formulation suggests the very minimum of restrictions of any kind, freedom of commerce is of the type which amounts to freedom of trade.

[13] A/B 63, p. 84. See below, pp. 485 *et seq.*
[14] See Sir Cecil Hurst's D.O., A/B 63, pp. 123–124 and 128–129, and Judge van Eysinga's S.O., *ibid.*, pp. 138–139.
[15] *Ibid.*, pp. 80–81.
[16] *Ibid.*, p. 83.
[17] *Ibid.*, p. 84.

In the Congo Act of 1885, freedom of commerce means freedom of trade on an absolute basis. Even under the Convention of St. Germain, as interpreted by the majority of the World Court, freedom of commerce consists in the " right—in principle unrestricted—to engage in any commercial activity, whether it be concerned with trading properly so called, that is, the purchase and sale of goods, or whether it be concerned with industry, and in particular the transport business; or, finally, whether it is carried on inside the country or, by the exchange of imports and exports, with other countries." [18]

Unless it is recalled that the Convention of St. Germain also comprises freedom of navigation in its formulation of the principle of complete commercial equality, the *Oscar Chinn* case is likely to be misunderstood. It, therefore, appears advisable to explain in more detail the more typical relation between the optional principles of freedom of commerce and navigation.

A treaty of commerce which is limited to the grant of freedom of commerce on an absolute or relative basis must not be interpreted as importing freedom of navigation. Two arguments militate against any implied grant of freedom of navigation in a treaty of commerce pure and simple. In the first place, freedom of navigation is not limited to commercial navigation. Secondly, the object of freedom of commerce can be attained without freedom of navigation even for only commercial purposes.

By way of contrast—and this is the only aspect of this problem on which judicial authority on the international level is available [19]—freedom of navigation imports freedom of commerce in the river region in question. If it did not, freedom of commercial navigation, which is one of the aspects of freedom of navigation, would be meaningless. In this case, therefore, such an implication is necessary to make the grant of freedom of navigation effective.

The issue before the World Court in the *Oscar Chinn* case arose from the exceptional privileges granted by the authorities of the Belgian Congo to *Unatra*, a Belgian company under State supervision. This position enabled *Unatra* to drive other competitors, Belgian and foreign alike, out of business and, thus, to establish a *de facto* trade monopoly. The Belgian Government defended the measures which it had taken in support of *Unatra*

[18] A/B 63, p. 84.
[19] See above, p. 219.

as part of a wider programme to protect the Belgian Congo against the consequences of the then rampant world economic crisis.

It was not in doubt that a government was fully entitled to take measures for the alleviation of an economic crisis. The only question was whether the principle of complete commercial equality did not call for assistance to enterprises irrespective of their nationality. The Belgian Government attempted to meet the charge of discrimination on grounds of nationality by the argument that the reason for the preferential treatment granted to *Unatra* was not the Belgian nationality of the company, but its particularly close association with the public administration of the Belgian Congo. This argument was accepted by the majority of the World Court.[20]

The weakness of this reasoning is that it opens the door wide to *de facto* inequality between nationals and foreigners. A foreign businessman or corporation can hardly be expected to receive such privileges as were accorded to *Unatra*. So long as a State can point to other " underprivileged " nationals or corporations owned by its own nationals, this ruling makes it too easy for States burdened by international obligations in the interest of complete equality of foreign trade to maintain that, in law, perfect commercial equality exists. Reasoning on these lines is not only contrary to the rules evolved by the World Court on the effectiveness of treaty obligations in general,[21] but also to the more specific practice of the World Court regarding *de facto* equality to which foreigners protected by treaties are entitled.[22]

What, therefore, mattered was not whether *Unatra's* monopoly was a *de jure* monopoly, that is to say, a monopoly " which others are bound to respect " or a " concession of a right precluding the exercise of the same right by others," [23] but whether, owing to the form which governmental intervention took in this case, *Unatra* was enabled to acquire a *de facto* monopoly of trade.

The somewhat formalistic manner in which the majority of the Court approached this question becomes still further apparent from its analysis of competition in relation to freedom of trade

[20] A/B 63, p. 87.
[21] See below, pp. 517 *et seq.*
[22] See below, pp. 280 *et seq.*
[23] A/B 63, p. 85.

under the Convention of St. Germain: "Freedom of trade does not mean the abolition of commercial competition; it presupposes the existence of such competition. Every undertaking freely carrying on its commercial activities may find itself confronted with obstacles placed in its way by rival concerns which are perhaps its superiors in capital or organisation." [24]

From this unimpeachable premise, the Court proceeded to a more debatable proposition. It reasoned that such a competitor might well be a company in which the public administration takes a special interest, and which is granted a privileged position. At this stage, however, a fairly obvious distinction appears to suggest itself.

If a State enters the economic arena on a footing of commercial equality and insists on a company thus supported operating in accordance with ordinary economic calculations, it is arguable that such an intervention is compatible with the principle of commercial equality. As, however, Judge Hurst pointed out in his Dissenting Opinion, State intervention in the case of *Unatra* meant something very different: "For the Government to oblige one transport concern by a direct order to reduce its transport charges and to agree to reimburse the resulting losses, and to oblige another transport concern indirectly to make similar reductions in order to save its business and to refuse to reimburse the resulting losses, cannot be said to amount to maintaining between the two a complete commercial equality." [25]

By six votes to five, the World Court upheld the contrary view. It suffered from a too static view of the phenomenon of competition. While this was fully in concord with the tenets of liberal economic theory, it was sadly out of touch with the realities of economic life.

Competition and monopoly are not contrasting absolutes. The distinction is merely relative, for the effect of competition if unchecked is more likely to be the monopoly or near-monopoly of the strongest than indefinite maintenance of a state of competition. Moreover, State assistance as granted to *Unatra* is an artificial stimulant to the transformation of competitive into monopolist business. Thus, even on the assumptions of liberal economic theory, this exception to the rule requires to be

[24] A/B 63, p. 84.
[25] *Ibid.*, p. 127. *Cf.* also Judge Anzilotti's D.O., *ibid.*, p. 110.

recognised and treated as such. Finally, already during the inter-war period, State intervention in economic life had everywhere assumed such proportions that the view of competition taken by the Court was even at that time somewhat dated. The approach of the World Court to the problem of *de jure* and *de facto* equality in another field [26] was more in keeping with the constant need for judicial institutions to attempt to penetrate through mere appearances to the substance of the problem.

Freedom of Entry and Transit

The contribution made by international judicial institutions to the law of the freedom of regional communications, in particular, freedom of navigation, has already been discussed in a previous chapter.[27]

In the Advisory Opinion on *Railway Traffic between Lithuania and Poland* (1931), the World Court examined the legal significance of Article 23 (*e*) of the Covenant of the League of Nations. By this clause member States had bound themselves to "make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all the members of the League." Poland attempted to derive from this Article an immediate obligation on the part of Lithuania to open the one railway line between the two countries which was of considerable economic importance.

The Court drew attention to the fact that the indefiniteness of the Article was still further increased by its introductory paragraph which made the obligations undertaken thereunder dependent on the proviso: "subject to and in accordance with the provisions of international conventions existing or thereafter to be agreed upon." In these circumstances, the Court held that no specific obligation was incumbent upon League members to open any particular line of communications. The fact that, in the case before it, the closing of this line amounted to the complete cessation of railway communications between two members of the League of Nations, did not affect the position in law.[28]

Similarly, international law does not know of any "natural" right of States to free access to the high seas. Landlocked States,

[26] See below, pp. 280 *et seq.*
[27] See above, pp. 216 *et seq.*
[28] A/B 42, pp. 118–119. *Cf.* also Judge Anzilotti's observations, *ibid.*, p. 123.

or States bordering the sea but without adequate port facilities in their own territory, either depend on the goodwill of other States which, in this respect, are more fortunate, or must secure by treaties rights which enable them to make use of such harbours.

The Polish case for free access to the sea appeared so strong to the Allied and Associated Powers that they felt justified in the severance of Danzig from Germany and its establishment as a Free City.[29] The promise made to Poland was carried out in Article 104 of the Peace Treaty of Versailles and the Convention of Paris between Danzig and Poland, concluded in pursuance of this Article.

In the Advisory Opinion on *Polish War Vessels in the Port of Danzig* (1931), the World Court had to interpret the scope of Danzig's obligations, which, in the Polish submission, covered the right to unrestricted anchorage of Polish war vessels in the Port of Danzig. According to both Article 104 of the Treaty of Versailles and Article 26 of the Paris Convention of November 9, 1920, between Danzig and Poland, Danzig was bound to ensure to Poland without any restriction the free use and service of all waterways, docks, basins, wharves and other works within her territory " necessary for Polish imports and exports." Article 28 of the Paris Convention further provided that, at all times and in all circumstances, Poland should have an unlimited right of import and export *via* Danzig. It was common ground between the two countries that this provision covered the import of munitions and other war material.

The Court could not see how these rights could entitle Polish men-of-war to anchor in Danzig harbour, as warships are not used normally for transactions of a commercial character: " There is nothing in the terms of the Article to show that its framers had in view any mode of transport for effecting such imports and exports otherwise than by the type of vessel which is normally used for commercial transportation. The Article cannot be held to confer any general right of access or anchorage to vessels of war." [30]

The Court dealt with an important implication of the principle of free access to the sea in another Advisory Opinion in which it had to consider the treatment to which Polish nationals in Danzig were entitled. It had been suggested that if Danzig's

[29] A/B 43, pp. 132 and 144, and above, pp. 109 *et seq.*, and below, pp. 278 *et seq.*
[30] A/B 43, p. 145.

treaty obligations merely prohibited discrimination on account of Polish nationality, origin or speech, Danzig could exclude all Poles from its territory, provided that the exclusion applied equally to other foreigners. The Court did not express any opinion on the question whether a State has the right to exclude all foreigners from its territory. It did, however, refute outright the above proposition on the ground that it was irreconcilable with the " free and secure access to the sea which is guaranteed to Poland by several articles of the Convention of Paris." [31]

The Standards of International Economic Law

While the minimum standard of international law is as much the result of judicial definition as of treaty practice,[32] international judicial institutions had until recently few opportunities to concern themselves with the optional standards of international economic law.[33] The principle of reciprocity on which most of the treaties in this field are based assists in the liberal interpretation of their duties by States which have accepted such functional limitations of their territorial jurisdiction. It is, therefore, according to pattern that the only case in which the Permanent Court of Arbitration had to apply the most-favoured-nation standard turned on the inclusion in most-favoured-nation privileges of unilateral advantages granted by one of the parties to a third State.

In the *Japanese House Tax* case (1905), Germany relied on the most-favoured-nation clause laid down in Article 16 of the German-Japanese Treaty of Commerce and Navigation of April 4, 1896, in order to claim the benefits granted by Japan to Great Britain in the Treaty of Commerce and Navigation of July 16, 1894.

By Article 16 of the Treaty of 1896, the two parties had agreed that, " in all that concerns commerce and navigation, any privilege, favour, or immunity which either Contracting Party has actually granted, or may hereafter grant, to the Government, ships, nationals of any other State, shall be extended immediately and unconditionally to the Government, ships, nationals of the other Contracting Party, it being their intention that the trade and navigation of each country shall be placed, in all respects, by

[31] A/B 44, p. 41.
[32] See above, pp. 200 *et seq.*
[33] *Cf.* 22 B.Y.I.L. (1945), p. 108, n. 6, and p. 117.

the other on the footing of the most favoured nation." In view of the wide formulation of this clause, the Permanent Court of Arbitration sustained the submission that Germany was entitled to all rights under the Anglo-Japanese Treaty of 1894.[34]

The Permanent Court of International Justice dealt only incidentally with the most-favoured-nation standard without making any new contribution to the elucidation of this topic.[35] On three occasions, however, the International Court of Justice was able to throw some light on some of these standards, that is to say, those of most-favoured-nation treatment, the open door and national treatment. The *Anglo-Iranian Oil Co.* (*Jurisdiction*) case (1952), the case concerning *Rights of United States Nationals in Morocco* (1952) and the *Ambatielos* (*Merits: Obligation to Arbitrate*) case (1953) are *sedes materiae*.

The Most-Favoured-Nation Standard. This standard, which is not exclusively limited to, but primarily employed in, international transactions of an economic character, has four essential characteristics:

(1) Most-favoured-nation treatment is incompatible with any discrimination on the part of the promisor *against* the beneficiary and in favour of third States.

(2) Most-favoured-nation treatment does not exclude the grant by the promisor *to* the beneficiary of additional advantages beyond those conceded to any third State.

(3) States other than the promisor and beneficiary form the *tertium comparationis*. Most-favoured-nation treatment requires non-discrimination in comparison with third States. It does not imply compliance with any of the other optional standards of international economic law.[36]

(4) Most-favoured-nation treatment does not require compliance with any definite or objective rules of conduct. The rights actually enjoyed under the standard are identical with the rights, whatever they may be, granted by the promisor to third States. In the absence of commitments to third States on the part of the promisor, the most-favoured-nation standard is but an empty shell. If operative, it is a shell with variable—and continuously varying—contents.

States are free to vary in treaty clauses any of these elements

[34] 1 Scott, p. 77, at p. 84.
[35] B 4, p. 31, and A/B 53, p. 40.
[36] See above, pp. 231 *et seq*.

of the most-favoured-nation standard. If, however, they do so, such a clause becomes a hybrid between the most-favoured-nation standard and other standards or may cease to have any connection with the most-favoured-nation standard.

The difference between the most-favoured-nation standard and any particular most-favoured-nation clause corresponds to that between principles and rules of international law.[37] It is an abstraction from typical most-favoured-nation clauses, that is to say, optional rules of international treaty law. The need for such an abstraction and awareness of its meaning becomes apparent when, as in the case of the *Rights of United States Nationals in Morocco* (1952), a party to a treaty relies on a clause such as the following: "The right to the treatment of the most favoured nation is recognised by Morocco as belonging to all the Powers represented at the Madrid Conference." [38] If this most-favoured-nation clause is compared with, for instance, that contained in the German-Japanese Treaty of 1896,[39] it becomes apparent that the parties to the Madrid Convention took for granted the meaning of most-favoured-nation treatment. They did not intend to rely on any particular clause of this type in any other treaty but on this auxiliary principle, that is to say, the standard of most-favoured-nation treatment as such.

In the case of *United States Nationals in Morocco*, the World Court underlined the third of the constituent elements of the most-favoured-nation standard, that is to say, its purpose to provide equality on the footing of foreign, as distinct from inland, parity. The function of the most-favoured-nation clauses, which had been embodied in the treaties concluded between Morocco and a number of Powers, including the United States of America, over the period from 1631 to 1892, was to "establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned." [40]

In the same case, and also in the *Ambatielos* case (1953), the Court came to grips with the fourth element of this standard, that is to say, the purely reflected nature of the rights of the beneficiary of most-favoured-nation treatment.

In Article 14 of the Treaty of 1836 between the United States

[37] See above, p. 6, and further *Fundamental Principles*, Chap. 1.
[38] Art. 17 of the Madrid Convention of 1880. *Cf. I.C.J. Reports 1952*, p. 191.
[39] See above, pp. 239–240.
[40] *I.C.J. Reports 1952*, p. 192.

of America and Morocco, it had been agreed that the " commerce with the United States shall be on the same footing as is the commerce with Spain, or as that with the most-favoured-nation for the time being." Moreover, it was laid down in Article 24 of the same Treaty that " whatever indulgence, in trade or otherwise, shall be granted to any of the Christian Powers, the citizens of the United States shall be equally entitled to them."

Thus, the World Court held that the United States was entitled to the most extensive privileges relating to the capitulatory régime in Morocco, but only so long as such treaties remained operative between Morocco and third States.[41] The Court refused to countenance the submission that, in this or any other respect, most-favoured-nation treaties with Morocco were subject to an interpretation different from that of such treaties between other sovereign States.[42] If any third State had temporarily renounced its rights, then, for the same period, the rights of the United States became merely contingent rights.[43] If third Powers had finally renounced their rights, or treaties concluded between third States and Morocco had terminated, the rights of the United States also came automatically to an end.[44]

In this connection, it is essential to distinguish clearly between situations in which third States fail to exercise their rights although remaining entitled to do so, and others in which, by renunciation or otherwise, they have temporarily or definitively forfeited their rights in law. While in the former case, the rights of the beneficiary remain unaffected, in the latter, they are suspended or extinguished. On this point, which may be considered uncontroversial in State practice, it is difficult to concur with the Joint Dissenting Opinion in the case of *United States Nationals in Morocco*, in which it is suggested that " suspending the exercise of a favour is equivalent to failure to exercise it." [45] The two are as " equivalent " as abstention on the ground of a legal duty and in the exercise of discretionary power.

In the case of the unconditional most-favoured-nation clause which alone complies fully with the most-favoured-nation standard, the reflected right enures " automatically and immediately " to the beneficiary on the acquisition of such rights by

[41] *I.C.J. Reports 1952*, pp. 190–191.
[42] *Ibid.*, pp. 191 and 204. See above, pp. 83 *et seq.*
[43] *Ibid.*, pp. 193–194.
[44] *Ibid.*, pp. 190 and 205.
[45] *Ibid.*, p. 226.

third Powers. If these are suspended or terminated, the rights of the beneficiary of most-favoured-nation treatment share their fate.[46]

In principle, treaties apply exclusively between the contracting parties.[47] Thus, a contracting party cannot derive rights from treaties concluded between another contracting party and third States. Most-favoured-nation treaties do not form an exception to this rule. On the contrary, they confirm it. They owe their existence to this rule. Merely by way of an abbreviation is it permissible to state that a beneficiary of most-favoured-nation treatment is entitled to the benefits which the other contracting party has granted, or may grant, to third States.

In reality, the beneficiary claims only under his own treaty with the other contracting party and by virtue of the most-favoured-nation clause in his own treaty. This gives him the right to incorporate into his own treaty all rights and favours under treaties in the same field between the other contracting party and third States while such treaties happen to be operative.

The most-favoured-nation standard is an ingenious form of legal shorthand. This drafting device, which has been employed in English practice since the twelfth century, contributes greatly to the rationalisation of the treaty-making process and leads to the automatic self-revision of treaties which are based on the most-favoured-nation standard. It makes unnecessary the incorporation in the treaty between the grantor and the beneficiary of most-favoured-nation treatment of any of the relevant treaties between the grantor and third States and their deletion whenever such treaties cease to be in force. So long as this last-mentioned aspect of the matter is kept in mind, most-favoured-nation clauses are correctly described as drafting (and deletion) by reference. It depends entirely on the formulation of each particular most-favoured-nation clause whether a beneficiary is entitled not only to the advantages granted by the promisor to third States by way of treaties but also to advantages enjoyed *de facto* by third States.

How essential it is to be fully aware of the legal structure of the most-favoured-nation nexus and, in particular, the nature of the legal link between the treaty rights of the beneficiary of most-favoured-nation treatment and the rights of third States which he

[46] *I.C.J. Reports 1952*, pp. 187, 190, 193–194, and 205.
[47] See below, pp. 446 *et seq.*

is entitled to invoke, became apparent in the *Anglo-Iranian Oil Co. (Jurisdiction)* case (1952), between the United Kingdom and Iran.

Iran had made a declaration under Article 36 of the Statute of the World Court, but subject to important reservations. The majority of the International Court of Justice interpreted the reservations added to the declaration in such a way that Iran was bound to submit to the jurisdiction of the Court only disputes which arose from treaties concluded by Iran after the date of her ratification of the declaration, that is to say, September 19, 1932.[48] The United Kingdom relied on most-favoured-nation clauses in treaties concluded with Iran in 1857 and 1903 and, under these clauses, on treaties which Iran had concluded with Denmark, Switzerland and Turkey after this crucial date.

The Court did not deny that, so long as these treaties between Iran and third Powers were in force, the United Kingdom was entitled to all the rights under these treaties. The United Kingdom could not, however, rely on these treaties for the purpose of establishing the Court's jurisdiction, for the relevant treaties between the United Kingdom and Iran had been concluded before the crucial date. They were the basis of the right to invoke the subsequent treaties between Iran and third States and excluded from the Court's jurisdiction by the Iranian declaration: "The treaty containing the most-favoured-nation clause is the basic treaty upon which the United Kingdom must rely. It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*."[49]

If the Court's jurisdiction had been established, the United Kingdom could have relied on the treaties concluded between Iran and third States after the ratification of the Iranian declaration. In view of the restricted character of this declaration, however, these treaties could not be relied upon to establish the

[48] See below, pp. 551 and 556 *et seq.*

[49] *I.C.J. Reports 1952*, p. 109. See also Judge McNair's I.O., *ibid.*, pp. 122–123. *Cf.*, however, Judge Read's D.O., *ibid.*, pp. 145–147, and Judge Levi Carneiro's D.O., *ibid.*, pp. 157–158.

On the *ejusdem generis* construction of most-favoured-nation clauses, see below, p. 250.

Court's jurisdiction. The reason is that the legal nexus between the Anglo-Iranian treaties and the treaties concluded between Iran and third States was established by the former set of treaties, that is to say, treaties which had been made before the crucial date.

The Standard of the Open Door. The need for this standard arose out of exceptional circumstances which existed before 1914 in the Near and Far East and, subsequently, arose in particular in the case of the League mandates and the United Nations trust territories. If, in situations of this kind, States intend to create between themselves equality on a footing of foreign or inland parity in a country which is not their own and has a distinct international personality or is administered in trust, the most-favoured-nation standard and standard of national treatment cannot produce this result. States can grant each other most-favoured-nation or national treatment only in relation to their own territories.

The object of equality of treatment between parties to such treaties in any such area may, however, be attained by means of the open-door standard, which amounts to a grant of equality of opportunity and treatment in the territory of one of the contracting parties or a territory for which, on the international level, one of the parties is responsible. The differences between such a State and the other parties to a treaty of this kind consists in the fact that, while the rights established between the other contracting parties are reciprocal in the substantive meaning of the term, the rights of any of these parties against the State which grants open-door treatment are of a unilateral character.

If, as in the case of China, the State passively concerned is a sovereign State, the unilateral character of the obligations undertaken by such a State towards the other contracting Powers is fairly obvious. If, however, one of the contracting Powers is merely the international agent of another subject of international law, as in the case of an international protectorate,[50] or acts in the capacity of an international trustee, as in the case of League mandates or trust territories of the United Nations,[51] the functions which are fulfilled by the open-door standard undergo a subtle change. A self-denying ordinance is imposed on the agent or

[50] See above, pp. 92 *et seq.*

[51] See above, pp. 95 *et seq.*, and 161.

trustee not to use his own special position in the protectorate, mandate or trust territory for purposes which, in relation to other contracting parties, would secure him preferential treatment.

It depends on the intention of the parties to any such treaty whether the application of the open-door standard means the equivalent to national or most-favoured-nation treatment. In the case of the Convention of St. Germain of 1919, the majority of the World Court held that equality of commerce meant national treatment, that is to say, equality with the nationals of the State exercising authority in the Belgian Congo.[52]

In other cases, the function of the open-door standard may consist in establishing equality on the footing of foreign parity between contracting parties in relation to a particular territory which is not their own. Thus, as was established in the case of the *Radio Corporation of America* (1935) between China and the United States of America,[53] the standard can have no bearing on the duties of a country in the position in which China then was in relation to different nationals of one and the same privileged State, in this particular instance, the United States. It does not exclude preferential treatment of one national, as compared with other nationals, of the same beneficiary.

In the case of *United States Nationals in Morocco* (1952), the World Court was concerned with the open-door standard as formulated in the General Act of Algeciras of 1906. In the Preamble to this Act, the status of Morocco was defined as based on the principles of the "sovereignty and independence of His Majesty the Sultan, the integrity of his domains, and economic liberty without any inequality." So long as Morocco had been an independent State, the foreign parity of other States was sufficiently safeguarded by the most-favoured-nation treaties which they had concluded with Morocco. When France and Spain established an international protectorate over Morocco, it was considered advisable not only to make the recognition of such an international agency dependent on the acknowledgment of these treaties by the protecting Powers, but also to limit the discretion of these protecting Powers still further by explicit recognition of the standard of the open door. Article 105 of the Act expressly applied the open-door standard to the public services in Morocco.

[52] A/B 63, pp. 84 and 86–87. See above, pp. 232 *et seq.*
[53] 3 R.I.A.A., p. 1623, at p. 1633.

The World Court confirmed that it would be contrary to the standard of the open door for France as a protecting Power to claim any commercial or economic privileges in Morocco which were not equally enjoyed by the other Parties to the Act of Algeciras.[54] It held that discriminatory treatment between imports from any part of the French Union and the United States was "not compatible with the Act of Algeciras, by virtue of which the United States can claim to be treated as favourably as France, as far as economic matters in Morocco are concerned."[55]

At the same time, the World Court emphasised that the purpose of the relevant multilateral conventions to which the United States was a party, that is to say, the Madrid Convention of 1880 and the Act of Algeciras of 1906, was not only to secure foreign parity in Morocco to the contracting parties, but also to "impose an element of restraint upon the Powers and to take steps to render possible the development of Morocco into a modern State."[56] Thus, unless a "necessary intendment" could be shown, the Court refused to entertain the submission that, by way of implication, the then existing rights of foreign Powers under bilateral treaties concluded with Morocco had been transformed into "new and autonomous rights based upon the Act."[57] Moreover, the Court drew authority from this interpretation of the intention of the parties to the Act of Algeciras in favour of a more "flexible" interpretation of this Act than either of the parties to the dispute had claimed.[58]

One of the main issues, that is to say, how *ad valorem* customs duties in Morocco were to be determined, provided the Court with an opportunity to apply this technique of flexible interpretation. In the submission of the United States, the proper method was to add to the purchase value of the imported merchandise in the United States the expenses incidental to its transportation to the custom-house in Morocco, but exclusive of expenses following such delivery as, for instance, customs duties and storage fees. In the French view, the value of such merchandise on the local Moroccan market was decisive.

The Court found that Articles 95 and 96 of the Act of Algeciras laid down some relevant criteria, but left a certain

[54] *I.C.J. Reports 1952*, p. 185.
[55] *Ibid.*, p. 185.
[56] *Ibid.*, p. 187.
[57] *Ibid.*, p. 198. *Cf. ibid.*, pp. 199 and 207.
[58] *Ibid.*, p. 211.

amount of discretion to the Moroccan authorities. This was to be exercised "reasonably and in good faith," but, "in view of the governing principle of economic equality, the same methods must be applied without discrimination to all importations, regardless of the origin of the goods or the nationality of the importers." [59]

The Standard of National Treatment. This standard provides for inland parity, that is to say, treatment on a footing of equality with the nationals of the State which grants such privileged treatment to foreigners.

The national standard cannot be used as a means of evading international obligations under the minimum standard of international law. Even if the standard of national treatment is laid down in a treaty, the presumption is that it has been the intention of the parties to secure to their nationals in this manner additional advantages, but not to deprive them of such rights as, in any case, they would be entitled to enjoy under international customary law or the general principles of law recognised by civilised nations.[60] Such an interpretation of the intention of parties is in full accordance with the trend in the practice of international judicial institutions to interpret treaties as consonant with rules stemming from these two other law-creating processes rather than as modifying such rules by way of implication.[61]

The relation between the standards of national and most-favoured-nation treatment is more complicated. In some fields as, for instance, that of customs duties, the national standard would be meaningless and, therefore, does not compete with the most-favoured-nation standard. In others, each of these standards may have its attractions. It then becomes a matter of the interpretation of the intention of the parties whether they have definitely opted in favour of one or the other standard on any particular topic or meant to apply cumulatively both standards.

It may even happen that the grant of national treatment implies a grant of most-favoured-nation treatment as, for instance, when, in this way, parties have intended to grant to each other the maximum of benefits which they are able to bestow on each other and they have thought that this intention is expressed most

[59] *I.C.J. Reports 1952*, p. 212. *Cf.* also *ibid.*, pp. 208 and 211.
[60] See above, pp. 200 *et seq.*
[61] See above, p. 57, and below, pp. 529 *et seq.* *Cf.* also the *Ambatielos* Arbitration (1956), between Greece and the United Kingdom, *Award*, H.M.S.O., 1956, pp. 15–16 and 17.

adequately by the formulation of their respective duties in terms of the national standard.

In the *Ambatielos* case (1953) between Greece and the United Kingdom, two relevant issues arose. The one turned on the question of the range of a clause in the Anglo-Greek Treaty of Commerce of 1886, by which the parties had granted to each other's nationals free access to their courts on a basis of inland parity. The other was concerned with the question whether most-favoured-nation treatment granted for purposes of commerce and navigation in the same Treaty covered also free access to courts and, thus, raised the issue of the cumulative grant of this right on the basis of both these standards.

In the form in which the case had been submitted to the World Court, the Court was not asked to decide on the substance of either of these questions. It had merely to determine whether the Greek claims were genuinely based on the Treaty of 1886 and whether, therefore, the United Kingdom was under an obligation to settle by way of arbitration the claims made by the Greek Government on behalf of M. Ambatielos. As the parties differed on the meaning of the term "free access to the Courts of Justice" and on the scope and effect of the most-favoured-nation clause in the Treaty of 1886, the Court affirmed the duty of the United Kingdom to submit these questions to arbitration.[62]

In their Joint Dissenting Opinion, four of the members of the Court, Judge McNair, then President of the Court, and Judges Basdevant, Klaestad and Read expressed themselves on the substance of both questions.

According to Article 15 of the Anglo-Greek Treaty of Commerce of 1886, the nationals of the Contracting Parties were to have in each other's countries "free access to the courts of justice for the prosecution and defence of their rights, without other conditions, restrictions, or taxes beyond those imposed on native subjects, and shall, like them, be at liberty to employ, in all causes, their advocates, attorneys or agents, from among the persons admitted to the exercise of those professions according to the laws of the country."

In the opinion of the Greek Government, this clause covered a situation in which it alleged that, by withholding vital evidence, the Crown had imposed restrictions on M. Ambatielos's freedom

[62] *I.C.J. Reports 1953*, p. 27

in the prosecution of his rights. In the submission of the United Kingdom, free access had been granted to M. Ambatielos, for he had been permitted to appear in English courts for the prosecution and defence of his rights on an equal footing with British subjects. The four dissenting judges held that the allegations made by the Greek Government fell outside the scope of this " free access " clause.[63]

On this interpretation of Article 15, the dissenting members of the Court had to consider whether the most-favoured-nation clause in Article 10 of the Treaty of 1886 entitled the Greek Government to invoke treaties between the United Kingdom and third States which were more directly concerned with the substance of the administration of justice. Under Article 10 of the Anglo-Greek Treaty of 1886, most-favoured-nation treatment extended to all matters relating to commerce and navigation.

Again, the dissenting judges arrived at a negative conclusion. They found that commerce and navigation did not include the administration of justice. Moreover, this aspect of the matter had been specifically dealt with in a separate Article of the same Treaty, and by reference to the standard of national treatment.[64]

This interpretation is open to doubt. It may be accepted that the *ejusdem generis* construction of most-favoured-nation clauses corresponds to normal practice in this field.[65] Especially in the light of the evolution of the principles of freedom of commerce and navigation, this does not mean that access to courts and administration of justice in commercial matters is necessarily outside the *genus* in question.[66] Moreover, the grant of national treatment in matters of free access to courts is hardly a self-evident argument against the cumulative application of the most-favoured-nation standard to the same subject. When, in a nineteenth-century treaty national treatment was granted, the typical assumption was that such inland parity amounted to the grant of an especially privileged position. The intention was hardly to forgo rights which, under most-favoured-nation treaties, were available to third States.

[63] *I.C.J. Reports 1953*, p. 34.
In the *Ambatielos* Arbitration (1956), between Greece and the United Kingdom, the Tribunal interpreted this clause in the same way as excluding discrimination between nationals of the Contracting Parties (*Award*, H.M.S.O., 1956, p. 20). See also *I.C.J. Reports 1953*, pp. 26–27.
[64] *I.C.J. Reports 1953*, p. 34.
[65] *Ambatielos* Arbitration (1956), *Award*, p. 16.
[66] *Ibid.*

Customs Unions

If a still higher level of economic integration is desired than may be obtained by means of the optional principles and standards of international economic law, the appropriate legal mould is a form of functional union. Its legal characteristic is that, for the purposes for which the union is created, the territories of the contracting parties are merged into one. In such unions, the barriers of national sovereignty between the contracting parties vanish to be replaced by new barriers surrounding the functional area of such a union.

Functional unions in this category may be economic unions in the widest sense or, as in the case of customs unions, limited to the achievement of more modest purposes. In the Advisory Opinion on the *Austro-German Customs Union* (1931), the World Court accepted the definition of a customs union which had been submitted by Austria: " Uniformity of customs laws 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." [67]

The Court disposed of the argument that a customs union, as envisaged in the Vienna Protocol of 1931 between Austria and Germany, was in itself incompatible with the political sovereignty of either of the Contracting Parties: " It can scarcely be denied that the establishment of this régime does not in itself constitute an act alienating Austria's independence, for Austria does not thereby cease, within her own frontiers, to be a separate State, with its own government and administration; and, in view, if not of the reciprocity in law, though perhaps not in fact, implied by the projected treaty, at all events of the possibility of denouncing the treaty, it may be said that legally Austria retains the possibility of exercising her independence." [68]

Normally, this issue is purely hypothetical, for every sovereign State may dispose of its sovereignty as it sees fit.[69] In view of the fact, however, that, in Article 88 of the Peace Treaty of St. Germain of 1919, Austria had undertaken to treat her sovereignty as " inalienable otherwise than with the consent of the Council

[67] A/B 41, p. 52.
[68] *Ibid.*, p. 52.
[69] See above, pp. 122 *et seq.*

of the League of Nations," a finding on this point became necessary. Moreover, in the Geneva Protocol of 1922, Austria had bound herself specifically to safeguard not only her political sovereignty, but also her economic independence. A majority of eight against seven members of the World Court held the contemplated customs union to be calculated to threaten Austria's economic independence.[70] Seven of the eight members of the Court forming the majority in this case also held the Vienna Protocol of 1931 contrary to Article 88 of the Peace Treaty of St. Germain.

2. INTERNATIONAL LABOUR LAW

If evidence were still needed to support the view that it is timely to think of International Labour Law as a special branch of international law, it would be provided by the optional principles and standards assembled in *The International Labour Code 1951*.

In a number of advisory opinions, the World Court had occasion to concern itself with constitutional aspects of the International Labour Organisation.[71] Only in one case, however, had it the opportunity to interpret an international labour convention which had actually come into force. In the Advisory Opinion on the *Convention concerning Employment of Women during the Night* (1932), the Court had to construe Article 3 of the Convention of 1919 on this subject: "Women without distinction of age shall not be employed during the night in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed."

The question was whether the Convention applied to women who held positions of supervision or management and were not ordinarily engaged in manual work. The Court found that, taken by itself, the above Article applied to the categories of women referred to in the question which the League Council had submitted to the Court: "If, therefore, Article 3 of the Washington Convention is to be interpreted in such a way as not to apply to women holding posts of supervision and management and not ordinarily engaged in manual work, it is necessary to find some valid ground for interpreting the provisions otherwise than in accordance with the natural sense of the word."[72]

[70] A/B 41, p. 52.
[71] See Vol. II, Chap. 58.
[72] A/B 50, p. 373.

In conformity with its previous practice,[73] the Court refused to circumscribe the activities of the International Labour Organisation so narrowly as prima facie to limit labour conventions to manual workers. In spite of its reluctance to interpret the clear text of a convention by reference to preparatory work, the Court departed from this rule in view of the confident opinions expressed by delegates with expert knowledge of the subject at meetings of the Governing Body and the Conference of the International Labour Organisation. Yet the Court arrived at the conclusion that the preparatory work merely confirmed the view formed on a study of the text of the Convention, and that, in accordance with the natural meaning of Article 3, the Convention applied equally to all categories of women engaged in industrial undertakings.[74]

[73] B 2, pp. 3 and 13. See also Vol. II, Chap. 58.
[74] A/B 50, pp. 374–380. See also below, pp. 499 and 502 *et seq*.