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

Report of the Secretary-General

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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 its thirty-third session, the General Assembly adopted resolution 33/139 of 19 December 1978, in section II of which it invited all States, organs of the United Nations which had 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. The Assembly also requested 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.

4. Pursuant to General Assembly resolution 33/139, comments and observations were received from the following 18 States: Austria, Barbados, Bulgaria, Byelorussian Soviet Socialist Republic, Cuba, Czechoslovakia, German Democratic Republic, Germany, Federal Republic of, Greece, Hungary, Mexico, Norway, Pakistan, Switzerland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America. Comments and observations were also received from the following intergovernmental organizations: Council for Mutual Economic Assistance, Food and Agriculture Organization of the United Nations, General Agreement on Tariffs and Trade, European Economic Community and the League of Arab States. These comments and observations were circulated in document A/35/203 and Add.1-3.

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

2/ Ibid., chap. II.

3/ Ibid., para. 73.

5. At its thirty-fifth session, the General Assembly adopted resolution 35/161 of 15 December 1980, entitled "Consideration of the draft articles on most-favoured-nation clauses", paragraphs 2 to 5 of which read as follows:

"The General Assembly,

"...

"2. Requests the Secretary-General to reiterate his invitation to Member States, organs of the United Nations which have competence in the subject-matter and interested intergovernmental organizations to submit or bring up to date, not later than 30 June 1981, 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 Commission;

(b) Those provisions relating to such clauses on which the Commission was unable to take decisions;

and also requests States to comment on the recommendation of the 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-sixth session of the General Assembly, the comments and observations submitted in accordance with paragraph 2 above;

"4. Further requests the Secretary-General to bring up to date, in view of the comments and observations mentioned in paragraph 2 above, the analytical compilation of comments and observations from Governments, organs of the United Nations which have competence in the subject-matter and interested intergovernmental organizations;

"5. Decides to include in the provisional agenda of its thirty-sixth session the item entitled 'Consideration of the draft articles on most-favoured-nation clauses' and to consider it at an early stage."

6. In pursuance of the above resolution, the Secretary-General, by letters dated 12 February 1981, signed by the Legal Counsel, reiterated his invitation to Member States, organs of the United Nations which had competence in the subject-matter and interested intergovernmental organizations to submit or bring up to date, not later than 30 June 1981, their written comments and observations on the matters referred to in paragraph 2 of the resolution.

7. By 31 August 1981, comments and observations submitted pursuant to resolution 35/161 had been received from the following 5 States: Czechoslovakia, Iraq, Italy, Mongolia and Romania. Comments and observations were also received from the Economic Commission for Africa, an organ of the United Nations, as well as from

the following intergovernmental organizations: Andean Development Corporation, Central Office for International Railway Transport, European Economic Community, European Free Trade Association, and Inter-American Development Bank.

8. The Economic Commission for Europe, the Economic Commission for Western Asia and the International Atomic Energy Agency stated that their comments on the draft articles on the most-favoured-nation clause adopted by the International Law Commission at its twenty-eighth session remain valid. 4/

9. The present document, which reproduces comments and observations mentioned in paragraph 7 above, is submitted to the General Assembly by the Secretary-General pursuant to the request made in paragraph 3 of resolution 35/161. Further comments and observations that may be forthcoming will be issued in addenda to the present document.

II. COMMENTS RECEIVED FROM GOVERNMENTS

CZECHOSLOVAKIA

[Original: English]

[6 August 1981]

1. The provisions of article 2, paragraph 2 (e) and (f), and of articles 12 and 13 of the draft deal with the question of the so-called conditions of compensation in connexion with the most-favoured-nation clause. The practical implementation of these provisions in the economic and commercial fields, however, is unjust and does not serve the interests of co-operation, because in its end result it leads to the violation of the principle of the sovereign equality of States. The most-favoured-nation clause with the compensation condition may lead to the application of the methods of discrimination and protectionism and thus to the discrediting and one-sided interpretation of the condition of reciprocity. Czechoslovakia therefore recommends that the provision on the most-favoured-nation clause with the condition of compensation be deleted from the draft.

2. The scope of the exceptions from the most-favoured-nation clause, as provided for in articles 23 to 26 of the draft, is quite sufficient. Any expansion of the exceptions would result in a reduction of the positive impact of the clause.

4/ For the texts of those comments see Official Records of the General Assembly, Thirtieth Session, Supplement No. 10 (A/33/10), annex, pp. 430-433, 433-435 and 439, respectively.

IRAQ

[Original: English]

[30 June 1981]

The position of the Government of the Republic of Iraq regarding the draft articles on the most-favoured-nation clauses adopted by the International Law Commission is basically that of the League of Arab States set out in document A/35/203/Add.2 dated 30 September 1980. The Government of Iraq wishes also to inform you that it reserves its right to make further comments as and when the occasion requires.

ITALY

[Original: English]

[14 August 1981]

1. The position of the Italian Government on this matter conforms to that already expressed by the European Economic Community in document A/35/203 of 7 May 1980. In fact, Italy maintains that the failure to include in the draft a clause which would exempt customs unions from applying to third States beneficiaries of the most-favoured-nation clause, the treatment which States members of the customs union accord each other, does not take adequately into account the requirements which form the foundation of modern processes of economic integration.

2. In any case, as far as Italy is concerned, since the States Members of the EEC have transferred to the Community their competence in the field of external trade policy, questions regarding the application of the most-favoured-nation clause are almost always within the exclusive competence of the Community.

3. The Italian Government believes that the inclusion in the draft of a clause such as the one suggested above would conform to the criteria universally followed in the case of customs unions. It would be incompatible with established international practice for a State which is not a member of a customs union or part of a free-trade area to be allowed to benefit, on the basis of the most-favoured-nation clause, from the special advantage enjoyed by the members of a custom union or parties to a free-trade agreement, respectively.

4. The extension to customs unions of exemption from the application of the most-favoured-nation clause in the cases in question corresponds to an established practice which States have agreed to so far and continue to accept in the course of their reciprocal relations.

5. Moreover, the Italian Government wishes to emphasize that the draft should conform to the structure and terminology of the 1969 Vienna Convention on the Law of Treaties, as well as to the spirit of the work now being completed by the International Law Commission on treaties between States and international organizations or between two or more international organizations.

6. For these reasons, Italy is of the opinion that the body of law relating to the most-favoured-nation clause should be extended to those entities other than States which, in accordance with international law, derive powers and obligations from international agreements to which they are contracting parties and in which the most-favoured-nation clause has been included.

MONGOLIA

[Original: English]

[17 August 1981]

1. The Government of the Mongolian People's Republic has carefully studied the final set of articles on most-favoured-nation clauses submitted by the International Law Commission to the General Assembly at its thirty-third session and considers that in general the draft could serve as a sound basis for the final drafting and adoption of an international legal instrument regulating one of the most important aspects of trade and other fields of economic activities among nations, irrespective of their social systems or the degree of development.

2. With the few exceptions, the draft articles could be considered as an important step in codifying and progressively developing contemporary international law in the vital fields of economic and legal co-operation of States on the basis of sovereign equality of States, non-discrimination and mutual benefit.

3. The Government of Mongolia believes that articles 23 to 26, dealing respectively with correlations of the most-favoured-nation clauses and treatment under a generalized system of preferences, arrangements between developing States, treatment extended to facilitate frontier traffic as well as rights and facilities extended to land-locked States justly reflect the existing international practice of exceptions to the most-favoured-nation treatment. Article 30, according to which the draft articles are to be without prejudice to the establishment of new rules of international law in favour of developing countries, also reflects the present trend in international law and international economic relations and therefore its inclusion is fully justified.

4. Furthermore, the Government of Mongolia supports the course of action taken by the International Law Commission of not including in the draft articles any provisions making unfounded exception to the most-favoured-nation treatment in favour of preferences as granted within a customs union or an economic community, since, given the nature of such unions and communities, the exception would increase the obstacles between the developed and developing States and defeat the very purpose of the treatment.

5. Also at variance with the main objectives of the most-favoured-nation treatment and of the draft articles as a whole is extending the most-favoured-nation treatment conditional to material reciprocity. Thus the terms "conditions of compensation" and "conditions of reciprocity" in paragraphs 1 (e) and (f) of article 2, articles 12 and 13 are contrary to the generally recognized and universally accepted interpretation of the principle of the most-favoured-nation treatment, according to which such a treatment is granted

without any pre-conditions. Furthermore, the concept of material reciprocity is incompatible with the generally recognized principles of sovereign equality of States and non-discrimination.

6. Bearing in mind the nature of the question of the most-favoured-nation treatment and the fact that the draft articles need further detailed examination by an expert body on international economic and commercial relations, the Government of Mongolia is of the view that the draft article could be further considered by the United Nations Commission on International Trade Law.

ROMANIA

[Original: French]

[26 June 1981]

1. The draft articles on most-favoured-nation clauses, the final text of which was adopted by the International Law Commission at its thirtieth session (A/33/192), make an excellent contribution to the efforts which have been devoted during the last 30 years in the United Nations to the progressive development and codification of international law.

2. The fact that the rules governing the subject are being collected and systematized in a coherent whole reflects the international community's deeply-felt need to arm itself with legal mechanisms to facilitate international trade and develop mutually advantageous economic co-operation among all States on the basis of equal rights and non-discrimination, the long-term aim being to establish a new international economic order.

3. State practice in respect of most-favoured-nation clauses has changed significantly during the twentieth century - as it has in respect of other institutions of international law - without, however, diminishing the political and economic significance of such clauses. In the view of the competent Romanian organs, it is essential that completion of the draft articles be based on as comprehensive a study as possible of State practice, which should be put to the most appropriate use.

4. Romania, however, feels that it is necessary, specifically concerning the matter under consideration, to pay due regard to the method whereby rules of law are progressively developed, since the most-favoured-nation clause system concerns extremely complex areas of inter-State relations which are undergoing far-reaching changes. We therefore believe that any effort to define the legal mechanism for most-favoured-nation clauses should pay due regard to the development of economic, trade and other relations not only between the developed industrialized countries but also, and above all, between such countries and the developing countries, as well as to the relations established among developing countries.

5. In the opinion of the competent Romanian organs, the international legal instrument to be elaborated concerning most-favoured-nation clauses should be

drafted in such a manner as to reflect the existing situation with respect to relations between States in the various areas of international life and to promote the development and reshaping of those relations so that they may gradually meet the requirements of a new international economic order. In the view of the Socialist Republic of Romania, the new economic order should base relations among all States on the principles of equality and equity, give the underdeveloped and the developing countries access to modern technology, enable them to benefit from the great achievements of modern science and encourage their rapid progress in all spheres, thereby creating the prerequisites for balanced development of all areas of the world and of the international economy. To that end, the international codifying instrument to be elaborated should be so drafted as to help to remove the obstacles and lift the restrictions which still hamper economic and trade relations and to narrow the gap between the developing countries and the developed countries.

6. In the light of the above considerations of principle, the competent Romanian organs are in favour of a number of the draft articles, so far as the substance is concerned. These include the articles containing the definition of the most-favoured-nation clause and the most-favoured-nation treatment (arts. 4 and 5), those regulating questions concerning the source and scope of most-favoured-nation treatment (art. 8), those providing for compliance with the laws and regulations of the granting State (art. 22), and those establishing the most-favoured-nation clause in relation to arrangements between developing States (arts. 23 and 24).

7. Romania would like to make some preliminary comments and observations on certain draft articles at this stage, while reserving its right to express its final position on the draft articles at a later stage.

(a) Article 1. The competent Romanian organs feel that limiting the scope of the codifying instrument to be elaborated to most-favoured-nation clauses contained in treaties concluded between States will reduce its effectiveness. Romania suggests that the question of applicability of the rules to be codified be reconsidered also in respect of clauses contained in treaties concluded between States and international organizations; the number of such treaties is growing constantly.

(b) Article 7. It seems to us that the provisions of this article, which refer in general terms to an "international obligation undertaken" by a State as a legal basis for another State to request most-favoured-nation treatment differs to some extent from the provisions of article 4, which states, in conformity with practice and custom, that the only legal basis for a State to request most-favoured-nation treatment from another State is the obligation to that effect undertaken, by the granting State under a treaty provision. Thus there does not seem to be the necessary concordance between the provisions of article 4 and those of article 7.

(c) Articles 12 and 13. The competent Romanian organs do not see the need to include in the future codifying instrument clauses made subject to conditions of compensation or reciprocal treatment. Such clauses are in the nature of exceptions and, if raised to the status of a codified general rule, the condition affecting the

clause might in practice lead to a restriction of the application of the clause in the relations among States. The condition could actually become a legal mechanism that might stand in the way of the development of economic and trade relations and technical and scientific co-operation among States, contrary to the basic principle of international law establishing the duty of all States to co-operate among themselves. (See the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted in resolution 2625 (XXV) of 24 October 1970.) Romania takes the position that the most-favoured-nation clauses should be codified in a non-conditional form, as was done in article I of the General Agreement on Tariffs and Trade, and as they have been applied in the general practice of States.

(d) Article 21, paragraph 1. This paragraph provides that the right of the beneficiary State to most-favoured-nation treatment under a most-favoured-nation clause in a treaty concluded by the granting State with the beneficiary State is terminated or suspended at the moment when the extension of such treatment to a third State is terminated or suspended. So formulated, this provision introduces an element of chance that could cause uncertainty in relations between States which apply reciprocal most-favoured-nation treatment. Admittedly, because of the supplementary character of the rule in question, States can in their agreements adopt appropriate contrary provisions which are in the best interests of their mutual relations. However, Romania is of the opinion that the consequences of applying this provision should be studied further by means of more extensive research into the practice of States, so as to prevent this rule from exercising a braking effect in the future on the process of the development of inter-State relations.

8. In drafting the articles, the Commission had to take into consideration the changes that have occurred in international relations in our times, and had to draw the appropriate conclusions regarding the codification or progressive development of rules pertaining to the operation of the most-favoured-nation clause. The Commission devoted special attention to the problems of developing countries when, in articles 23 and 24 mentioned above, it formulated exceptions to the general rule of the most-favoured-nation clause (A/33/10, para. 63). At the same time, mindful of the needs of a constantly changing international community, the Commission foresaw the possibility of establishing new rules of international law in favour of developing countries (art. 30).

9. That is a very reasonable step. In our opinion the draft articles should none the less be re-examined in the light of the most recent developments in economic and commercial relations between States. In that connexion, an in-depth study of the new set of rules must be made by the international economic authorities.

10. The supplementary nature of the rules proposed by the Commission, which is reflected in article 29, is such that the draft articles can be seen as a rather flexible mechanism which, while guiding States in their reciprocal relations, does not prevent them from adopting different stipulations that will fully reflect their interests. The competent Romanian organs believe that, for the future codifying instrument to maintain its flexible character, it must not be overloaded with exceptions to the rule, and that exceptional situations should be left to specific regulations contained in inter-State agreements.

11. As for the form which the new rules should take, Romania believes that, to the extent that the draft articles in their final stage offer generally acceptable solutions, they might serve as the negotiating text for the elaboration and adoption of an international convention.

12. Should the draft articles be incorporated in an international convention, the convention would be governed by the principles and rules of the law of treaties. In such a case, we feel that it is possible to conceive of a mixed procedure, combining negotiation, mediation and optional arbitration, for the settlement of any disputes arising from the interpretation and application of the convention.

13. In conclusion, the competent Romanian organs are of the opinion that further efforts are needed to obtain a consensus of States on the draft articles on most-favoured-nation clauses or at least a widespread support, which is an essential condition for the usefulness and effectiveness of the future international legal instrument.

III. COMMENTS RECEIVED FROM ORGANS OF THE UNITED NATIONS

ECONOMIC COMMISSION FOR AFRICA

[Original: English]

[19 June 1981]

1. The worK done by the International Law Commission on most-favoured-nation clauses is, of course, highly commendable and any comment we make in the paragraphs that follow must be viewed against the background of this observation.

2. We doubt, however, whether a Convention on most-favoured-nation clauses will attract enough ratifications by States for it ever to come into force. In this event the valuable work done by the International Law Commission would be wasted. In order to avoid this we suggest that a less formal legal technique than a Convention be adopted to ensure that the legal materials so painstakingly collected, analysed and evaluated are made available to the widest possible constituency.

3. Although passing reference is made in the third preambular paragraph of General Assembly resolution 35/161 to the new international economic order, the substance of the draft most-favoured-nation articles does not carry the matter much further. I will return to this point later in this note.

4. The draft deals extensively with the most-favoured-nation clauses with respect to treaties between individual states but not as between states and economic groupings such as: Preferential Trade Areas, Common Markets and Economic Communities, etc. If this is correct, the difficulty which it may raise for the African Region where the promotion of economic integration has been accepted as the vehicle for accelerated economic and social development, is that most-favoured-nation clauses may not apply with respect to African countries and

ican economic groupings, such as the Economic Community of West African States OWAS), the Central African Economic and Customs Union (UDEAC) and the spective Preferential Trade Area of Eastern and Southern African States.

Moreover, the approach to the treatment of third countries implied in the ft most-favoured-nation clauses of the International Law Commission is radically ferent from the approach that have been adopted by African countries in their ent dealings with each other. For instance, article 18 of the draft Treaty for Establishment of the Preferential Trade Area for Eastern and Southern African tes being negotiated by its prospective Member States provides as follows:

"1. The Member States shall accord to one another in relation to trade between them the most favoured nation treatment.

2. In no case shall trade concessions granted to a third country under an agreement with a Member State be more favourable than those applicable under this Treaty.

3. Any agreement between a Member State and a third country under which tariff concessions are granted shall not derogate from the obligations of that Member State under this Treaty.

4. The provisions of this Article shall apply only with respect to commodities contained in the Common List."

The ECOWAS treaty has similar provisions which are, however, not limited in ir application to goods on a Common List. In addition, article 59 of the ECOWAS aty provides that:

"1. Member States may be members of other regional or sub-regional associations, either with other Member States or non-Member States, provided that their membership of such associations does not derogate from the provisions of this Treaty.

2. The rights and obligations arising from agreements concluded before the definitive entry into force of this Treaty between one or more Member States on the one hand, and one Member State and a third country on the other hand, shall not be affected by the provisions of this Treaty.

3. To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

4. In applying the agreements referred to in paragraph 1 of this Article, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the

creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States."

7. This leads me to my next point. Why should States sign a most-favoured-nation Convention when even third countries can also enjoy the full rights, privileges, immunities offered by the Convention without their undertaking any of its obligations, duties, liabilities?

8. I return to what I stated under the second paragraph of this note. In formal legal terms, all sovereign States are equal in status. But what does one see on piercing through this veil of nomenclature? Not equality but serious economic inequalities. Such inequalities make nonsense of the new international economic order. Or, to put it differently, such glaring inequalities call for a really new international economic order. The draft most-favoured-nation clauses will contribute very little to the achievement of these purposes because they are based on the principle of reciprocity between developed and developing countries. Reciprocity is acceptable as between one developed country and another developed country or between one developing country and another developing country. It is not equitable in the unequal relationships between developed and developing countries. In our case, Africa has 21 of the World's 31 Least Developed Countries.

9. In the light of the foregoing, we welcome article 30 of the draft most-favoured-nation clauses which provides that "The present articles are without prejudice to the establishment of new rules of international law in favour of developing countries". We hope early action can be taken on the provisions of this article.

10. It is not clear how disputes arising out of the interpretation or application of most-favoured-nation clauses will be settled because the draft makes no provision for the settlement of disputes.

IV. COMMENTS RECEIVED FROM INTERGOVERNMENTAL ORGANIZATIONS

ANDEAN DEVELOPMENT CORPORATION

[Original: Spanish]

[14 July 1981]

1. Since the sphere of application of the draft articles is restricted to most-favoured-nation clauses contained in treaties between "States" and not other subjects of international law, it would seem to be more correct for the observations and comments concerning the wording of those articles to be made by States. However, in the case of organizations or institutions which, like the Andean Development Corporation, have been established by a very special group of countries, in this case developing countries, precisely with the aim of achieving development through economic integration, the consequences which might ensue for Member States if a beneficiary State of the most-favoured-nation clause sought to obtain for itself the advantages pledged in an integration agreement to which it is not a party, give grounds for concern.

2. Such a situation might arise if it were to be held as a definitive view that the advantages conferred by the most-favoured-nation clause may be derived from the existence of either a bilateral treaty or a multilateral treaty. In the latter case there would be a possibility that a State might have access to the advantages and privileges that a group of States had agreed to grant one another within the framework of an integration agreement.

3. Article 113 of the Cartagena Agreement states that "the advantages pledged under this Agreement shall not be extended to non-member Countries, nor create for them any obligations based thereon." Thus, the inclusion of an article or provision excluding regional economic integration systems from the obligations of the most-favoured-nation clause would accord with an established international practice which has been given conventional embodiment in numerous international treaties and agreements.

4. Furthermore, it should be stated that the draft articles on the most-favoured-nation clause are an important contribution to the work of codifying and developing the rules of international law in general and of treaty law in particular.

CENTRAL OFFICE FOR INTERNATIONAL RAILWAY TRANSPORT

[Original: English]

[26 June 1981]

1. The International Convention concerning the Carriage of Goods by Rail (CIM) of 7 February 1970 (first edition: 1890) to which belong all European States (with the exception of the Soviet Union and Albania) as well as some States of the Near East and of North Africa, regulates the form and conditions of the international contract of carriage; according to its provisions, carriage charges must, as a rule, be calculated on the basis of the tariffs in force. The Convention also contains provisions for the publication of the tariffs; they shall be applied to all users on the same conditions. These obligations have, however, been moderated by the admission of special non-published agreements. However, the member states of CIM are sovereign in setting up the tariffs; in most countries the railway tariffs are subject to a stringent supervision by the competent authorities.

2. According to document A/33/10, page 44, the field of application for the articles on most-favoured-nation clauses is a many-sided one. Although the list contained in the above mentioned document is not exhaustive and does not mention railway tariffs, the latter could well be the subject of such a clause.

3. Under these circumstances, the interested Member States of the Convention should, as a rule, not experience any special difficulties in vouching for a practical realization of the promise contained in the said clause. 5/

5/ Central Office for International Railway Transport also attached to its comments an extract from a judgement of 23 December 1931, passed by the "Handelsgericht Berlin Mitte" and which has been published in Eger, Eisenbahn- und Verkehrsrechtliche Entscheidungen, vol. LII (1932), p. 372.

EUROPEAN ECONOMIC COMMUNITY

[Original: English/French]

[30 June 1981]

1. The European Economic Community (EEC) refers to resolution 35/161 adopted by the General Assembly on 15 December 1980 which invites Member States and interested intergovernmental organizations to submit or bring up to date their written comments and observations on chapter II of the report of the International Law Commission (ILC) on the work of its thirtieth session, 6/ 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 Commission was unable to take decisions.

2. The Community wishes to comment on the latter point, that is, concerning clauses on which the International Law Commission was unable to take decisions. In doing so, the Community refers to its previous written comments, in particular those forwarded to the Secretary-General on 20 December 1979 (see A/35/203) and to its statement on the subject-matter in the Sixth Committee at the thirty-fifth session of the General Assembly (see A/C.6/35/SR.65) on 28 November 1980.

3. On these previous occasions, it has been emphasized by the Community that a customs union or a free-trade area agreement is a form of far-reaching co-operation which entails obligations for the parties involved in exchange for the rights which they grant to each other. 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 States and their unanimous practice. This rule is in particular expressed in Article XXIV of the General Agreement on Tariffs and Trade.

4. The Community considers it essential that this situation must be expressly covered. Otherwise would the draft articles on most-favoured-nation clauses ignore the existing international situation and they would be unacceptable.

5. The same opinion appears in the proposal to a new article 23 bis concerning a customs union exception which was discussed by the International Law Commission during its thirtieth session.

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

6. After having considered this draft to a new article 23 bis and having taken into account the opinions expressed by States and interested international organizations on this issue, the Community forwards in writing the proposal to a new article which has earlier been submitted in the above statement on 28 November 1980 in the Sixth Committee. The text which should be inserted as a new article 23 bis in the draft articles on most-favoured-nation clauses reads:

> "A beneficiary State is not entitled under a most-favoured-nation clause to the treatment provided for in an agreement establishing a customs union or a free-trade area or in a provisional agreement concluded with a view to the establishment of such a union or such a zone and extended by the granting State or party to a third State or party as co-party to that agreement".

EUROPEAN FREE TRADE ASSOCIATION

[Original: English]

[5 June 1981]

1. Regarding the question whether a future international convention on most-favoured-nation clauses should exempt free trade areas and customs unions from the application of such clauses, EFTA recalls the suggestion made previously that the draft articles be supplemented by a provision which explicitly recognizes free trade areas and customs unions as exceptions to the most-favoured-nation treatment in matters of trade.

2. Such exceptions are necessary in view of the importance of the aforementioned groupings as instruments of economic integration.

3. Moreover, the benefits arising to Members are normally based on complex and extensive obligations contained in the agreements erecting such groupings, and could therefore not automatically be accorded to a non-Member State on the basis of a most-favoured-nation clause.

4. Lastly, it should not be overlooked that the General Agreement on Tariffs and Trade, which has contained such exceptions since its entry into force, is adhered to or observed by States accounting for more than four-fifths of world trade.

5. These comments from EFTA as an organization do not prejudice any comments which the individual EFTA countries may wish to send to you.

INTER-AMERICAN DEVELOPMENT BANK

[Original: English]

[14 April 1981]

1. In our view, the draft articles elaborated by the International Law Commission constitute a significant contribution to the codification and development of international law in this field. The provisions of these articles, if implemented,

would be very helpful in promoting the growth of relations between states, especially in matters relating to trade and economic co-operation.

2. This Bank has consistently supported and encouraged efforts in Latin America toward regional integration. We believe, therefore, that it could be useful for the Commission to study the possibility of making the articles applicable to interested free-trade areas, customs unions and other recognized groupings of States establishing closer economic integration, instead of limiting them to clauses contained in treaties between States.
