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

Report of the Secretary-General

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* A/38/150.

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. The comments and observations received pursuant to resolution 33/139 were circulated in 1980 in document A/35/203 and Add.1-3.

4. At its thirty-fifth session, the General Assembly, in its resolution 35/161 of 15 December 1980 requested the Secretary-General to reiterate 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 subject. The comments and observations received pursuant to resolution 35/161 were circulated in 1981 in document A/36/145.

5. At its thirty-sixth session, the General Assembly adopted resolution 36/111 of 10 December 1981, entitled "Consideration of the draft articles on most-favoured-nation clauses", paragraph 1 of which read as follows:

> "The General Assembly,
>
> "...
>
> "1. Requests the Secretary-General to reiterate his invitation to Member States, relevant organs of the United Nations, such as the regional commissions and the United Nations Commission on International Trade Law, as well as interested intergovernmental organizations, to submit or bring up to date, not later than 30 June 1983, any written comments and observations which

they deem appropriate on chapter II of the report of the International Law Commission on the work of its thirtieth session, 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 a decision;

and also 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."

6. In pursuance of the above resolution, the Secretary-General by means of letters signed by the Legal Counsel, dated 29 January 1982, reiterated his invitation to Member States, relevant organs of the United Nations, such as the regional commissions and the United Nations Commission on International Trade Law, as well as interested intergovernmental organizations, to submit or bring up to date, not later than 30 June 1983, any written comments and observations on the matters referred to in paragraph 1 of the resolution.

7. As at 14 September 1983, comments and observations submitted pursuant to resolution 36/111 had been received from the following States: Ecuador, Spain and Venezuela. Comments and observations were also received from the World Intellectual Property Organization, a specialized agency of the United Nations.

8. The Council for Mutual Economic Assistance, after considering again the draft articles on most-favoured-nation clauses, reaffirmed its previous comments (A/35/203/Add.1). The European Free Trade Association stated that its earlier comments on the draft articles were still valid (A/36/145). The Organisation for Economic Co-operation and Development indicated that it had no comments or observations to submit on this matter.

9. The present document reproduces the comments and observations mentioned in paragraph 7 above. Further comments and observations that may be forthcoming will be issued as addenda to the present document.

II. COMMENTS AND OBSERVATIONS RECEIVED FROM STATES

ECUADOR

[Original: Spanish]

[11 July 1983]

1. Chapter II of the report of the International Law Commission 1/ begins with a few remarks regarding the codification of international law in respect of the most-favoured-nation clause:

(a) The most-favoured-nation clause and the principle of non-discrimination. On this question, the Commission stated that the most-favoured-nation clause could be considered as a means for promoting the equality of States or non-discrimination, but added that the close relationship between the most-favoured-nation clause and the general principle of non-discrimination should not blur the differences between the two notions. In this connection, the Commission quoted certain articles of the Vienna Convention on Diplomatic Relations, 4/ the Vienna Convention on Consular Relations 5/ and the Convention on Special Missions (General Assembly resolution 2530 (XXIV), annex). Those articles state, inter alia, that discrimination shall not be regarded as taking place where States extend to each other more favourable treatment than is required by the Convention on Diplomatic Relations and where States modify among themselves the extent of facilities, privileges and immunities for their special missions. The Commission concluded that while States were bound to abide by the principle of non-discrimination, they were nevertheless free to grant special favours to other States on the ground of some special relationship of a geographic, economic, political or other nature.

(b) The most-favoured-nation clause and the different levels of economic development. On this question, the Commission referred to a memorandum prepared by the United Nations Conference on Trade and Development (UNCTAD). One section of the memorandum states that to apply the most-favoured-nation clause to all countries regardless of their level of development would satisfy the conditions of formal equality, but would in fact involve implicit discrimination against the weaker members of the international community. The aforementioned UNCTAD report goes on to state that the recognition of the trade needs of developing countries requires that for a certain period of time the most-favoured-nation clause will not apply to certain types of international trade relations. The International Law Commission also took into account General Principle Eight of annex A.I.1. of the recommendations adopted by UNCTAD at its first session, which states that "developed countries should grant concessions to all developing countries and extend to developing countries all concessions they grant to one another and should not, in granting these or other concessions, require any concessions in return from developing countries." On that basis, the Commission found that the operation of the most-favoured-nation clause in the sphere of economic relations with particular reference to the developing countries was not a matter that lent itself easily to codification of international law. It therefore decided to bring to the attention of the General Assembly two proposals for additional articles submitted by one member of the Commission at its thirtieth session. The texts of those proposals are as follows:

"Article A

"The most-favoured-nation clause and treatment extended in accordance with the Charter of Economic Rights and Duties of States

"A beneficiary State is not entitled under a most-favoured-nation clause to the treatment extended by a granting State under an agreement in conformity

with the Charter of Economic Rights and Duties of States if the grant of the benefit of the most-favoured-nation clause is contrary to the object and purpose of such an agreement and

"(i) if the agreement is open to all member States of the international community and is concluded under the auspices of the United Nations or an organization of a universal character belonging to the United Nations family; or

"(ii) if the conformity of the agreement with the principles of the Charter of Economic Rights and Duties of States is subject to review by an organ of the United Nations or an organization of a universal character belonging to the United Nations family." 6/

"Article 21 ter

"The most-favoured-nation clause and treatment extended under commodity agreements

"A beneficiary State is not entitled under a most-favoured-nation clause to the treatment extended by a granting State under an agreement open to all member States of the international community, concluded under the auspices of the United Nations or an organization of a universal character belonging to the United Nations family and the object of which is the economic régime of a commodity, if the grant of the benefit of the most-favoured-nation clause is contrary to the object and purpose of such an agreement." 6/

(c) The most-favoured-nation clause in relation to customs unions and similar associations of States. The Commission dealt with the question whether a most-favoured-nation clause does or does not attract benefits accorded within customs unions and similar associations of States. In that connection, the Commission considered the following text for an additional article proposed by one member:

"Article 23 bis

"The most-favoured-nation clause in relation to treatment extended by one member of a customs union to another member

"A beneficiary State other than a member of a customs union is not entitled under a most-favoured-nation clause to treatment extended by the granting State as a member of the customs union to a third State which is also a member." 7/

After examining that draft article, the Commission concluded that the ultimate decision was one to be taken by the States to which the draft was submitted, at the final stage of the codification of the topic. It should be noted that the Commission has been cognizant of several matters relating to the operation of the

most-favoured-nation clause in the field of international trade, such as the existence of the General Agreement on Tariffs and Trade (GATT), the emergence of State-owned enterprises, the application of the clause between countries with different economic systems, the application of the clause vis-à-vis quantitative restrictions, and "anti-dumping" and "countervailing" duties. Nevertheless, the Commission has attempted to maintain the line between law and economics, so as not to try to resolve economic questions of a highly technical nature, such as those mentioned above, which belong to fields entrusted to other international organizations.

2. The second part of chapter II of the report of the International Law Commission contains a number of draft articles on the most-favoured-nation clause, including the following:

"Article 15

"Irrelevance of the fact that treatment is extended to a third State against compensation

"The acquisition without compensation of rights by the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, under a most-favoured-nation clause not made subject to a condition of compensation is not affected by the mere fact that the treatment by the granting State of a third State or of persons or things in the same relationship with that third State has been extended against compensation." 8/

It is worth noting that the category of unconditional promises or promises conditional on reciprocal treatment or on another kind of compensation can also include the favours extended by the granting State to third States even if the most-favoured-nation clause is not in operation. Similar procedures are provided within the framework of the Latin American Integration Association (ALADI) although the most-favoured-nation clause is not applied. For example, chapter I, article 3, of the 1980 Treaty of Montevideo stipulates that the purpose of the norms and mechanisms of the Treaty, and of those established by the member countries under the Treaty, shall be to develop the Association's basic functions, namely, the promotion and regulation of reciprocal commerce, economic complementation and the development of systems of economic co-operation which stimulate the expansion of markets. Those provisions are subsequently supplemented by chapter II, article 4, of the Treaty, which stipulates that, in order to fulfil the Association's basic functions as provided in article 2, the member countries shall establish an area of economic preferences consisting of a regional tariff preference, agreements of regional scope and agreements of partial scope. The article dealing with the regional tariff preference (art. 5) states that the member countries shall reciprocally grant a regional tariff preference, which shall be applied in relation to the level set for third countries.

"Article 23

"The most-favoured-nation clause in relation to treatment under a generalized system of preferences

"A beneficiary State is not entitled under a most-favoured-nation clause to treatment extended by a developed granting State to a developing third State on a non-reciprocal basis within a scheme of generalized preferences established by that granting State, which conforms with a generalized system of preferences recognized by the international community of States as a whole or, for the States members of a competent international organization, adopted in accordance with its relevant rules and procedures." 8/

We stated earlier that the International Law Commission had taken cognizance of the problem which the application of the most-favoured-nation clause creates in the field of economic relations between States whose economic development is unequal. In this connection, both UNCTAD and GATT have considered this question time and again. UNCTAD, for example, maintains that developed market-economy countries are to accord preferential treatment in their markets to exports of manufactures and semi-manufactures from developing countries and that, at the same time, developing countries will not be required to grant developed countries reciprocal concessions. It should be noted that while UNCTAD is in favour of a general non-reciprocal system of preferences from which all developing countries would benefit, it does not favour the so-called special or vertical preferences, such as those in force between the European Economic Community (EEC) and several African countries which are former French colonies, and the preferential arrangement between the United Kingdom of Great Britain and Northern Ireland and developing Commonwealth countries. UNCTAD does not favour such vertical preferences because, on the one hand, they involve discrimination against developing countries which do not belong to the aforementioned groups and, on the other hand, because reciprocal preferences are accorded to the developed countries.

"Article 26

"The most-favoured-nation clause in relation to rights and facilities extended to a land-locked third State

"1. A beneficiary State other than a land-locked State is not entitled under a most-favoured-nation clause to rights and facilities extended by the granting State to a land-locked third State in order to facilitate its access to and from the sea.

"2. A land-locked beneficiary State is entitled under a most-favoured-nation clause to the rights and facilities extended by the granting State to a land-locked third State in order to facilitate its access to and from the sea only if the subject-matter of the clause is the facilitation of access to and from the sea." 8/

This article is in response to the fact that, at present, approximately one fifth of the members of the international community are land-locked States, and most of them are developing States. The International Law Commission thus found it advisable to adopt a provision on most-favoured-nation clauses in relation to treatment granted to land-locked States. In this connection, the Commission took the view that the rights and facilities extended to a land-locked State by a coastal State for the purpose of facilitating the access of the former to and from the sea could not be attracted by a most-favoured-nation clause in favour of another coastal State. Such preferences constitute an exception serving the legitimate interests of land-locked States which are in a disadvantageous position in international trade in respect of their access to the sea.

"Article 30

"New rules of international law in favour of developing countries

"The present articles are without prejudice to the establishment of new rules of international law in favour of developing countries." 8/

In this connection, the Commission was conscious that, at present, the developing countries are seeking to promote reciprocal trade, with a view to their economic development, by using mechanisms other than those referred to in the draft articles, namely, the generalized system of preferences, preferences granted by developing countries among themselves and multilateral trade negotiations. Such mechanisms might in the future be the subject of new rules of law in favour of developing countries.

3. In general, it can be said that the draft articles on the most-favoured-nation clause are a contribution to the efforts being made within the United Nations to codify international law. The compilation and disposition of rules in this area testify to the need for a legal mechanism to be constructed by the international community in order to facilitate trade and economic co-operation among the various countries of the world, on the basis of the principles of mutual advantage, equality of rights and non-discrimination, which are essential elements in the establishment of a new international economic order.

SPAIN

[Original: Spanish]

[12 August 1982]

1. In accordance with General Assembly resolution 36/111, adopted on 10 December 1981, the Government of Spain is submitting a number of comments and observations on the draft articles on most-favoured-nation clauses adopted by the International Law Commission at its thirtieth session, and on those provisions relating to such clauses on which the Commission was unable to take a decision.

2. Generally speaking, the Government of Spain considers that these draft articles constitute a useful starting-point for both the codification and the progressive development of the relevant norms of international law. It is true that, to a very great extent, draft articles which merely codify do nothing more than gather together rules relating to the law of treaties that are already universally accepted. In the view of the Government of Spain, however, the reiteration and development of such general rules to cover the specific problems raised by the application of most-favoured-nation clauses clearly enhances the certainty of the law. And the latter would also be enhanced if those provisions of the draft which represent progressive development of international law were the subject of a general agreement, whether in their present form or otherwise.

3. Consequently, and without prejudice to some substantive observations set forth below and such as may be made in due course, the Government of Spain would have no particular objection to convening an international conference with a view to the adoption of a convention on the subject, although it is also of the view that the proper timing of such a conference will depend on the number, nature and trenchancy of the observations and comments of other Governments and international organizations. Obviously, if it should appear from those observations and comments that the fundamentals of the draft articles elaborated by the International Law Commission do not command minimal acceptance, further preparatory work would be needed and the immediate convening of an international codification conference would be premature.

4. The first substantive observation on the International Law Commission's draft articles relates to their scope. That scope is unduly restricted, in the view of the Government of Spain, inasmuch as the draft articles apply only to "most-favoured-nation clauses contained in treaties between States" (article 1) and to "the relations of States as between themselves under an international agreement containing a clause on most-favoured-nation treatment to which other subjects of international law are also parties" (article 6). 8/

5. However, it does not emerge from either the letter or the ratio of those articles that the draft applies to relations between a State and an entity, being a subject of international law, which has exclusively assumed the functions in certain areas - particularly in the field of trade - formerly exercised by the member States; for it seems undeniable that, in such circumstances, trade relations are not really between a third State and the States members of the entity itself. Agreements concluded between a State and the European Economic Community (EEC) are a striking example of this. The natural sense of the terms of the Commission's draft article 6, which refers only to the relations of States as between themselves, would not admit of the application of the draft articles to relations between such a State and the entity in question.

6. It should be briefly recalled that EEC has concluded and continues to conclude many non-preferential trade agreements with States and groups of States and that such agreements often contain most-favoured-nation clauses. There is obviously no reason whatever to exclude such agreements, and the relations they create between EEC and third States, from the scope of the draft articles prepared by the International Law Commission. The Government of Spain therefore believes that the

draft articles should include a provision unequivocally making the most-favoured-nation clauses which they contain applicable to agreements of the kind we are concerned about. One possible approach would be a provision to the effect that, for the purposes of the draft articles, the term "State" also includes entities which, by virtue of a delegation of powers made to them by the member States, exercise functions in certain areas falling within the scope of the articles. However, if such a broadening of the term "State" were to encounter difficulties or objections, consideration should be given to other approaches that would meet the concerns expressed here by the Government of Spain.

7. Pursuing a similar line of thought, the Government of Spain would like next to refer to draft article 17, which provides that, for the purpose of the application of a most-favoured-nation clause, the mere fact that the treatment resulting from the clause is extended to a third State under a multilateral or bilateral agreement is irrelevant.

8. In the view of the Government of Spain, this provision presents special difficulties for States joined together, under multilateral treaties, in a customs union or free-trade zone, since it could be interpreted to mean that the most-favoured-nation clause would entail the granting to third States of the advantages which the States members of the customs union or free-trade zone grant to each other.

9. In its report on the draft articles, the Commission acknowledges that it considered the matter but finally agreed, bearing in mind the inconclusiveness of the comments made thereon and the lack of time available, not to include an article on a customs union exception. The report states:

> "It was understood that the silence of the draft articles could not be interpreted as an implicit recognition of the existence or non-existence of such a rule, but should rather be interpreted to mean that the ultimate decision is one to be taken by the States ... at the final stage of the codification of the topic." 9/

10. However, the Government of Spain is of the view that, in order to avoid the uncertainty of the law which would result from the above judgement by the Commission and to prevent an unjustified extension of the benefits created for the States members of the customs union or free-trade zone to non-member States through the operation of the most-favoured-nation clause, such an exception should be clearly provided for at the present stage.

11. The Government of Spain is similarly concerned about draft article 18, which provides that, for the purpose of the application of a most-favoured-nation clause, the mere fact that the treatment resulting from the clause is extended to a third State as national treatment is irrelevant. This provision could be interpreted to mean that the national treatment obligation which the States members of a customs union or free-trade zone establish among themselves is applicable to third States through the operation of the most-favoured-nation clause. Any such extension would be totally unjustified, which makes it all the more necessary to include the exception relating to customs unions and similar associations referred to in the preceding paragraph.

12. With regard to draft articles 23, 24 and 30, which provide exceptions to most-favoured-nation treatment in favour of developing countries, the Government of Spain believes that an objective criterion should be established for assigning a State to that group; for it should be pointed out that at present there is no objective criterion and that, in practice, a system of self-assignment is followed. The result is that all States which have joined the so-called Group of 77 are considered to be developing countries, although some of them have socio-economic characteristics similar to and even, perhaps, a higher per capita income than, those of other States which are not members of the Group. The fact is that among the hundred or so States comprising the Group there is a great variety of situations, levels of development and characteristics, and the Government of Spain therefore considers the radical division of the world into industrialized and developing countries to be wrong.

13. The articles in question should accordingly embody the idea, which is now beginning to take root, that the developing countries as a whole are made up of various interest groups with different and sometimes conflicting aspirations: least developed countries, newly industrialized countries, island developing countries, land-locked countries, petroleum-importing and petroleum-exporting countries, and so on.

14. The Government would also like to point out that, whereas the text of articles 23 and 24 refers to "developing States", the Spanish heading of article 24 and the English and Spanish texts of article 30 use the expression "developing countries". The terminology should be standardized and the expression "developing countries" should always be used, since it is the country and not the State that is developing.

15. With reference to draft article 25, which provides exceptional treatment for frontier traffic, the Government of Spain considers that it is necessary to specify exactly what is meant by frontier traffic, in order to avoid any possible confusion between such traffic and traffic between adjacent countries. Failure to establish this distinction clearly would entail the risk that in certain cases the special régime for frontier traffic might be applied to normal trade between countries with common frontiers, which would be unjustified and undesirable.

16. The Government of Spain wishes to draw attention to the vagueness of a basic concept in the draft articles. The question is to whom most-favoured-nation treatment under a most-favoured-nation clause is to be given. According to draft article 5, it is given to the beneficiary State and also to persons or things in a determined relationship with that State. Draft article 9, paragraph 2, goes a step further by providing that the beneficiary State acquires those rights which fall within the subject-matter of the clause "only in respect of persons or things which are specified in the clause or implied from its subject-matter". 8/ On the other hand, article 10, paragraph 2, makes it a requirement for the acquisition of those rights that such persons or things must belong to the same category of persons or things as those in a determined relationship with a third State which benefit from the treatment extended to them by the granting State, and that they must have the same relationship with the beneficiary State as the persons and things in question have with that third State.

17. The necessary vagueness and generality of the stated criteria and the different solutions which the domestic laws of the States affected may provide in that connection will cause considerable difficulties when the time comes to apply the draft articles, as the International Law Commission in fact acknowledges at various places in its report (para. 67 of the introduction; commentary to art. 5, para. (3); and commentary to arts. 9 and 10, para. (22)). In the view of the Government of Spain, those difficulties highlight the need to establish an effective system for the settlement of disputes, a question on which the Commission decided not to include a provision, although it did decide that the question should be referred to the General Assembly and Member States and, ultimately, to the body which might be entrusted with the task of finalizing the draft articles (para. 69 of the introduction to its report).

18. It is therefore desirable, in the opinion of the Government of Spain, that the draft articles should establish an effective system for the settlement of disputes. In view of the essentially non-political character of the subject-matter of most-favoured-nation clauses, the system should provide, as a last resort, for compulsory submission to an arbitration body or to the International Court of Justice. The Government of Spain accordingly considers the formula proposed by one member of the Commission, which appears in paragraph 68 of the introduction to the report, to be a good starting-point, although it is of the view that whatever system may be established should in any event be secondary. In other words, it should become operative only in the absence of any other agreed provision, in the treaty applicable between the States parties to the dispute, for compulsory recourse to arbitral or judicial settlement.

VENEZUELA

[Original: Spanish]

[14 June 1983]

1. The Government of Venezuela considers that the draft articles on the most-favoured-nation clause prepared by the International Law Commission represent a valuable work of codification.

2. In general, it may be said that the draft articles are acceptable to the Government of Venezuela. Since the most-favoured-nation clause is a conventional provision, it clearly must be considered within the general context of the law of treaties, codified in Vienna in 1969. The 1969 Vienna Convention today constitutes the most authoritative statement on this subject. Consequently, the draft articles, which contain special rules applicable to treaty provisions of a specific type - namely, most-favoured-nation clauses - should be interpreted in the light of the provisions of that Convention. As can be seen, many of the draft articles follow very closely the text of the articles of the Vienna Convention. Nevertheless, in the opinion of the Commission, the articles are intended to constitute an autonomous set concerning the legal rules relating to most-favoured-nation clauses. In addition, the draft articles are residual in character (art. 29): in other words, they apply only in the absence of provisions laid down by the parties.

3. So far as Latin America is concerned, the clause has played an important role, in particular, in connection with regional integration.

4. As long ago as the 1933 Montevideo Conference, the American nations stated that "the principle of equality of treatment stands and most continue to stand as the basis for all acceptable commercial policy". The American States adopted the conditional formulation of the clause, realizing that this was a compromise between most-favoured-nation treatment and the specific reciprocity system. But the concept is still evolving: the developing countries are seeking a formulation which would reflect their own development goals, new rules have to be worked out which will eliminate situations of dependence, promote development and reduce inequalities. The formula adopted by the developing countries is a formula of associations, multilateral unions - in a word, integration. This exists not only in developing countries but also in developed countries; the constituent instruments of these associations define what is meant by "most-favoured-nation clause" and establish the juridical conditions for its application.

5. In addition to these remarks, some comments are given below on specific draft articles.

6. In their existing wording, articles 15 and 16 present major difficulties: article 15 could be open to the interpretation that the clause would entail the extension to third countries of the advantages which the States members of customs unions grant to each other by virtue of their union.

7. In its existing wording, article 16 would imply the extension to third countries of the mutual commitments not to practise discrimination which the States members of the customs union make to each other. The customs union exception, as an exception ipso jure, is confirmed in the doctrine and practice of States. Evidence of established doctrine is provided by the conclusion of the Economic Committee of the League of Nations that "... Customs unions constitute exceptions, recognised by tradition, to the principle of most-favoured-nation treatment" (document C.138.E.53.1929.II, pp. 4 to 14). A similar approach is adopted in the 1936 resolutions of the Institute of International Law; paragraph 7 states:

> "The most-favoured-nation clause does not confer the right:
>
> to the treatment which is or may hereafter be granted by either contracting country to an adjacent third State to facilitate the frontier traffic; [or]
>
> to the treatment resulting from a Customs union which has been or may hereafter be concluded;"

The 1969 resolution states in paragraph 2 (b) that "States to which the clause is applied should not be able to invoke it in order to claim a treatment identical with that which States participating in an integrated regional system concede to one another".

8. As far as practice is concerned, the clearest example is provided by article 24 of GATT, which recognizes the exception in the same way as the clause itself. The exception to the most-favoured-nation clause constituted by the free-trade zone is a world-wide phenomenon and is currently common to many regional groups.

9. To sum up - in the absence of the exception, all the advantages of economic integration systems should be shared with all third States to which member States are bound by treaties containing the most-favoured-nation clause. It would therefore be desirable for the provisions of draft articles 15 and 16 to state clearly in their final wording that they do not affect the rights and obligations established within the framework of activities as established in article 2, and in particular economic unions and customs unions, conducted for or by the members of such entities.

10. With reference to article 21, a formula should be found which will fully protect the interests of the developing countries. It should be pointed out that the objective of economic unions of developed countries is to erect immovable barriers against non-member countries.

11. Unions set up by developing countries have a different objective: to promote the economic and social development of their members. Economic unions of developed countries, on the other hand, are designed to support their markets and to compete with other blocs of equally developed countries. Tariff and other barriers are not disappearing but are tending to multiply.

12. The provisions of article 21, and also those of article 27, should be expanded in order to enable the developing countries to promote the expansion of their mutual trade, through the granting of preferences under bilateral or regional agreements, without being obliged as a result to extend such preferences to developed countries by virtue of the most-favoured-nation clause.

III. COMMENTS AND OBSERVATIONS RECEIVED FROM INTERGOVERNMENTAL ORGANIZATIONS

WORLD INTELLECTUAL PROPERTY ORGANIZATION

[Original: English]

[19 April 1982]

1. We have examined the draft articles that are the subject of chapter II 6/ and they appear to apply only to international agreements between States (art. 1) or, in so far as those clauses exist in international agreements to which other subjects of international law are also parties, then also to the relations of States as between themselves under such an agreement (art. 6).

2. We have examined the treaties among States that are administered by the World Intellectual Property Organization (WIPO) and have not found any "most-favoured-nation clauses" in any of those treaties. We do not feel, therefore, in a position to comment on any of the articles that have been drafted on the most-favoured-nation clauses.

3. However, we do wish to bring to your attention that in the Headquarters Agreement concluded between WIPO and the Swiss Confederation there is a provision that might be termed "the most-favoured-organization clause", which raises questions similar to those of the most-favoured-nation clauses. It is contained in article 6 of the Headquarters Agreement 10/ and extends to the matter of official communications and to the diplomatic couriers and bags. In the latter case also, the application accorded to WIPO would seemingly be that accorded to the diplomatic couriers and bags of States. While we realize that this does not, strictly speaking, fall within the scope of the draft articles on the most-favoured-nation clauses that the International Law Commission has been preparing, we do feel that it would be useful to bring it to your attention, especially should it be contemplated to extend the scope of the draft articles to international agreements concluded by intergovernmental organizations with States that contain most-favoured-nation-type clauses applicable to such organizations or eventually to prepare separate draft articles on such clauses or on "most-favoured-organization" clauses.

Notes

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/ United Nations, Treaty Series, vol. 500, p. 95.

5/ Ibid., vol. 596, p. 261.

6/ Official Records of the General Assembly, Thirty-third Session, Supplement No. 10 (A/33/10), para. 55.

7/ Ibid., para. 57.

8/ Ibid., chap. II, sect.D.

9/ Ibid., para. 58.

10/ Article 6 of the WIPO Headquarters Agreement reads:

"Communications

"1. The Organization shall benefit, in respect of its official communications, from treatment at least as favourable as that which is granted to other international organizations in Switzerland, in so far as it is compatible with the International Telecommunication Convention.

"2. The Organization shall have the right to use codes for its official communications. It shall also have the right to send and receive correspondence by duly identified couriers or bags enjoying the same privileges as diplomatic couriers and bags.

"3. Official correspondence and other official communications of the Organization, when duly identified, may not be subjected to censorship."
