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Agenda Item 78

Report of the International Law Commission on the work of its 66th session
Cluster III

Statement by Bill Campbell
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(Check against delivery)

Mr Chair

As noted in our previous statement, Australia acknowledges the work of the Commission over the past year on a range of topics, many of which are of fundamental importance in international law.

On this occasion, we would like to comment briefly on two topics in the third cluster, namely the provisional application of treaties and the item concerning most-favoured-nation clauses.

Mr Chair

On the first matter, Australia welcomes the second report of the Special Rapporteur, Mr Juan Manuel Gomez-Robledo, on the provisional application of treaties. Australia shares the Special Rapporteur's view that the task of the International Law Commission is neither to encourage nor discourage the provisional application of treaties, but rather to provide guidance to enhance understanding of this mechanism. In that regard, Australia appreciates the Special Rapporteur's substantive analysis of the legal effects of the provisional application of treaties.

Mr Chair

Australia notes the views expressed by Members on the value or otherwise of a comparative study of domestic provisions relating to the provisional application of treaties.

Individual States decide whether to provisionally apply treaties in light of the purpose, scope and content of the specific treaty, as well as domestic legal and political considerations. For example, Australia has adopted a dualist approach to the implementation of treaties under which treaties have no effect in Australian domestic law until incorporated formally by legislation. Accordingly, Australia's general practice is not to provisionally apply treaties – but there are exceptions, for example bilateral air services agreements. In short, for each State, domestic law, including constitutional law, is key to the provisional application of treaties by that State.

Australia notes also the views expressed by Members of the ILC as to whether the decision to provisionally apply a treaty might be characterised as a unilateral act. Australia agrees with the view that the source of the obligation remains the treaty itself and not the declaration of provisional application.

Australia welcomes the Special Rapporteur's continued work on this topic, including consideration of the provisional application of treaties by international organizations and the different consequences arising from the provisional application of bilateral as opposed to multilateral treaties.

Mr Chair

Moving to the matter of most-favoured-nation clauses. Australia welcomes the progress made in the discussion of MFN clauses as well as the draft final report based upon a comprehensive analysis undertaken by the Study Group's chair, Professor Donald McRae. We reiterate our thanks for the work of Professor McRae and the Study Group.

Mr Chair

We concur with the conclusion of the Study Group as to the importance and relevance of the Vienna Convention on the Law of Treaties as a point of departure in the interpretation of investment treaties, including MFN clauses.

Australia supports the emphasis of the Study Group on analysing and contextualising case-law, the prior work undertaken by the ILC and on contemporary practice relating to MFN clauses.

Finally, Australia very much supports the Study Group's objective of providing the international community with an outcome on MFN interpretation that has practical utility for policy makers and those involved in the investment field.

Thank you, Mr Chair