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CONSIDERATION OF THE DRAFT ARTICLES ON MOST-FAVOURED-NATION CLAUSES

Report of the Secretary-General

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* A/35/50.

CONTENTS (continued)

I. INTRODUCTION

1. The International Law Commission in the report on the work of its thirtieth session held from 8 May to 28 July 1978, 1/ submitted to the General Assembly at its thirty-third session its final set of draft articles on most-favoured-nation clauses, 2/ in conformity with the recommendation made by the Assembly in resolutions 31/97 of 15 December 1976 and 32/151 of 19 December 1977.

2. The Commission, in accordance with article 23 of its statute, decided to recommend to the General Assembly that the draft articles on most-favoured-nation clauses should be recommended to Member States with a view to the conclusion of a convention on the subject. 3/

3. At the thirty-third session of the General Assembly, the Sixth Committee considered the International Law Commission's report at its 27th, 31st to 46th and 67th meetings. 4/ At its 67th meeting, the Committee adopted by consensus a draft resolution (A/C.6/33/L.16) sponsored by 33 States.

4. On the recommendation of the Sixth Committee, the General Assembly, on 19 December 1978, adopted the draft, also by consensus, as resolution 33/139. Section II of that resolution reads as follows:

> "The General Assembly
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> ...
>
> "1. Expresses its appreciation to the International Law Commission for its valuable work on the most-favoured-nation clause and to the Special Rapporteurs on the topic for their contribution to this work;
>
> "2. Invites all States, organs of the United Nations which have competence in the subject-matter and interested intergovernmental organizations to submit, not later than 31 December 1979, their written comments and observations on chapter II of the report of the International Law Commission on the work of its thirtieth session and, in particular, on:
>
> "(a) The draft articles on most-favoured-nation clauses adopted by the International Law Commission;
>
> "(b) Those provisions relating to such clauses on which the International Law Commission was unable to take decisions;

1/ Official Records of the General Assembly, Thirty-third Session, Supplement No. 10 (A/33/10).

2/ Ibid., chap. II.

3/ Ibid., para. 73.

4/ A/C.6/33/SR.27, 31-46 and 67.

and requests States to comment on the recommendation of the International Law Commission that those draft articles should be recommended to Member States with a view to the conclusion of a convention on the subject;

"3. Requests the Secretary-General to circulate, before the thirty-fifth session of the General Assembly, the comments and observations submitted in accordance with paragraph 2 above;

"4. Decides to include in the provisional agenda of its thirty-fifth session an item entitled Consideration of the draft articles on most-favoured-nation clauses."

5. In pursuance of section II, paragraph 2, of the above resolution, the Secretary-General, by means of letter dated 31 January 1979, signed by the Legal Counsel, requested from States, organs of the United Nations which have competence in the subject-matter, and interested intergovernmental organizations, before 31 December 1979, written comments and observations on chapter II of the report of the International Law Commission on the work of its thirtieth session and, in particular, on the draft articles on most-favoured-nation clauses adopted by the Commission and those provisions relating to such clauses on which the Commission was unable to take decisions.

6. By 1 May 1980, comments and observations had been received from the following 16 States: Barbados, Bulgaria, Byelorussian Soviet Socialist Republic, Cuba, Czechoslovakia, German Democratic Republic, Germany, Federal Republic of, Greece, Hungary, Mexico, Norway, Pakistan, Switzerland, United Kingdom of Great Britain and Northern Ireland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics. Comments and observations were also received from the following intergovernmental organizations: Food and Agriculture Organization of the United Nations (FAO), General Agreement on Tariffs and Trade (GATT) and European Economic Community (EEC).

7. The present document is submitted to the General Assembly by the Secretary-General pursuant to the request made in section II, paragraph 3, of resolution 33/139, quoted above. It reproduces the written comments and observations received. Further comments and observations that may be forthcoming will be issued in addenda to the present document.

II. COMMENTS AND OBSERVATIONS RECEIVED FROM GOVERNMENTS

A. Comments from Member States

BARBADOS

[Original: English]
[7 November 1979]

The articles constitute an autonomous system of rules, which, if embodied in a Convention, would considerably simplify the task of Courts dealing with disputes relating to most-favoured-nation clauses.

BULGARIA

[Original: English]
[27 December 1979]

1. The draft articles on the most-favoured-nation clause elaborated by the International Law Commission represent an important step in the codification and progressive development of international law in that field. The adoption of a convention on the most-favoured-nation clause will contribute to the expansion of international economic relations, particularly in the field of international trade.

2. In the view of the People's Republic of Bulgaria, the draft as a whole constitutes a good basis for a Convention regulating the most-favoured-nation mechanism.

3. The Bulgarian Government evaluates positively those elements of the draft which formulate the concepts of "the most-favoured-nation clause" and "the most-favoured-nation treatment", as well as the articles referring to various aspects of the most-favoured-nation clause: sources and scope, scope of rights, correlation with the national treatment, arising of rights under a most-favoured-nation clause, etc.

4. Support should also be given to those provisions in the draft which provide certain advantages for the developing countries, for land-locked and for neighbouring States with a view to encouraging frontier trade.

5. The positive assessment which the draft merits as a whole cannot be applied to those texts which regulate the conditional form of the most-favoured-nation clause.

6. It is an acknowledged fact that the conditional form of the most-favoured-nation clause has a limited application in the international treaty practice.

It is mostly included in treaties governing consular functions and immunities, as well as in international acts settling questions which pertain to private international law.

7. The application of the conditional form of the most-favoured-nation clause in trade relations among States is unacceptable and unfair. The hitherto practice has shown that the conditional and compensational form of the clause in the field of economic relations among States results in the unequal treatment of some of them and, consequently, brings to violation of the principle of sovereign equality among States. Therefore, those clauses which envisage the application of the conditional form of most-favoured-nation treatment should be dropped from the draft.

8. In conclusion, the People's Republic of Bulgaria remains hopeful that the International Law Commission will continue to work for the improvement of some articles of the draft with a view to bringing it into conformity with the principle of sovereign equality among States - one of the fundamental principles of contemporary international law.

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

[Original: Russian]
[8 January 1980]

The Byelorussian SSR submitted its comments on the preliminary draft articles on the most-favoured-nation clause (published in the annex to the report of the International Law Commission) in response to the United Nations Secretary-General's inquiry of 6 January 1977. However, in the light of section II, paragraph 2, of General Assembly resolution 33/139, the Byelorussian SSR wishes to make the following additional comments:

1. It would seem that most of the provisions contained in the final draft articles can serve as a fully satisfactory basis for preparing an international convention on the subject. This applies in particular to the definition of the most-favoured-nation clause and of most-favoured-nation treatment, the provisions envisaging certain advantages for developing countries and land-locked States, and some other provisions.

2. The removal of the expression "material reciprocity" represents a significant improvement to the draft from the standpoint of both substance and wording. In this way, the Commission has taken into account the views of a number of States.

3. At the same time, it is completely unjustified to include certain provisions, in particular of article 2, paragraph 1 (e) and (f); article 12 and article 13, containing the so-called "conditions of compensation", which are essentially at variance with the basic principles of the draft articles.

4. In the view of the Byelorussian SSR, it should be borne in mind in the course of further work on the draft articles that it is the practice of the overwhelming majority of States to grant most-favoured-nation treatment on an unconditional and non-reciprocal basis.

5. If the legal institution of the most-favoured-nation clause is strengthened in this manner, it will help to remove unjustified trade barriers and create mutually advantageous and equitable economic relations among all States on the basis of their sovereign equality and co-operation. The Byelorussian SSR shares the Commission's view that the clause can be regarded as a method or means of promoting the equality of States and non-discrimination. This is particularly important because cases still occur in international practice where the granting of most-favoured-nation treatment to other States is made conditional on their fulfilment of completely unacceptable requirements, including requirements of a political nature. Such attempts at discrimination cannot fail to have an adverse effect not only on relations among the States concerned in the commercial, economic and other fields but also on the development of international relations as a whole.

6. The Byelorussian SSR feels that, since the questions regulated by the provisions of the draft articles are very important for international commercial and economic relations as a whole, the articles could also be considered by the Commission on International Trade Law.

CUBA

[Original: Spanish]
[15 January 1980]

1. The Government of Cuba believes that the draft articles are, broadly speaking, acceptable as a basis for discussion at a Conference of Plenipotentiaries, if one is convened.

2. It is essential that whatever legal instrument is adopted on the subject should take particularly into account the interests of the developing countries, which make up - numerically speaking - the largest and at the same time the weakest part of the international community, and that it should be based on the premise that fair and equal treatment in international trade is not always a fact when the economic position of the States involved is not equal.

3. It is the opinion of the Government of Cuba that, on the basis of the draft articles prepared by the International Law Commission and of the principle stated above, it should be possible to arrive at an international instrument conducive to more equitable trade relations between States and providing adequate safeguards for the developing countries.

CZECHOSLOVAKIA

/Original: English/
/25 January 1980/

The Czechoslovak Socialist Republic is of the opinion that the draft articles on the most-favoured-nation clause worked out by the International Law Commission at its thirtieth session are to be welcomed, since the most-favoured-nation clause plays a significant role in the regulation of international relations. The draft is a good basis for the international codification of that institution. In principle, the proposed articles correspond to the needs of international economic relations. A convention would represent a most suitable form of codification. The draft articles touch upon certain very complex legal questions, the solution of which has yet to be clarified in more detail. The Czechoslovak Socialist Republic therefore submits the following comments on the draft articles.

1. The proposed regulation proceeds from the distinction between the concept of the most-favoured-nation clause, which becomes effective only on the basis of contractual instruments, and the principle of non-discrimination, whose source is the principle of the sovereign equality of States and which is based on general principles of international law. The distinction between the content of the most-favoured-nation clause and the principle of non-discrimination is not, however, made sufficiently clear in the draft. The Commission's report states merely that States bound by the principle of non-discrimination have the right to grant more favourable treatment to another State and that no State may object to that, provided the non-discriminatory treatment extended to it is comparable with that extended to other States. However, the example used to clarify this difficult distinction cannot have general application. Even if article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations use the term "discrimination", it is clear from the content that its purpose is to impose observance of the obligations accepted under the respective Conventions in respect of all States. As the Conventions designate the scope of these obligations, they concede that States may grant each other, on the basis of agreement or custom, treatment more favourable than that provided for by the Conventions. Both Conventions thus use the term "discrimination" in the sense of non-observance of their provisions. However, in spheres where minimum treatment is not provided for (for example, the commercial sphere), the existence of discrimination cannot be argued by analogy.

2. In article 1, and possibly in article 2, the sphere of application of the draft articles is limited only to the most-favoured-nation clauses contained in written agreements concluded between States. In that respect, the draft corresponds to the Vienna Convention on the Law of Treaties, although the Commission's report stresses that the draft articles are to be considered as an independent legal instrument. This definition of the subject-matter of the draft articles will substantially limit their application in practice. The most-favoured-nation clause is applied primarily in the commercial and political spheres, in which some States have delegated to international organizations of

which they are members the right to conclude international agreements. That is true chiefly of the European Economic Community (EEC), which is one of the major participants in international trade. If the draft articles were adopted without change, they would not apply to most-favoured-nations clauses contained in the treaties and agreements concluded by EEC with other States. The main object of the draft articles should thus be redefined, so that the articles could also apply to most-favoured-nation clauses contained in international treaties to which international organizations that conclude treaties containing the most-favoured-nation clause on behalf of their member States are parties, such treaties being effective in the territories of those States.

3. Articles 4 and 5 are of fundamental importance for the draft, and the scope of the most-favoured-nation clause should follow from them. It should be therefore useful to unite and harmonize the two articles to facilitate their interpretation. Certain difficulties of interpretation might arise from the fact that the term "treatment" is used in both articles, but in different senses. Article 4 deals only with the granting of most-favoured-nation treatment to other States and this wording is intended to specify clearly the subjects of rights and obligations under the most-favoured-nation clause, i.e., the contracting States. Article 5 deals with the treatment of the beneficiary State, persons or things, and delimits the scope of the most-favoured-nation clause.

4. The proposed wording of articles 4 and 5, however, does not correspond with some of the conclusions set out in the commentary. Paragraph (13) of the commentary to article 4 rightly stresses that the most-favoured-nation clause may be variously worded, but that its purpose is the granting of treatment as defined in article 5. Taking into account the terms of article 2 (d), article 5 implies that any provision of an agreement expressing the will of the contracting States to grant a treatment that is not less favourable than that granted to any third State should also be considered as a most-favoured-nation clause.

5. Nevertheless, in its commentary to article 4, the Commission takes as an example of a case in which most-favoured-treatment is purportedly not involved the provisions of article XIII, paragraph 1, of the General Agreement on Tariffs and Trade. Those provisions, however, fulfil the conditions of article 5 of the draft articles, since they stipulate the obligation, for the contracting States, not to apply to another contracting State restrictions that are not applied to all third States. The reasons why article XIII of the General Agreement should not be considered as constituting a most-favoured-nation clause do not follow from the commentary. It might be thought that the Commission's conclusions were based merely on the title of the said article, which includes the words "non-discriminatory administration". However, the interpretation is not acceptable, because there exist a number of provisions of international treaties that indisputably constitute most-favoured-nation clauses and in which the term "non-discrimination" is used. In view of the indeterminate form of the most-favoured-nation clause, the intention of the parties should be decisive for its interpretation.

6. If prohibition of discrimination is accepted as following directly from the general principles of international law and therefore as valid irrespective of the content of the contractual provisions, the parties that expressly undertake to prohibit discrimination against third States generally have in mind any treatment less favourable than that granted to third States. If paragraph 1 of article XIII of the General Agreement does not constitute an acceptable example that is also because, under article 1 of that Agreement, the concept of most-favoured-nation treatment is so broad that it covers all regulations on imports and exports. Thus article XIII aims only at correcting and defining the concept of the most-favoured-nation clause in the sphere of quantitative restrictions. That interpretation is also confirmed by the exceptions referred to in article XIV of the General Agreement.

7. Neither articles 4 and 5, in their present wording, nor the other proposed articles, indicate the distinction between the most-favoured-nation clause and non-discrimination. It is therefore being proposed to unite articles 4 and 5 of the draft most-favoured-nation clause under the following wording:

> "The most-favoured-nation clause is a contractual provision on the basis of which a contracting State undertakes to grant to another contracting State or to other contracting States or to persons or things being in a certain relation to such a State a treatment that is not less favourable than that granted by the bound State to any third State or to persons or things being in the same relation to the third State."

GERMAN DEMOCRATIC REPUBLIC

[Original: English]
[8 January 1980]

The German Democratic Republic attaches great importance to the question of most-favoured-nation treatment. Therefore, it expresses its satisfaction at the progress that has been made in the elaboration of the draft articles on most-favoured-nation clauses. In detail, there are the following comments to be made on the draft submitted by the International Law Commission to the General Assembly at its thirty-third session.

1. The draft is based on the long-standing practice of States. Its articles are suitable to strengthen the role of most-favoured-nation treatment in international relations. It regulates legal questions of most-favoured-nation treatment with a view to promoting international relations on the basis of equality and mutual advantage, and to overcoming discrimination and trade barriers. This makes the draft a valuable instrument to help continue and implement the international process of détente. On the other hand, it cannot be overlooked that the arrangements proposed in the draft cannot solve all problems connected with the elimination of discrimination and trade barriers. Thus, the positive effect of the provisions set forth in the draft can be felt only if and when States agree on a most-favoured-nation clause. Therefore, the draft would be more effective if it contained a provision that would encourage States to agree on most-favoured-nation clauses in their international economic relations. In addition, most-favoured-nation treatment can only become an effective means to promote international economic relations if it is applied unconditionally and without any restriction. Incidentally, this would be the only way of conforming to the generally recognized practice of States.

2. The draft demonstrates the topicality of most-favoured-nation treatment, taking account of consequences that arise in terms of international law codification from the establishment of a new international economic order. This is especially apparent from the fact that the draft is not confined to a mere protection of equal rights, but also makes concrete provision for differences in the level of development of States and for the promotion of developing States. Therefore, the provisions contained in articles 23, 24 and 30 deserve full support.

3. The present draft takes account of questions concerning the relationship between States with different social systems. The draft, which in this case is in line with the long-standing practice of States, makes it clear that in granting most-favoured-nation treatment the essential thing is not that States agreeing on a most-favoured-nation clause extend equal preferences to each other. Rather, what matters most is the fact that on the territory of the granting State the beneficiary State enjoys the same rights as any third State, unless an exception is agreed upon. What sort of preferential treatment is extended under a most-favoured-nation clause depends in each individual case on what preferences the granting State accords to any third State.

4. The present draft contains a reasonable number of exceptions from most-favoured-nation treatment. A most-favoured-nation clause can have a favourable effect on the development of mutual relations only if it is not limited by too large a number of exceptions. If too many preferences are identified as exceptions such a most-favoured-nation clause may prove ineffective and become a basis for trade barriers. On the other hand, it is necessary to agree on certain exceptions. Therefore, the exceptions provided for under draft articles 23 to 26 and the exceptions which may be invoked pursuant to article 30 in favour of developing, contiguous or land-locked States are justified. Should, however, further exceptions be added, the presently balanced relationship between the effect of a most-favoured-nation clause and the exceptions would be severely affected.

5. From this point of view the adoption of an exception in favour of preferences as granted within a customs union or an economic community would be questionable. To stipulate such an exception would reduce the positive effect of a most-favoured-nation clause to an unjustifiable extent. It is more advisable to settle questions arising from a most-favoured-nation clause in connexion with the establishment of an economic community in direct negotiations between the States concerned.

6. An article on dispute settlement should not be included in the provisions on most-favoured-nation treatment. Questions of interpreting a most-favoured-nation clause will in practice arise only in connexion with a specific agreement, i.e., the one that contains the clause. Therefore, it would be enough to apply the procedure for the interpretation of the specific most-favoured-nation clause, which the respective contracting States have envisaged for the settlement of disputes arising from that agreement, unless there is a general agreement on dispute settlement between the parties concerned.

7. The present draft contains a number of arrangements which take account of the requirements of the new international economic order and which are of importance for the practical application of most-favoured-nation clauses. However, these can make their full contribution to promoting a unified approach of States only if the drafting of provisions which do not yet serve the international practice of States and the requirements of the development of international co-operation are continued. It would be appropriate to accord as high as possible a degree of binding force in international law to the articles on most-favoured-nation treatment. The German Democratic Republic, therefore, advocates the conclusion of a convention on most-favoured-nation treatment.

GERMANY, FEDERAL REPUBLIC OF

/Original: English/
/2 January 1980/

I

The Federal Republic of Germany regards the result of the second reading of the draft convention by the International Law Commission (ILC) as a well-considered

catalogue of the most significant legal aspects to be observed when making and applying most-favoured-nation clauses in treaties. The draft describes various types of model régimes, identifies legal consequences ensuing therefrom, and establishes rules for interpreting facts and circumstances not provided for. This is done partly by codifying customary law and partly also by progressively developing international treaty law. The provisions of the draft are to have residual character (art. 29). The draft and the valuable ILC commentary thereon take account of State practice, of judicature in the international and national spheres, and the theory of international law. Thanks to its systematic and scientific elucidation of this particular field of law, the ILC draft itself, with the commentary, is a valuable contribution towards clarifying the legal situation. It is moreover appreciated that the draft closely follows the system and terminology of the Vienna Convention on the Law of Treaties (cf. arts. 1, 2, 27, 28), most-favoured-nation clauses as integral parts of treaties being at any rate subject to the general rules of international treaty law.

It cannot, of course, be ignored that in some of its parts the draft lacks the character of a codification with permanent validity, especially as it is neither complete nor final.

II

1. The draft is not complete. It covers state practice only in part since it confines itself to most-favoured-nation clauses in treaties between States. True, this conforms to the Vienna Convention on the Law of Treaties but the latter is to be supplemented by a special convention dealing with the law of treaties as relating to international organizations. The ILC draft, however, is deliberately confined to treaties between States although in practice groupings of States (customs unions, free-trade areas) are assuming more and more importance in this field.

The consequences of this omission are in many respects disadvantageous: most-favoured-nation clauses in mixed treaties to which other subjects of international law are parties - and the number of such treaties is likely to increase - would, if based on article 6 of the ILC draft, fall under differing treaty régimes where the ILC provisions are not identical with customary international law. In terms of international law policy this would amount to a deplorable splitting up of the treaty régime.

As regards the non-inclusion of customs unions, free-trade areas and other internationally recognized groupings of States establishing closer economic integration, reference is made to relevant comments in the written statement submitted by the Commission of the European Communities (EC) in January 1978, which are fully endorsed by the Federal Republic of Germany as an EC member State. The failure to include customs unions is all the more incomprehensible as the draft enumerates a number of exceptions to most-favoured-nation treatment that are of less importance. If one regards the list of exceptions in a systematic régime as an exclusive enumeration, the non-inclusion of customs unions amounts to an adverse prejudgement. The Federal Republic of Germany therefore makes its acceptance of the present rules subject to completion of the draft provisions by filling the existing gaps in accordance with the views of the EC Commission.

2. The draft is not a final arrangement. Being flexible and open to further development, the draft, in its article 30 with its indefinite and open-ended terminology, leaves room for the elaboration of new rules in favour of the development of a large section of the community of nations. The Federal Republic of Germany, while welcoming this approach in principle, regards this general reservation of article 30 as an opening likely to break up the system of legal norms contained in the draft should the latter be regarded as a final régime (codification).

III

Re substantive reciprocity (art. 11 et seq. in conjunction with art. 2 (1) (e) and (f)). As regards the granting of most-favoured-nation treatment, it will be necessary, as set out in the statement of the EC Commission, to take account of the differences in economic systems, especially in relations with state-trading countries. Over and above purely formal reciprocity, such differences necessitate a differentiated approach which is tailored to the prevailing situation and cannot even be regarded as contrary to the system developed in the draft since the latter provides for the special treatment of developing countries also on account of structural differences, namely, the level of their development. What is right for the level of development can, mutatis mutandis, also apply to the gap between differently structured national economies.

IV

Re the further procedure. The International Law Commission had recommended in paragraph 73 of its report that the General Assembly propose to Member States the adoption of the draft in completed form as a convention among States. The Federal Republic of Germany had a provisional statement delivered on that recommendation last year before the sixth Committee (A/C.6/33/SR.33 para.30). The report submitted by the Sixth Committee (A/33/419, sect.III (b)) on its deliberations in 1978 shows that a number of other States also saw various possibilities for the further treatment of the draft. In the light of those comments one might examine whether there are alternatives which, instead of rigidly codifying the ILC result in a convention, would be more consonant with the contents of the draft and the level of development of international law. Consideration could be given in particular to the question whether the provisions agreed upon might not be developed into a (further) model contractual régime on the subject-matter. The General Assembly, in its resolution 1262 (XIII) of 14 November 1958, had recommended that Member States observe and apply the model rules on arbitral procudure elaborated by the International Law Commission. The interpretative rules contained in the present draft would, as guidelines, fit in well with such a conception. The indefiniteness of some terms in the draft, its incompleteness and its future perspective (all of these elements being an impediment to its codification in the form of a convention) would be acceptable if it were to be a model régime open to subsequent review in the event of changes in the world economic situation. Such a procedure would also render superfluous the elaboration of the otherwise indispensable provisions on the settlement of

disputes which, in view of the incorporation of most-favoured-nation clauses in treaties with differing arbitration provisions, would prove to be difficult on account of legal technicalities.

GREECE

/Original: French/
/31 December 1979/

The Greek Government wishes to make the following brief comments on the draft articles on most-favoured-nation clauses adopted by the International Law Commission.

1. It would be desirable to examine in depth the possibility of not confining the aforementioned draft articles to inter-State relations alone, but of making them applicable to interested international organizations also.

2. Article 5. It would be useful to state in the text of this article itself that the relationship between the "granting State" and the "third State" may result either from a treaty or from another source, such as internal laws.

3. The text of the draft should explicitly make a specific exception to the application of the most-favoured-nation clause for customs unions and free-trade areas. Such an exception is already part of current international practice concerning the most-favoured-nation clause.

4. Article 27. This provision, which no doubt had its place in the Vienna Convention on the Law of Treaties, appears superfluous in the context of the most-favoured-nation clause, which is much more limited in scope.

5. Article 30. This provision seems to arrest permanently the development of legal rules concerning the most-favoured-nation clause, except those relating to the developing countries. It would perhaps be better to word the article as follows:

> "The present articles are without prejudice to the establishment of new rules of international law on this subject, in particular rules in favour of developing countries."

HUNGARY

/Original: English/
/28 February 1980/

1. The Government of the Hungarian People's Republic attaches great importance to the work of codification carried on by the United Nations and its International Law Commission in accordance with Article 13 of the Charter. A task of great timeliness, the elaboration of the draft treaty on most-favoured-nation clauses is supported by Governments, including that of the Hungarian People's Republic, in

view of the positive effect the treaty is bound to produce on the development of international relations free from discrimination and based on mutual advantages.

2. Several provisions of the draft articles as adopted in second reading by the International Law Commission seek to achieve, in a forward-looking and positive manner, the objective of codification to ensure the broadest possible application - in keeping with the principle of sovereign equality of States - of the most-favoured-nation treatment in international relations. Accordingly, the Government of the Hungarian People's Republic does not endorse but the sole concept that the treaty should allow only for a narrow scope of exceptions to the general rule to meet justified interests that are recognized by the international community as deserving of special consideration. It therefore agrees with the draft articles relating to developing countries as well as with the rules extending certain rights and facilities to land-locked countries and to contiguous States in respect of frontier traffic.

3. At the same time, the Government of the Hungarian People's Republic believes that the basic principle of codification that the broad application of the most-favoured-nation treatment may serve as an important tool for giving effect to the principle of equality of States and for reducing and eliminating the possibility of discrimination in international economic relations is impaired by several provisions of the draft articles, particularly those relating to international economic and commercial relations.

4. The Government of the Hungarian People's Republic considers that those of the present draft articles which leave scope for the most-favoured-nation treatment to be made subject to conditions, especially to material reciprocity, in international economic and commercial relations are highly unfavourable and constitute a setback in comparison with the draft articles elaborated by the International Law Commission in 1976. This regulation is at variance with the practice established in international commercial relations during the past 30 years as well as with international law-making consistent with that practice.

5. While some half a century ago certain countries sought to establish a practice of treatment subject to conditions, such application of most-favoured-nation clauses proved unfit to become an acceptable regulatory principle of international trade. In the field of international trade nothing but the most-favoured-nation treatment as a legal institution not made subject to conditions can ensure international legal security, the equality of parties and a balanced harmony between rights and obligations, since the essential substance of the most-favoured-nation clause consists in the fact that under a treaty according such treatment the contracting parties and their merchants can have the certainty that in the other country they shall enjoy a position no less favourable than that enjoyed by merchants of any other country and are thereby enabled to take into account with sufficient security the relative conditions that are to govern their marketing activities in the longer term.

6. Should the parties choose to comply with the rules of conditionality and thus compare concrete benefits in each case, the treaty would provide a framework not

for the application of the most-favoured-nation treatment but merely for the comparison of ad hoc conditions. By doing so the party granting the most-favoured-nation treatment will unilaterally consider its fulfilment of the obligations undertaken in view of compensation and might even claim unjustified additional performance by the beneficiary.

7. It may therefore be stated that the conditionality of the most-favoured-nation treatment would but cause the prevailing international legal practice to be counter-productive by resulting in the non-application of or in prejudice to the most-favoured-nation principle in international trade.

8. On the other hand, the fundamental requirement upon the ongoing work of codification by the United Nations rules out the possibility for the universal regulation of the most-favoured-nation treatment subject to conditions to be included in the United Nations treaty on most-favoured-nation clauses, for the said treaty is intended to be based on existing international practice concerning the application of the most-favoured-nation principle and to regulate and codify that practice, yet the most-favoured-nation clause made subject to conditions never became a practice in international trade.

9. The Government of the Hungarian People's Republic cannot support those draft articles which allow a system of most-favoured-nation clauses subject to conditions to be extended to commercial and economic relations as well. It still holds this view which it has already expressed during the preparatory work concerning the elaboration of the draft articles of 1976 and 1978. Therefore, as regards economic and commercial relations, it finds it desirable to delete from the draft articles the conditional form of the most-favoured-nation clause as a general rule and for the draft treaty to restrict conditionality to clearly specified non-commercial and non-economic fields, essentially in accordance with the principles stated in paragraph 31 of the commentary of the International Law Commission to articles 12 and 13. 5/

10. The Government of the Hungarian People's Republic maintains that the application of the most-favoured-nation clause made subject to an explicit condition of material reciprocity is bound to raise the same kinds of difficulty in economic and commercial contacts among States as conditionality is in general in these aspects. Therefore, the rules of the draft articles for material reciprocity (art. 13) should take account of these considerations and accordingly provide for the applicability of those rules to non-commercial and non-economic relations only.

11. Draft article 22 refers to the laws and regulations of the granting State as a guarantee for the practical fulfilment of the obligation undertaken under public international law to apply the most-favoured-nation clause. As, keeping international legal practice in view, it is necessary further to strengthen the

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5/ Yearbook of the International Law Commission, 1978, vol. II, part two, p. 38.

elements of guarantee in national legislations, it is proposed to commence the second sentence in article 22 as follows: "Those laws and regulations, however, shall be applied to all countries and shall not be applied in such a manner ..."

12. As the foregoing comments of the Hungarian Government suggest, certain cardinal provisions of the draft articles on most-favoured-nation clauses adopted by the International Law Commission raise strong doubts as to whether the adopted line of regulation is correct. The draft articles, which even in the present stage of codification contain truly objectionable provisions, cannot be considered to have reached full clarity and adequacy. Existing experience in the work of codification shows that serious problems tended and tend to arise mainly in respect of provisions affecting economic and commercial contacts among States. The International Law Commission, while being aware of the fundamental importance of the most-favoured-nation clause in international economic and commercial relations, has centred its work on the legal nature of the clause, on giving a clear outline of this legal institution.

13. None the less, this otherwise proper endeavour has inevitably relegated to the background an exhaustive and balanced study of economic questions inseparable from the clause and has given rise to difficulties in the legal formulation of the clause. The lack of a thorough study of economic interrelationships in the relevant fields has, in the view of the Hungarian Government, made its negative effect felt in the entire course of codification. It will suffice to refer on this score to the difference in contents between the relevant rules contained in the draft articles elaborated by the International Law Commission in 1976 and 1978.

14. Consequently, the Government of the Hungarian People's Republic is of the opinion that it would be advisable to refer the draft articles to an appropriate forum of the United Nations, such as the United Nations Commission on International Trade Law, for an in-depth study of the questions discussed above. It is further believed that a diplomatic conference convened for this purpose could also be a useful forum for the final elaboration of the draft articles. While making these suggestions the Government of the Hungarian People's Republic wishes to state that it will adopt a flexible attitude regarding the procedure and the forums that may be judged competent to formulate the final text of the draft articles.

MEXICO

/Original: Spanish/
/15 January 1980/

1. The Government of Mexico considers that the draft articles on the most-favoured-nation clause prepared by the International Law Commission constitute a significant contribution to the clarification of this subject and its definition from the legal point of view and that in adoption of the draft articles in the form of an international convention this would represent a decisive step in the codification and development of international law which would unquestionably contribute to greater harmony in the relations among the members of the international community.

2. Although the draft articles on the most-favoured-nation clause would be acceptable to Mexico in general terms the Mexican Government, if it considered it necessary, may submit comments on various sections of the draft at an appropriate time, since some of the articles, such as article 14, required additional work because the existing wording might give rise to confusion, owing to the imprecision of the terms used.

NORWAY

/Original: English/
/3 March 1980/

The most-favoured-nation clause has, in most cases lost its actuality, especially in the relations between developed and developing countries. The very important questions in this connexion, particularly the work to establish a new international economic order, should, in the opinion of the Norwegian Government, be resolved as economic-political questions within existing fora. The way the International Law Commission works it is only to a limited degree possible to take into account the changes that are occurring within these economic relations.

PAKISTAN

/Original: English/
/17 December 1979/

1. Despite the realization in the international community that there is an urgent need to rectify the existing assymetries and imbalances that characterize the present international economic system which has resulted in a growing disparity between the rich and poor nations of the world, the efforts of the developing countries to effect structural changes in the system have not met with a positive response from the industrialized nations. It is, therefore, a matter

of satisfaction that the International Law Commission recognizes the importance of alleviating the economic condition of the developing countries and has taken cognizance of the relevant resolutions on the subject adopted at various international fora.

2. The mandate of the International Law Commission, in the words of Article 13 of the United Nations Charter, is "... encouraging the progressive development of international law in its codification". And, whereas in the case of areas such as diplomatic privileges and immunities and law of treaties the element of codification had to play a more significant role in the nature of things, in economic and trade matters, the element of progressive development ought to play the dominant role in the performance of its task by the Commission. The Government of Pakistan, therefore, is of the view that the right of the developing countries to preferential treatment in economic and trade matters that has emerged as a consequence of almost universal acceptance of the claim of the developing countries to be treated on a preferential basis in the field of international trade and economic relations ought to be recognized and reflected in these articles. Although at the present there are only a few concrete manifestations of the recognition of this right in the shape of the schemes of generalized preferences established by some developed countries, the claim of the developing countries for preferential treatment, in the abstract, has almost universally been accepted and the draft articles ought to fully accommodate it in order to adequately emphasize the element of "progressive development" in them.

3. In the light of the preceding general observations the Government of Pakistan proposes the following alterations/amendments in the draft articles:

Article 7

4. The article enshrines the principle of "no obligation without consent" which is an old principle of international law governing treaty relations. This rule, however, does not accommodate the emerging right of developing countries to be accorded different and preferential treatment which has been recognized by the international community almost universally. It is admitted that the provisions of subsequent articles do try to accommodate this right of the developing States to some extent. For example, article 23 provides for preferential treatment of the developing countries under the generalized system of preferences but this is not enough. It is, therefore, felt that a new rule ought to be incorporated in article 7, stating that a certain category of States, to be determined by the General Assembly, would be entitled to automatic most-favoured-nation treatment. The following lines may thus be added at the end of the article: "except that the developing States to be specified periodically by the General Assembly in accordance with agreed criteria would be automatically accorded most-favoured-nation treatment by all States on a non-reciprocal basis".

Article 23

5. This article is too specific and narrow in scope. It is felt that the Generalized System of Preferences at the moment is neither a system nor generalized.

It is only a provisional grant of preferences by the developed States which mainly relates to tariffs. As presently drafted, the article sanctifies a temporary grant of specific preferences and conspicuously remains short of the expectations of the developing States. It is, therefore, considered that the article should be made broader in scope. The article, in essence, tries to incorporate the right of the developing States to differential and favourable treatment in their trade and economic relations and the article should be redrafted to fully accommodate that right.

Article 29

6. This article as presently drafted could provide a free hand to States in a position to do so to nullify the effect of the rules that are being suggested to ensure a preferential treatment to the developing countries and thus merits complete deletion. In case it is considered that the deletion of the article is not possible, adequate safeguards designed to protect the interests of the developing States will have to be inserted in the article.

SWITZERLAND

/Original: French/
/17 January 1980/

1. Although, as the International Law Commission (hereinafter referred to as "the Commission") notes in the introduction to chapter II of its report on the work of its thirtieth session, the draft articles on the most-favoured-nation clause are not intended to form an annex to the Vienna Convention on the Law of Treaties of 23 May 1969, they do nevertheless constitute an aspect of the general law of treaties. Moreover, the Commission has rightly established the residual character of the provisions of the draft by including an express reservation (art. 29) concerning the different provisions on which the granting State and the beneficiary State may agree, whether in treaties containing the clause or otherwise. Furthermore, it has included a general reservation on the development of the clause and the establishment of new rules of international law on the subject at a later stage (art. 30). If, lastly, it is borne in mind that, however prevalent the use of the clause may be even now in customary practice, it no longer plays as important a role today in international relations as it did in the last century and even during the first half of this century, particularly in the economic sphere, then the limitations which these various elements impose upon the practical scope of the draft articles from the outset must be recognized.

2. The Swiss Government, like the other Governments and the various international organizations which have already expressed their views on the draft articles, was struck by the absence from the draft articles of a provision concerning the relationship of the most-favoured-nation clause to customs unions and free trade areas. The exception envisaged by GATT to the principle of the general and unconditional application of the clause in cases of customs unions and free trade areas (art. XXIV), which has been taken up and confirmed in many multilateral and

bilateral treaties, is now sufficiently widespread in practice to justify regarding the treaty provisions which envisage this exception as being of only declaratory value. The developments which have characterized the efforts to achieve regional integration, the existence at present of customs unions and free trade areas in the five continents and the reservations pertaining to them in many treaties, particularly trade treaties in relation to the operation of the most-favoured-nation clause, cannot be ignored, and justify the establishment of a rule specifying that the clause does not apply in the case of unions or areas of this type. The draft should therefore be completed by a provision specifying that a beneficiary State which is not a member of a customs union or a free trade area is not entitled by virtue of a most-favoured-nation clause, to the treatment granted by the granting State as a member of the customs union or of the free trade area to a third State which is also a member of that union or area. A provision of this nature would also dispel the doubts which may arise in relation to article 17, which is concerned with another question (irrelevance of the fact that treatment is extended to a third State under a bilateral or a multilateral agreement).

3. It may be wondered whether it is necessary to include in a set of draft articles on the most-favoured-nation clause a provision such as article 22, concerning compliance with the laws and regulations of the granting State. Although as the Commission indicates in its commentary, it is appropriate to include a provision of this nature in an instrument establishing a preferential régime benefiting specific persons or categories of persons, some misgivings are permissible in this particular case, especially in the light of the reasons for including this article in the draft given by the Commission in its commentary (principles of sovereignty and equality of States).

4. The Swiss Government shares the concern expressed, notably in the Commission itself, regarding the lack of a generally accepted definition of the States that should be considered as developing States.

5. In including a reservation concerning the future development of the clause, the Commission took into account only the situation of the developing countries. Apart from the difficulties inherent in the lack - mentioned in paragraph 4 above - of any agreement among States concerning the concepts of developed State and developing State, the Swiss Government feels that, although the trends emerging from the work being done in various international forums tend to favour the developing countries, article 30 should be reworded so as not to exclude developments of interest to the developed States also. Consequently, the word "notably" should be inserted after the words "new rules of international law".

6. The Swiss Government regrets that the draft articles do not contain any provision relating to the settlement of disputes concerning their interpretation or application. It considers that any multilateral instrument establishing rules for States should contain appropriate provisions for this purpose.

7. With regard to the Commission's recommendation that the draft articles should serve as the basis for the preparation of a convention on the subject, the Swiss Government, taking the foregoing observations into account, is of the view that

the adoption of a covention on the subject would be without point or value unless the new codification instrument constituted an appropriate reflection of contemporary international practice. It therefore wonders whether it would not be advisable to envisage instead the adoption of a declaration or recommendation containing guidelines.

UKRAINIAN SOVIET SOCIALIST REPUBLIC

[Original: Russian]
[24 January 1980]

1. Under present-day conditions the practical significance of the codification of principles and norms of modern international law directed at the development of mutually beneficial co-operation on a footing of equality is becoming an increasingly timely question. In this context, the draft articles on most-favoured-nation clauses adopted by the International Law Commission at its thirtieth session have an important role to play. It would seem that a future convention on this subject can effectively promote the development of international economic co-operation and will ultimately constitute an important legal instrument for the establishment of the new economic order.

2. After careful study of the draft articles prepared by the International Law Commission in 1978, the Ukrainian SSR believes that they are better formulated than the previous version of 1976. The final draft corresponds more closely to the present-day practice of States in that it offers specific advantages to the developing countries, contains exceptions on frontier traffic and on the rights and privileges granted to land-locked States, clearly formulates the definition of the clause, most-favoured-nation treatment and the scope of this treatment.

3. At the same time, the draft also contains provisions the advisability of whose retention is open to doubt. In particular, the use of the terms "conditions of compensation" and "conditions of reciprocal treatment" (art. 2, para. 1, subparas. (e) and (f); arts. 12, 13 et al.) in place of the concept of "material reciprocity" is essentially at variance with the most-favoured-nation principle. Such provisions will in no way help to eradicate discrimination or to promote the development of mutually beneficial trade and economic relations. Furthermore, they may be used to justify situations in international relations in which, unfortunately, some States continue to make the granting of most-favoured-nation treatment conditional on the fulfilment of completely unacceptable demands, including political demands, which bear no relation to trade and economic co-operation.

4. With regard to the final draft articles on most-favoured-nation clauses adopted by the International Law Commission at its thirtieth session, the Ukrainian SSR in general considers that the greater part of the provisions contained in them can provide an entirely satisfactory basis for the elaboration of a multilateral international convention on this question.

5. It would also seem appropriate that the Commission on International Trade Law should give the draft special consideration.

6. The Ukrainian SSR reserves the right to make other observations and suggestions in the future regarding the international convention that is now in preparation.

UNION OF SOVIET SOCIALIST REPUBLICS

/Original: Russian/
/26 November 1979/

1. The competent organs in the Soviet Union have carefully studied the final text of the draft articles on most-favoured-nation clauses. It appears that most of the provisions of those articles could serve as a basis for the drafting of a document which would promote the development of relations between States, above all in matters relating to trade and economic co-operation. This applies in particular to the definition of a most-favoured-nation clause, most-favoured-nation treatment, the scope of most-favoured-nation treatment, the provisions providing for preferential treatment for land-locked developing countries, those involving matters relating to co-operation in respect of frontier traffic, and so on.

2. At the same time, it must be stated that the draft articles contain certain provisions which in essence fall outside the scope of most-favoured-nation treatment and the inclusion of which in the draft cannot be regarded as justified. This applies to the provisions of the draft articles permitting the granting of most-favoured-nation treatment under a "condition of compensation" (art. 2, para. 1 (e) and (f), arts. 12, 13, etc.).

3. A "condition of compensation" is fundamentally at variance with the principle of most-favoured-nation treatment set forth in article 5 of the draft. In practice, the provisions concerning "conditions of compensation" could to a significant degree reduce the value of the positive provisions which the Commission has managed to include in the draft articles. A "condition of compensation" could be used to justify practices which are, unfortunately, still followed by certain States when they attempt to link the granting of most-favoured-nation treatment to the fulfilment of demands, including demands of a political nature, which affect matters within the internal competence of States and which bear no relation whatsoever to trade and economic co-operation. Such demands not only do not promote the development of international trade and economic relations, but, on the contrary, impede their normal operation.

4. The granting of most-favoured-nation treatment on an unconditional and gratuitous basis would promote the development of trade and economic co-operation between States. The overwhelming majority of States follow precisely that practice.

5. The competent Soviet organs believe that this should be taken into account during further work on the draft articles. In view of the importance of the question for trade and economic relations, it would, inter alia, seem advisable that the draft articles should be specially considered by the United Nations Commission on International Trade Law.

6. The competent Soviet organs naturally reserve the right in future to put forward further comments and proposals concerning the document to be drafted.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

/Original: English/
/12 March 1980/

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2. Although some of the comments which follow may appear to be somewhat critical in nature, this should not be taken as any reflection upon the work achieved by the International Law Commission. The Commission's painstaking and thorough review of a whole series of questions associated with most-favoured-nation clauses meets the Commission's customary high standards and is deserving of commendation. The comments which follow are directed far more towards the question whether - at least at the present stage of development - existing rules and practices connected with most-favoured-nation clauses can be regarded as so self-contained and coherent a corpus of international legal rules and practices as to be capable of codification in the traditional sense or of a comprehensive restatement involving progressive development. The problem is illustrated by the difficulty experienced by the Commission (and subsequently by the General Assembly) in deciding whether the title of the topic could properly refer to "the most-favoured-nation clause" or whether it should read, "most-favoured-nation clauses", in the plural. This difficulty naturally implies the question whether there exists at all a single institution of the most-favoured-nation clause or alternatively a whole variety of individual clauses, each with its own incidents in its own particular context; it thus bears directly on the question whether the most-favoured-nation clause lends itself to the normal processes of codification and progressive development.

3. However, before proceeding with this aspect of the matter, the United Kingdom Government would wish to refer to the comments already transmitted to the Secretary-General by the European Economic Community (EEC), which deal with certain aspects of the draft articles as they affect external trade, an area in which exclusive competence has been conferred on the Community by the member States. As a member State of the Community, the United Kingdom Government wish to commend and endorse these comments, which fall mainly under the head of (b) in the General Assembly resolution. In drawing attention to certain serious omissions from the draft articles, particularly the absence of an exception for customs unions, free trade areas and equivalent arrangements of economic integration, such as those allowed for under article XXIV of the General Agreement on Tariffs and Trade, the comments of EEC serve to re-emphasize the difficulties encountered by the Commission itself in attempting to arrive at a suitably comprehensive and generally acceptable treatment of the topic. It is certainly true that, whatever the merits or demerits of such an exemption clause (and the United Kingdom Government do not share the view recorded in paragraph 58 of the Commission's report that there was any inconclusiveness in the comments submitted on this subject), the omission of such an exemption would render the draft articles as a whole unacceptable to a substantial number of States, both developed and developing.

4. This leads the United Kingdom Government to examine the essential legal nature of the rules put forward in the draft articles. In draft article 29, which preserves provisions on which the granting State and the beneficiary State may otherwise agree, the Commission has put forward a rule which it describes in the Commentary as designed to "express the residual character" of the provisions contained in the draft articles. It may be inferred from the use of the word "express" that the Commission had it in mind to restate in an explicit form what would automatically have followed in any event from the application of the general rules of the law of treaties. There is certainly no suggestion in the remainder of paragraph (1) or in paragraph (2) of the Commentary of any intention to limit the freedom enjoyed by States under international law to conclude, of their own free choice and on a basis of mutual agreement, whatever particular treaty provisions they choose within the general area of most-favoured-nation treatment. It is clear, moreover, that any such attempt at limiting the freedom of States in this context would have been ineffective. This being so, the fact that draft article 29 springs from an existing, general rule of international law gives rise to the following observations.

5. If the intention behind draft article 29 and the residual nature of the draft articles as a whole are as described above, then they are residual in a way significantly different from, say, the rules contained in the Vienna Convention on the Law of Treaties; moreover, this difference is of a kind which raises serious doubts about the meaning and effect of transforming the draft articles into a convention, as is proposed by the Commission in paragraph 73 of its report. For example, the Vienna Convention on the Law of Treaties incorporates numerous provisions corresponding to rules of international law which are valid on a general plane and are not capable of being overridden by agreement between the parties for the particular case: one may cite, simply by way of example, article 6 (Capacity of States to conclude treaties), article 26 (Pacta sunt servanda) , and article 46 (Internal law and observance of treaties). Other provisions of the Vienna Convention are residual in the sense that they expressly provide for the possibility that they may be displaced by agreement between the parties. But such residual rules operate alongside, and in part within the framework of, the non-residual (or "invariant") articles such as those mentioned above. Whereas this is so in the case of the Vienna Convention, there are in fact no provisions of the "invariant" kind in the draft articles on most-favoured-nation clauses, except perhaps draft article 8, which provides that the right to most-favoured-nation treatment arises only from a treaty provision (clause) in force between the two States: as the Commentary puts it, "in other words, ... any such clause is the source of the beneficiary State's rights".

6. This statement in the Commentary, with which the United Kingdom Government are in agreement, calls for the observation that the rights of the beneficiary State can in principle have only one source. If their source is the treaty which contains the most-favoured-nation clause, then the rights cannot at the same time stem from the general articles on most-favoured-nation clauses. In other words, the draft articles would constitute merely a set of rules for the

interpretation and application of existing obligations, and are not themselves (unlike the invariant articles in the Vienna Convention on the Law of Treaties) a source of primary obligation (leaving aside for the moment the question whether the invariant articles in the Vienna Convention on the Law of Treaties, or some of them, may not simply be a codification of pre-existing custom). Thus, the draft articles presuppose the existence of another treaty, and this is moreover a treaty to which the rules of the law of treaties will already apply. In consequence, the Commission's draft articles would have to operate alongside other rules of law existing in that area, such as the rules for observance, application and interpretation of treaties dealt with in part III of the Vienna Convention on the Law of Treaties, which would automatically apply to the treaty containing the most-favoured-nation clause, and which the Commission's draft articles cannot be intended to override (cf. para. 59 of the Commission's report). Accordingly, it seems clear to the United Kingdom Government that the Commission's draft articles (which, as shown above, can only have a secondary, and not a primary, character) will in fact be secondary in a dual sense: secondary because they are by their very nature residual rules subject to being overriden by a particular agreement between the parties, and secondary also in that they would only operate in the interstices of the general rules of the law of treaties. The United Kingdom Government feel bound to point out, therefore, that, as a matter of pure law, the scope of operation of the Commission's draft articles would be an exceptionally restricted one.

7. As regards the substance of the matter, the United Kingdom Government are satisfied, after a careful examination of the United Kingdom's own practice, that most-favoured-nation clauses no longer occupy the central place in international economic relations which they once held. A similar conclusion was reached by the Commission and is reflected in paragraphs 51 to 54 in the general part of the Commission's report. It is also reflected in draft articles 23 and 24 and again in draft article 30. In drafting articles 23 and 24 the Commission proceeded from the express conviction that a generalized application of most-favoured-nation treatment does not correspond to the present needs of the world economy, and that any statement of the law must needs reflect new developments designed to counter this fact. Furthermore, in drafting article 30, the Commission acknowledge that this process is far from complete, and that international economic relations are in fact in the throes of significant new developments in this general field. The Commission concedes, in paragraph 54 of its report, that this state of affairs was not one "that lent itself easily to codification of international law ... because the requirements for that process, as described in article 15 of the Statute, namely, extensive State practice, precedent and doctrine were not easily discernible". For the United Kingdom Government, these carefully measured words from the Commission raise a serious question as to the effect that would be produced on international economic relations by proceeding to the adoption of a new convention on the basis of the draft articles. Clearly, there must be a serious danger that such a convention might lead to an ossification of the system, to the detriment of new rules and new institutional arrangements that are currently being worked out in the appropriate international fora with the participation of the States and international organs concerned. At best, the Commission's own conclusions

suggest that the problems inherent in an attempt at codification at the present stage could only be addressed, and the necessary flexibility maintained, by way of provisions as patently unsatisfactory (from a legal point of view) as the present article 30. The United Kingdom Government do not in any sense take issue with the motive behind article 30, which it supports, but simply wishes to draw attention to the unacceptably broad and one-sided nature of the draft (over and above the specifically legal difficulties it poses and the very great problems of interpretation to which it would give rise) as an indicator of the major difficulties confronting any attempt in present circumstances to achieve an acceptable draft convention without inhibiting current and future developments.

8. As stated on previous occasions in the Sixth Committee, the United Kingdom Government do not approach the question, how the product of the Commission's work on a particular topic should be dealt with at the governmental level, in any fixed spirit. They do not, however, believe that there should be an automatic assumption that each and every final set of draft articles emanating from the Commission must necessarily be transformed into a multilateral convention. The richness of the methods available for giving effect to the work of the Commission has, in general, been but little explored in the practice of the United Nations. This was understandable in the period of the great law-making Conventions of the 1950s and 1960s (the subject matter of those Conventions being inherently suitable for codification by convention), but the time has now come, in the view of the United Kingdom Government, to adopt a more flexible approach. For the reasons given above, a multilateral convention on most-favoured-nation clauses would, in their opinion, be largely ineffective; moreover, they believe that major difficulties still stand in the way of formulating a generally acceptable convention. The United Kingdom Government do not, therefore, regard the topic as a suitable one for the preparation of a convention and are ready to explore alternative ways of preserving and building on the valuable work done by the International law Commission.

B. Comments from intergovernmental organizations

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

/Original: English/
/5 December 1979/

While FAO does not consider that the draft articles raise any questions relating specifically to international trade in the agricultural sector, it wishes to make the observation set forth below.

Draft article 24 provides that:

> "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 ..."

The provision quoted above does not preclude a developing beneficiary State from receiving the preferential treatment extended by a developing granting State to another developing State. In addition, draft article 30 leaves the door open for the establishment of new rules of international law in favour of developing countries. Nevertheless, it would seem desirable for the draft articles expressly to regulate the position of a developing beneficiary State. In this connexion it may be noted that this question has been considered by the GATT in relation to Article XXXVII.1 of the General Agreement. 6/

You may rest assured that FAO will follow with great interest all further action to be taken on the most-favoured-nation clause, since the operation of this clause has a significant bearing on international trade relations in the agricultural sector.

GENERAL AGREEMENT ON TARIFFS AND TRADE

/Original: English/
/27 December 1979/

1. I have submitted, on behalf of the GATT secretariat, general comments on the articles on most-favoured-nation clauses in my letter of 30 December 1977. In the present letter I shall limit myself to comments on articles 23 and 24 of the proposed convention on most-favoured-nation clauses and their relationship to recently adopted GATT rules on preferences for and among developing countries.

6/ See GATT, Basic Instruments and Selected Documents, Twenty-fifth Supplement, Geneva, January 1979.

2. On 28 November 1979, the Contracting Parties to GATT adopted by consensus a decision on differential and more favourable treatment, reciprocity and fuller participation of developing countries. This decision allows GATT contracting parties to provide differential treatment in favour of developing countries in respect of: (a) tariff preferences accorded under the Generalized System of Preferences, (b) non-tariff measures governed by codes negotiated under GATT auspices; (c) tariff and, under certain conditions, non-tariff preferences granted to one another by developing countries in the framework of regional or global trade arrangements; and (d) special treatment of least-developed countries. The decision requires that any action taken under it be designed to facilitate and promote the trade of developing countries and to respond positively to those countries' development, financial and trade needs. Arrangements providing for differential treatment of developing countries must not prevent the further reduction of trade barriers on a most-favoured-nation basis, nor create obstacles to the trade of countries not parties to the arrangements. Differential treatment, by way of GSP preferences or under codes regulating the use of non-tariff measures, can be modified to respond to the changing needs of developing countries. The decision establishes consultation procedures that may be used to deal with any difficulties arising from such modifications or from other aspects of the operation of arrangements covered by it.

3. In view of the practical importance of the GATT decision - it was adopted by, and binds, 84 States representing 85 per cent of world trade - the International Law Commission may find it useful to take it into account in its further work.

4. We noted that articles 23 and 24 of the proposed convention on most-favoured-nation clauses sanction, as far as States members of a "competent international organization" are concerned, only preferential treatment granted in accordance with the relevant rules and procedures of that organization. The Commission states in its annotation to article 24 that this requirement is intended to make the provision "conform with the relevant provisions of the Charter of Economic Rights and Duties of States". Would it be correct to assume that the reference to competent international organizations is intended to include the GATT?

5. We would like to draw your attention to the fact that the GATT decision, to the extent that it embraces non-tariff measures, is wider than the proposed articles, which only exempt differential treatment from most-favoured-nation clauses but not other provisions stipulating equal treatment. Differential treatment applied to developing territories, which are among the beneficiaries of most GSP schemes, is covered by the GATT decision whereas articles 23 and 24 appear to cover only differential treatment granted to States.

6. In concluding I would like to stress that the views expressed in this letter are those of the GATT secretariat and not necessarily those of the Contracting Parties to GATT.

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EUROPEAN ECONOMIC COMMUNITY

/Original: English/French/
/20 December 1979/

I

1. The European Economic Community (EEC) wishes to refer to resolution 33/139 of 19 December 1978 adopted by the General Assembly of the United Nations inviting comments and observations on chapter II of the report of the International Law Commission on the work of its thirtieth session and, in particular, on (a) the draft articles on most-favoured-nation clauses adopted by the International Law Commission; and (b) those provisions relating to such clauses on which the International Law Commission was unable to take decisions.

II

2. The Community has on earlier occasions 7/ commented on the deliberations in the International Law Commission on the most-favoured-nation clause. The purpose of the present comments is again to draw attention to the particular aspects of the EEC use of the most-favoured-nation clause which derive from the special nature of the regional integration process in which the Community is engaged.

3. EEC recalls that its member States have transferred to the Community their competence with regard to external trade policy and that, accordingly, questions concerning the application of the most-favoured-nation clause within this important area are now exclusively a matter for the Community. It is therefore the Community, and not its member States, which has the power to grant and receive most-favoured-nation treatment in that regard.

III

4. Having made these general observations, the Community wishes to submit the following proposals for amendments to the draft articles on the most-favoured-nation clause as adopted by the International Law Commission at its thirtieth session, while at the same time reiterating the remarks (A/CN.4/308, pp. 38-49) on the draft articles which the Community has made on earlier occasions, as referred to above.

7/ Written comments submitted on 24 January 1978 to the Secretary-General of the United Nations, reproduced in document A/CN.4/308 of 28 March 1978, and oral statements made during the debate in the Sixth Committee of the General Assembly in 1975, 1976 and 1978.

The most-favoured-nation clause in relation to treatment extended within a customs union or a free-trade area

5. It would not be consistent with well established and unambiguous international practice that a State which is not a member of a customs union or is not included in a free-trade area arrangement should be entitled, on the basis of a most-favoured-nation clause, to be granted special benefits accruing to the members of a customs union or parties to a free-trade agreement. A customs union or a free-trade area agreement is a form of far-reaching co-operation which entails far-reaching obligations for the parties involved, in exchange for the rights that they grant each other. (See in particular article XXIV of the General Arrangement on Tariffs and Trade (GATT).)

6. It should also be mentioned that the contracting parties to a treaty containing a most-favoured-nation clause do not normally intend the clause to be applicable to benefits which either of them might subsequently grant to another party in connexion with the establishment of a customs union or a free-trade area. An exception for such cases is a generally accepted customary rule in international law, based on legal writing as well as on general agreement of the States and their unanimous practice. This situation must be expressly covered by the draft articles.

7. The Community further recalls that a member of the International Law Commission, during the Commission's deliberations on this issue at its thirtieth session, proposed a new article 23 bis 8/ containing a customs union exception.

8. The International Law Commission found that there was no final agreement on the subject. Accordingly, as stated in the Commission's report on its thirtieth session, the Commission decided not to include an article containing any exception for customs unions and free-trade areas. It is difficult to explain why the Commission, while being ready to adopt draft articles 23 and 24 as part of the progressive development of international law, has left out this exception for customs unions and free-trade areas which is simply codifying an existing rule of customary international law.

9. The Community considers that an express exception in the application of the most-favoured-nation clause must be made for customs unions, free-trade areas, composed either of States or of entities other than States, which, like the Community, have power to grant and receive the most-favoured-nation treatment provided for in an international agreement.

10. It should be recalled that the Community's misgivings about the draft clauses on this point are shared by numerous States and groups of States, both industrialized and developing, which likewise are engaged in a more or less advanced process of economic integration.

8/ Official Records of the General Assembly, Thirty-third Session, Supplement No. 10 (A/33/10), paras. 57-58.

11. The Community reserves the right to propose at a later stage the text of an article regarding this matter, to be added to the draft proposed by the International Law Commission.

Scope of the draft articles

12. The draft articles on the most-favoured-nation clause are in their present form restricted to clauses contained in treaties between States. This would greatly restrict the value of them since they do not take account of the fact that, following the extensive establishment by sovereign States of regional economic integration organizations in various parts of the world, the clause is likely to be found more and more frequently in agreements concluded by unions or groups of States. This development should be taken into account and the scope of the articles should be revised accordingly.

13. The Community agrees with the position taken by the International Law Commission to let the draft articles follow as closely as possible the structure and terminology of the Vienna Convention on the Law of Treaties. At the same time, these articles should, however, not ignore the important work which, since the adoption of the Vienna Convention in 1969, has taken place in the International Law Commission on the question of treaties concluded between States and international organizations or between two or more international organizations.

14. The scope of the draft articles should therefore be broadened in order to cover the case of entities other than States having rights or duties according to international law within fields covered by a most-favoured-nation clause included in an international agreement to which such entities are contracting parties.

15. This could be obtained, for example, by revising the present article 1 of the draft articles and by including consequential amendments to article 2, paragraph 1 (a), (b) and (c), article 4 and article 6.

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

16. It is appreciated that the International Law Commission, during its second reading, made important changes so that the present draft clearly recognizes that the obligation to accord most-favoured-nation treatment might be subject to certain conditions and that the granting of such treatment is not even presumed to be unconditional.

17. In its written comments (A/CN.4/308) EEC has emphasized that relations between States with different socio-economic systems depended upon certain rules and that, in particular, application of most-favoured treatment in this respect would be without real meaning if the conditions under which such treatment is granted were not spelled out in mutually measurable facts which made it possible to evaluate the results achieved.

18. EEC recalled in this connexion that the Final Act of the Conference on Security and Co-operation in Europe made the principle of reciprocity a

guiding principle in the preamble to the chapter on "co-operation in the field of economics, of sciences and technology and of the environment" and that it was only in this context that the signatory powers of the Final Act had accepted that beneficial effects could result "from application of the most-favoured-nation clause for the development of mutual relations".

19. EEC also referred to the rules adopted by GATT, whereby, upon the accession to the agreement of certain States with a socio-economic system different from that applied in market-economy countries, it had been necessary to establish special protocols taking these differences into account.

20. The Community reiterates its earlier proposal that the draft articles should be supplemented accordingly.

IV

21. In conclusion, EEC wishes to restate its position that any general rules on the most-favoured-nation clause, regardless of their final form and legal status, even if they were only of a supplementary nature, could not be accepted by the Community unless they constituted a well-balanced set of rules which, as a whole, reflected practical realities and in particular took account of the matters referred to above. It is only on such basis that EEC, whish is the major international trading partner and which has full delegated powers in this area from the member States as regards the granting or acceptance of most-favoured-nation treatment, could contemplate accepting an instrument of international law on this subject.
