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

Report of the Secretary-General

Addendum

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COMMENTS FROM GOVERNMENTS

AUSTRIA

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1. The structure chosen by the International Law Commission for its draft articles on most-favoured-nation clauses would suggest that the Commission already at an early stage of its preparatory work had, for all practical purposes, decided in favour of the elaboration and eventual adoption of a convention (rather than any other instrument). This is, inter alia, confirmed by the Commission in the recommendation "that those draft articles should be recommended to Member States with a view to the conclusion of a convention on the subject". While recognizing that the work of the Commission concerning the most-favoured-nation clause is very useful and further proof of the quality of the Commission's work (of particular value as it encompasses a thorough and well researched analysis of the legal aspects of this subject matter) Austria finds it regrettable that the Commission did not explore in more depth possible alternative legal frames for the draft but rather hastily, and somewhat prematurely, opted for a convention and accordingly structured the draft articles in such a manner so as to almost exclude other alternatives.

2. The draft is based on a painstaking analysis of the treaty practice of States. This is due to the fact that the subject of most-favoured-nation clauses is practically exclusively dealt with in treaties and that, as a consequence, seemingly no significant body of customary rules developed. That study of State practice undertaken by the Commission is certainly an admirable piece of work. Unfortunately, however, it did not result in a set of draft articles which would reflect all aspects of such State practice. Since it cannot be ignored that numerous treaties have in fact been concluded between States, on the one hand, and other subjects of international law, on the other, Austria would feel that the Commission when drafting the present articles should have taken this undeniable fact into consideration. In any event, the provision of draft article 6 does not satisfactorily deal with this problem. It is true, that the scope of the Vienna Convention on the Law of Treaties is confined to treaties between States and that the present draft articles are based on that Convention. One should not, however, overlook the fact that the Convention of the Law of Treaties will eventually be supplemented by a second legal instrument, presumably of a similar nature, dealing with the law of treaties between States and international organizations. In fact, the Commission itself is actively engaged in such a project of codification which undoubtedly is in conformity with actual treaty practice.

3. The fact that the present draft articles had to be based almost exclusively on the practice of States and that no significant rules of customary international law have been established in that field raises doubts about the practicability and usefulness of a codification in the traditional sense of "the law" on this subject. The only source of the beneficiary States rights are treaty provisions to that effect in force between two subjects of international law (articles 4 and 7 of the draft).

The draft articles by themselves cannot be regarded as constituting a source of primary obligation. They can only be intended to facilitate the interpretation and application of the primary treaty obligation. This clearly demonstrates the subsidiary nature of the draft articles which are, in addition, of a residual character inasmuch as States remain - and must remain - free to agree among themselves differently. This residual character of the draft articles derives from general international law and accordingly found its explicit expression in draft article 29. The subsidiary and residual nature of the draft articles would seem to make widespread practical application of the rules a rather restricted possibility and accordingly, at least in the view of Austria, would not justify the exercise of drawing up a convention on this subject.

4. Apart from the issue of the usefulness of a convention, which is questionable as explained above, the existing imbalance of the draft in its present form would undoubtedly make it unacceptable to a number of States, both developed and developing. This, in turn, would make a widespread application of the rules adopted even more unlikely. Should, therefore, in the final analysis a significant number of States indeed wish to elaborate a convention on the subject of most-favoured-nation clauses, the existing imbalances will have to be removed if one cares for adherence, to the convention, of a large number of States. While Austria appreciates the efforts deployed by the International Law Commission in order to take into account the realities of contemporary economic intercourse and State practice as regards the needs of developing countries lead the Commission to adopt draft articles 23 et seq. Austria feels that these articles could be improved in the light of arrangements which have been and are being worked out in the framework of GATT, taking into account, among others, in particular the decision adopted on 28 November 1979 by the Contracting Parties to GATT on differential and more favourable treatment, reciprocity and fuller participation of developing countries, which allows GATT Contracting Parties to provide differential treatment in favour of developing countries.

5. Austria, like other States and the various international organizations which have already expressed their views on the draft articles, considers the absence of an adequate provision on customs unions/free trade areas, which would take into account the realities of present-day economic life, a major deficiency of the draft which thus ignores a practice that has been confirmed in a great number of treaties and which has become an established practice of inter-State trade relations. It is therefore imperative that specific provisions be included in the draft articles excluding from their field of application customs unions and free trade areas as well as existing and future treaty arrangements with such groups of States. The inclusion of provisions of this nature must in fact be regarded as a prerequisite for a generally acceptable text.

6. As regards other provisions of the draft, the Austrian Government would limit its remarks at this stage to the general observation that the non-inclusion of a provision on dispute settlement is most regrettable. However, this question will have to be carefully studied in view of the fact that the draft provisions are only of a subsidiary nature and that a specific method of dispute settlement might already have been agreed upon by the parties to the original most-favoured-nations treatment clause.

7. Summing up, Austria wishes to state that it does not regard the subject of most-favoured-nation treatment as particularly well suited for the conclusion of a convention and that other possibilities in putting the valuable work done by the International Law Commission to a practical use should be explored. Should a significant majority of States feel that there is indeed a need for a convention on the subject, Austria would not oppose the adoption of such an instrument. It would, however, continue to insist, that the interests and needs of all States be duly taken into consideration.