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

Report of the Secretary-General

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\* A/43/150.

## I. INTRODUCTION

1. On 11 December 1985, the General Assembly adopted resolution 40/65 entitled "Consideration of the draft articles on most-favoured-nation clauses", the operative paragraphs of which read as follows:

"The General Assembly,

"...

"1. Calls upon Member States, interested organs of the United Nations and interested intergovernmental organizations to review the questions related to the most-favoured-nation clauses and the draft articles thereon so that the General Assembly, at its forty-third session, may decide on the action to be taken on the draft articles;

"2. Requests the Secretary-General to reiterate his invitation to Member States and interested organs of the United Nations, as well as interested intergovernmental organizations, to submit or bring up to date, not later than 31 March 1988, any written comments and observations which they deem appropriate on the substance of the draft articles;

"3. Also requests the Secretary-General to invite Member States to comment on the most appropriate procedure for completing work on most-favoured-nation clauses and on the forum for future discussion, bearing in mind the suggestions and proposals made in the Sixth Committee, including the suggestion to establish a working group of the Sixth Committee after one of the existing working groups accomplishes its mandate;

"4. Further requests the Secretary-General to submit to the General Assembly at its forty-third session a report containing the comments and observations received pursuant to paragraphs 2 and 3 above with a view to taking a final decision on the procedure to be followed;

"5. Decides to include in the provisional agenda of its forty-third session the item entitled "Consideration of the draft articles on most-favoured-nation clauses."

2. On 20 February 1986, the Legal Counsel, in letters addressed on behalf of the Secretary-General to Member States and interested organs of the United Nations, as well as interested intergovernmental organizations, invited comments and observations in response to paragraphs 1, 2 and 3 of General Assembly resolution 40/65.

3. As at 15 August 1988, communications had been received from: Kuwait and the United Nations Industrial Development Organization (UNIDO). These communications are reproduced in the present report. Further communications will be circulated as addenda to the present report.

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## II. COMMUNICATIONS RECEIVED FROM GOVERNMENTS

### KUWAIT

[Original: Arabic]

[14 May 1986]

#### I. The most-favoured-nation clause in relation to customs unions and similar economic associations

1. The International Law Commission did not include an article on customs unions and similar economic associations in relation to the most-favoured-nation clause, leaving it to Member States to take the final decision whether or not to apply it. Our comment on the subject is that the non-applicability of the most-favoured-nation clause with respect to customs unions and similar economic associations is a matter that has long since been decided by international custom and State practice. The custom in that area has been codified, for example, in article 24 of the General Agreement on Tariffs and Trade (GATT) and in the decisions of the Institute of International Law.

2. We therefore propose that there be added to the draft an article providing for an exception to its provisions in favour of States members of customs unions and the like, so that the special treatment agreed upon between the States members of a union does not extend to any third State that is not a member thereof, even where a treaty containing the most-favoured-nation clause exists between such State and a State member of the union.

3. Our intention thereby is to prevent any third State which is not a member of a customs union from enjoying all the advantages of the union that are supposed to be restricted to members, because any customs union or similar economic association is, necessarily, based on a bilateral or multilateral treaty, and, if we were to extend such advantages to another State which was not a member of the union but which had concluded with a member State an agreement containing the most-favoured-nation clause, the raison d'être of customs unions would thus be eliminated and there would no longer be any distinction between a State member of the union and a non-member State.

#### II. Observations on certain draft articles and the recommendations of the Commission on the subject of the most-favoured-nation clause

##### Article 1

4. Article 1 restricts the scope of the draft to most-favoured-nation clauses contained in treaties between States.

5. In this connection, we believe that the draft should cover entities other than States where such entities derive under international law rights and obligations from international agreements containing the most-favoured-nation clause, provided that the draft is compatible with the structure and terminology of the 1969 Vienna

Convention on the Law of Treaties and with the spirit of the Convention on the Law of Treaties between States and International Organizations or between International Organizations, adopted at the Vienna Conference in March 1986.

#### Article 4

6. We agree with the proposal of certain States that the definition in article 4 of the most-favoured-nation clause should be redrafted to read: "The most-favoured-nation clause is a treaty provision whereby a State undertakes to accord another State the treatment provided for in article 5 in an agreed sphere of relations". In the Arabic translation of draft article 4, the phrase "most-favoured-nation clause" is used more than once, leading to unnecessary repetition.

#### Article 9

7. A reading of this article, which consists of two paragraphs, shows that the text of the first paragraph is restricted to the content and excludes the coverage of persons entirely.

8. The second paragraph takes up the question of persons so that the text of the first paragraph is extended to cover both persons benefiting from the most-favoured-nation clause and its material content.

9. We therefore propose that paragraph 2 of article 9 should be deleted, since the text of paragraph 1 contains the required provision and fulfils the purpose. There is no need for a separate paragraph.

### III. Recommendation of the Commission on the conclusion of a convention

10. We support the Commission's recommendation that the draft articles that it has prepared should - following their approval - be incorporated in an international multilateral convention, since such a convention should be the ideal mould in which to cast the articles on the most-favoured-nation clause.

### IV. Procedure to be followed in completing the work and the body to be responsible for its completion

11. We support the proposal by certain States that the draft articles on most-favoured-nation clauses be referred to a working group of the Sixth Committee, which should review those draft articles in the light of the comments and suggestions made by Member States and international organizations, with a view to facilitating arrival at speedy agreement on the provisions of the desired international convention.

III. COMMUNICATIONS RECEIVED FROM SPECIALIZED AGENCIES

UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION

[Original: English]

[14 March 1988]

1. As far as the United Nations Industrial Development Organisation (UNIDO) is concerned, to this date the policy-making organs have not adopted any decision or recommendation on most-favoured-nation clauses. In general, the Organisation has no experience with regard to the application of such clauses. Except for some instances in the field of privileges and immunities of the Organisation, the treaties concluded by UNIDO do not contain provisions having the effect of a most-favoured-nation clause.

2. Thus, the practice of UNIDO may be summarized as follows:

A. Most-favoured-nation clause

(a) Draft Standard Basic Co-operation Agreement between UNIDO and Governments: 1/

Article VII:

"2. The Government undertakes to furnish in kind the following local services and facilities:

"...

"(d) Assistance in finding suitable housing accommodation for international personnel, and the provision of such housing to operational experts under the same conditions as to national civil servants of comparable rank."

B. Clause assimilating the treatment of certain categories of persons performing services on behalf of UNIDO to that of international officials

(a) Draft Standard Basic Co-operation Agreement between UNIDO and Governments:

Article X:

"3. (a) Except as the Government and UNIDO may otherwise agree in project documents relating to specific projects, the Government shall grant all persons, other than Government nationals employed locally, performing services on behalf of UNIDO, who are not covered by paragraphs 1 and 2 above, the same privileges and immunities as are granted to officials under Section 18 or 19, respectively, of the Conventions on the Privileges and Immunities of the United Nations or of the Specialized Agencies, as applicable.

/...

"4. The expression 'persons performing services' as used in articles X, XI and XIV of this Agreement includes operational experts, volunteers, consultants and juridical as well as natural persons and their employees. It includes governmental or non-governmental organizations or firms which UNIDO may retain to implement or to assist in the implementation of UNIDO assistance to a project and their employees. Nothing in this Agreement shall be construed to limit the privileges, immunities or facilities conferred upon such organisations or firms or their employees in any other instrument."

(b) Standard Basic Terms and Conditions Governing UNIDO Projects: 2/

Article IV:

"2. (a) Except as the Government and UNIDO may otherwise provide for in the Project Document, the Government shall grant all persons, other than Government nationals employed locally, performing services on behalf of UNIDO who are not covered by paragraph 1 above the same privileges and immunities as are granted to officials under section 18 or 19, respectively, of the Conventions on the Privileges and Immunities of the United Nations or of the Specialized Agencies, as applicable."

C. Clause assimilating the treatment of the Senior Industrial Development Field Adviser (SIDFA) to that of diplomatic envoys

(a) Draft Standard Basic Co-operation Agreement between UNIDO and Governments:

Article X:

"2. The SIDFA of UNIDO and his staff in the country shall be granted such additional privileges and immunities as may be necessary for the effective exercise of their official functions. In particular, the SIDFA shall enjoy the same privileges and immunities as the Government accords to diplomatic envoys in accordance with international law."

D. Clause assimilating the treatment of different categories of persons

(a) Agreement concluded on 22 October 1986 between the Government of Italy and UNIDO on Basic Terms and Conditions Governing UNIDO Projects envisaged by the Interim Programme for the International Centre for Genetic Engineering and Biotechnology (ICGEB).

Article III:

"1. In respect of the project activities executed within the framework of the present agreement, the Government shall apply to UNIDO, including its organs, its property, funds, assets and its officials and experts on mission, the provisions of the Convention on the Privileges and Immunities of the United Nations, or of the Convention on the Privileges and Immunities of the

Specialized Agencies, as applicable in accordance with article 21 of the Constitution of UNIDO.

"2. For this purpose:

"(a) Representatives of States Members of the Preparatory Committee for the Establishment of the ICGEB and Observers from non-Member States shall be assimilated to representatives of members of UNIDO;

"(b) Members of the Panel of Scientific Advisers to the Preparatory Committee shall be considered experts on mission for UNIDO;

"(c) Consultants employed by UNIDO, as well as trainees, for the purpose of implementing the Interim Programme for the ICGEB shall be considered experts on mission for UNIDO.

"..."

#### E. Most favourable conditions

(a) Draft Standard Basic Co-operation Agreement between UNIDO and Governments:

##### Article XI:

"1. The Government shall take any measures which may be necessary to exempt UNIDO, its experts and other persons performing services on its behalf from regulations or other legal provisions which may interfere with operations under this Agreement and shall grant them such other facilities as may be necessary for the speedy and efficient implementation of UNIDO assistance. It shall, in particular, grant them the following rights and facilities:

"..."

"(e) The most favourable legal rate of exchange;"

(b) Identical provisions are incorporated in Article IV (1) (d) of the above-mentioned Agreement concluded between Italy and UNIDO on 22 October 1986, and in Article IV (1) (e) of the Standard Basic Terms and Conditions Governing UNIDO Projects.

#### Notes

1/ Draft Standard Agreement approved by the General Conference of the United Nations Industrial Development Organization on 12 December 1985 (GC.1/Dec.40).

2/ The Standard Basic Terms and Conditions Governing UNIDO Projects form an integral part of agreements on technical co-operation concluded between UNIDO and Governments in the form of project documents, which may be annexed to Technical Co-operation Trust Fund Agreements between UNIDO and donors of funds.

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