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Chairman: Mr. CALLE Y CALLE (Peru)

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AGENDA ITEM 121: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS
THIRTY-THIRD SESSION (continued)

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The meeting was called to order at 3.15 p.m.

AGENDA ITEM 121: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-THIRD SESSION (continued) (A/36/10 and Corr.1; A/36/428)

1. Mr. MAKAREVICH (Ukrainian Soviet Socialist Republic) said that the annual discussion on the report of the International Law Commission provided a valuable opportunity for the expression of a wide variety of views on the topics under consideration by the Commission and for the formulation of generally agreed recommendations to guide the Commission in its future work. It should be stressed that a responsible approach to the progressive development and codification of international law was the natural concomitant of a concern to enhance the effectiveness of international law as a means of strengthening peace.
2. Referring first to the important topic of succession of States in respect of matters other than treaties, he said that his delegation was gratified to note that the Commission had concluded its second reading of the draft articles on succession of States in respect of State property, archives and debts. In their new form the draft articles were a considerable improvement on their predecessors, and could form the basis for a future convention. A particularly valuable feature of the new version was the fact that the scope of the articles had been more precisely defined, thus improving the prospects for both the implementation and the correct interpretation of future treaties and for the settlement of any disputes that might arise.
3. Three new draft articles - articles 4, 5 and 6 - had been added. Article 6 was especially valuable in that it was based on the assumption that the rights and obligations of natural or juridical persons which were established under a particular system of internal law could not be subject to regulation under international law, and could not, therefore, be the subject matter of a future convention. The article established that succession of States could not in itself affect the rights and obligations of such persons. In the case of article 4, he particularly welcomed the fact that its wording was identical to that of the corresponding provision in the 1978 Vienna Convention on Succession of States in Respect of Treaties.
4. The articles in part I concentrated on those provisions which were crucial to the draft as a whole, and had been formulated in accordance with the most generally accepted norms governing relations between States in respect of succession. It was therefore logical, and more in keeping with the content of the draft articles, that the title of part I had been changed to "General provisions".
5. The draft articles in part II had undergone little modification. The most important changes were in articles 14 and 17. Article 14 established criteria regarding the circumstances in which immovable State property should pass to a successor State. The major change in the article on dissolution of a State (article 17 in the new version) was in paragraph 1, subparagraph (b), which in

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its new version affirmed that immovable State property of the predecessor State situated outside its territory should pass to the successor States in equitable proportions.

6. As in the case of part I, the new title of section 2 of part II - provisions concerning specific categories of succession of States - was more appropriate than its predecessor. The previous title had been "Provisions relating to each type of succession of State", but the new term used by the Commission ("specific categories of succession") was fully justified because the categories envisaged in the draft articles differed from those in the 1978 Vienna Convention, and because there was no general consensus on the meaning of the term "types of succession" of States.

7. The most noteworthy feature of the new version of part III of the draft, relating to State archives, was that the articles had been grouped together in a separate part of the draft. The Commission had taken into account the fact that State archives were a distinctive type of State property and that special rules should govern succession in their case. The definition of "State archives" in article 19 satisfactorily defined the scope of the articles in part III. Article 24 dealt with a very important aspect of State succession, namely preservation of the unity of State archives; the article was based on recognition of the fact that many of the situations which might arise in connexion with State archives were of a sensitive nature, affecting as they did the interests of States, and could therefore not easily be resolved through the application of uniform rules. In general, however, the rules established in part III were both satisfactory in their wording and susceptible of universal application.

8. The marked improvement in the formulations of the draft articles in part IV of the draft, on State debts, reflected the extensive work carried out by the Commission at its thirty-third session. The most conspicuous progress was to be seen in the definition of "State debts"; the Commission had rightly decided to eliminate subparagraph (b) of article 16 in the previous version of the draft (article 31 in the new version) on the ground that it was not pertinent to the issue of State succession and was incompatible with the generally accepted view that an obligation under contemporary international law was an obligation binding upon the subjects of international law. It had been argued that the elimination of that provision would prejudice the interests of both natural and juridical persons, but such an objection was unfounded. In any case, the provision could have no practical application in that, in the event of a dispute, natural and juridical persons unlike States, could not have recourse to international settlement procedures such as diplomatic negotiations, intermediaries or the International Court of Justice.

9. His delegation welcomed article 33, which provided that the date of the passing of State debts should be the date of the succession of States. It also agreed with the Commission's decision to eliminate paragraph 2 of article D in the previous draft (now article 37), inasmuch as that paragraph drew a false analogy between State property and State debts in respect of succession in cases involving the uniting of two or more States.

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10. In general, the draft articles on succession of States as adopted in second reading were satisfactory in that they conformed to the fundamental principles of international law and provided a sound basis for future work on the drafting of a convention.

11. With regard to the question of treaties concluded between States and international organizations or between two or more international organizations, he said that, while the Commission's report showed that considerable attention had been devoted to the subject at the thirty-third session, the regrettable fact remained that the Commission had not succeeded in carrying out a second reading of all 60 draft articles. Of those considered (articles 1 to 26), a number raised important matters of principle and had been the focus of widely differing interpretations by members of the Commission. That was particularly true of articles 19 to 23, which dealt with reservations. The main drawback of the articles in their original form had been that they accorded the same status to States and to international organizations in the procedure regarding reservations, an approach which had rightly been criticized by many delegations. The new text had eliminated that short-coming by establishing the rule that an international organization could formulate reservations on the same basis as a State, but that particular rules applied in respect of the procedure for acceptance of and objection to reservations. Thus, paragraphs 1 and 2 of article 19 established parallel conditions for the formulation of reservations by an international organization and a State. The comparable provisions of the Vienna Convention on the Law of Treaties had left open the question of reservations to bilateral agreements, and the new draft articles were an improvement in that respect in that they took into account the fact that most of the agreements to which international organizations were parties were bilateral.

12. Article 20 determined that different rules applied to States and to international organizations in respect of acceptance of and objection to reservations. While paragraph 4 admitted the possibility that States could tacitly accept reservations, the article did not extend that provision to international organizations. Nor, quite rightly, did it establish a specific time-limit for the acceptance of reservations by international organizations, since the competent bodies of the various organizations held their sessions at different intervals and no uniform time-limit would therefore be applicable. The question was one best resolved through appropriate provisions in individual treaties concluded by an international organization.

13. It had to be stated, with regret, that the Commission had been unable to make any material progress in its work on the subject of State responsibility. The five articles in part 2 of the draft which dealt with content, forms and degrees of international responsibility of States for internationally wrongful acts, were really only the beginning of the work on that part of the draft. However, that did not exclude the possibility and perhaps it even emphasized the necessity of the question being broached during discussion of the Commission's report in the Sixth Committee, so that the Commission could take the views of States into account. In that connexion, his delegation thought it should reiterate a number of considerations.

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14. The first was the important role of State responsibility in solving the problems of strengthening international law and order, the topicality of which was growing in the current international situation. Secondly, a thoroughly well thought out approach to the formulation of articles relating to the various aspects of the problem was essential so that the rules prepared on State responsibility really would serve to enhance the effectiveness of the institution of responsibility in strengthening international law and order. Paramount attention must be paid to the most important questions and to determining which principles should be taken as the basis of the approach to formulating the group of articles relating to any particular problem of responsibility. His delegation considered that the Commission should work first of all to formulate the articles on responsibility for international crimes, since that was the central problem of international State responsibility for internationally wrongful acts, and that the Committee should make appropriate recommendations to the Commission in that regard. As for the general approach to the matters covered in part 2 of the draft, they should be considered from the angle of the origin of the rights of the injured State and, possibly, of all other States in cases of the violation of obligations of an ergo omnes nature.

15. In connexion with the Commission's discussion of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, it had to be emphasized that it would be wrong in principle and contrary to practice to proceed from the obligation of States to act or to observe discretion within the limits of their jurisdiction so as not to harm other States or their citizens. In the first place, the "obligation of discretion" simply did not exist as a legal obligation. Secondly, if such an obligation were taken as a primary rule, its violation would exceed the framework of the topic and entail responsibility for an internationally unlawful act.

16. He noted with approval that the Commission was continuing to formulate articles on the topic of jurisdictional immunities of States and their property and that the draft articles considered at its thirty-third session, relating to the obligation to guarantee the immunity of a foreign State and the exceptions to that obligation resulting from a State's explicit or implied consent to foreign jurisdiction, were wholly in agreement with the basic principle of the immunity of a State and its property from foreign jurisdiction. That principle, which was firmly established in international law, must be made the foundation of the Commission's further work on the problem. It was very important that the formulation of all the articles, without exception, should not create loopholes for the violation of that basic principle.

17. His delegation noted with pleasure that the Commission had made a successful start on the work relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The facts of international life indicated that the problems involved in ensuring strict observance of the rules of diplomatic law and increasing their effectiveness

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were not only topical but demanded additional efforts by the international community. The formulation of an international convention on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier had to be considered an important and useful means to that end.

18. Provisions of existing multilateral conventions and regional and bilateral agreements regulated many of the questions involved but it appeared expedient to formulate and adopt a convention devoted exclusively to the subject. In the first place, it was very important that the rules should be concentrated in one convention of a universal nature. Secondly, the process of drafting of a convention would provide an opportunity to perfect appropriate general rules on the basis of those already existing, by systematizing them and stating them more precisely. Thirdly, that process would make it possible to ascertain more accurately the needs for new rules which unquestionably existed in practice.

19. His delegation approved of the Commission's proposal for the drawing up of a draft convention, since that was both timely and topical. It therefore thought that, since previous General Assembly resolutions on the Commission's reports had given no precise instruction on the matter, the Committee should support the proposal and include in the draft resolution for the current session a special paragraph with a direct mandate requesting the Commission to formulate a convention on the subject.

20. In conclusion, his delegation considered that the results of the Commission's 1981 session had been positive and hoped that the Commission would continue to promote the progressive development and codification of international law in its future work.

21. Mr. FLEISCHHAUER (Federal Republic of Germany), commending the International Law Commission on the work of its thirty-third session, said that the Commission had been wise to concentrate on the completion of the second reading of the draft articles on succession of States in respect of State property, archives and debts. His delegation welcomed the completion of work on those articles, a task that could not have been achieved without the dedication of the Special Rapporteur for the topic, Mr. Bedjaoui.

22. His delegation did not oppose the Commission's view regarding the value of parallel treatment of those draft articles and the articles on succession in respect of treaties. Nor did it object to the Commission's recommendation that an international conference of plenipotentiaries should be convened to study the draft articles on succession of States in respect of State property, archives and debts and to prepare a convention on the subject. Such a conference would be the proper place for detailed comments on individual articles.

23. His delegation was pleased to see that those draft articles had been merged into one coherent set of articles. It agreed with the positioning of the articles on State archives immediately after the part devoted to State property, but as a separate part. It also agreed with the clarifications introduced in the title of the draft articles.

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24. The Commission acknowledged the desirability of maintaining some degree of parallelism between that set of draft articles and the 1978 Vienna Convention on Succession of States in Respect of Treaties. However, the pertinent parts of the draft articles deviated in certain respects from the 1978 Vienna Convention. The reasons for that deviation were not always clear, but it was possible that further work on the draft articles might convince his delegation of the practical need for differentiation.

25. The principle of equity played an important role throughout the draft. That seemed appropriate, particularly in view of the frequent discrepancies in State practice. His delegation fully agreed with the Commission when it emphasized that equity, in addition to being a supplementary element throughout the draft, was also used therein as part of the material content of specific provisions and not as the equivalent of the notion of equity as used in an ex aequo et bono proceeding, to which a tribunal could have recourse only upon express agreement between the parties concerned (A/36/10, para. 85). The application of the articles referring to equity as the balancing factor presupposed either that the parties concerned reached agreement on what "equity" meant to them in the individual case or that a third party decided on that matter. There was a danger that, without third-party decisions as part of the mechanism for the peaceful settlement of disputes, it would be difficult to arrive at solutions in certain situations. It would therefore seem appropriate to include provisions on the peaceful settlement of disputes in an eventual convention, provisions which should be more stringent than those of the 1978 Vienna Convention relating to compulsory jurisdiction by the International Court of Justice or by arbitral tribunals.

26. The newly introduced articles 3 and 4 were modelled on the 1978 Vienna Convention. That seemed appropriate. The United Nations Conference on Succession of States in Respect of Treaties had devoted considerable time and effort to the preparation of the two corresponding articles of the 1978 Vienna Convention. The solutions found for the two articles of that Convention made them appropriate models for the corresponding provisions in the draft articles under consideration.

27. The time factor played a role not only in the application of the draft articles, but also in the determination of the date of the passing of property, archives and debts. Articles 10, 21 and 33 referred in that respect to the date of the succession of States. That rule was simple and, as such, hardly objectionable. Whether it was practical remained to be seen.

28. The inclusion of the new article 6 was to be welcomed, because it made it clear that no argument a contrario could be drawn from the absence of references to private property, rights and interests. Another question was whether article 6 was sufficient; that question was closely related to the structuring of article 31. There the Commission had omitted the reference to State debts owed to creditors other than States, international organizations or other subjects of international law. In compensation, the Commission had offered the new article 6. His delegation understood the reasons that had led the Commission to

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the definition of "State debt" contained in article 31. The solution adopted by the majority of those who had taken part in the vote in the Commission, though not without logic, disregarded the fact that, from the legal standpoint, it was internationally accepted that any natural person was capable of constituting the basis of a relationship in international law, and that, in international relations, international rights existed side by side with internationally protected rights, particularly in the context of diplomatic protection (A/CN.4/345/Add.1, para. 128). In spite of article 6, his delegation would therefore have welcomed the inclusion in article 31 of a paragraph extending the definition of "state debt" to cover "any other financial obligation chargeable to a State".

29. The Commission had decided not to draft general provisions on the question of "odious debts", because the rules formulated for each type of succession of States might well settle the issues raised by that question (A/36/10, p. 175, para. (43)). His delegation fully shared that view and would warn against the inclusion of a specific rule on odious debts.

30. His delegation was grateful to the Commission for its careful consideration of the problem created by the fact that the passing of State debts affected not only the legal position of the predecessor and successor States, but also that of creditor third States. The passing of State debts very often created a triangular relationship in which the respective interests were not necessarily in harmony. At first sight, and subject to further reflection, his delegation tended to agree with the solution proposed in article 34, paragraphs 1 and 2. It did so, however, on the understanding that article 34 laid down a new rule, essentially one belonging to the sphere of the progressive development of international law. The rule in article 34 could not, in his delegation's view, apply to cases where a creditor third State was not a party to the convention on State property, archives and debts.

31. His Government had considered whether article 34 made it desirable to redraft and enlarge article 12 on the same basis. That question had arisen because part II did not exclude debt-claims from the notion of property, rights and interests. In other words, as far as a creditor third State was concerned, articles 12 and 34 dealt with the same legal relationship, viewed, however, from the point of view of the debtor in article 34, and from that of the owner/creditor in article 12. His Government had, temporarily, come to the conclusion that the difference in point of view justified a difference in drafting between the two articles. The problem, however, definitely needed further study.

32. The particular interests of newly independent States were reflected in articles 36 and 14. There again, the Commission had had to advance into the field of the progressive development of international law. The new rule, laid down in article 36, appeared at first glance to be in line with the so-called "clean slate rule", as contained in the 1978 Vienna Convention. However, the principle of State debts must be viewed in connexion with the rules on the passing of State property, as laid down in article 14. Article 36 would then be

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interpreted as meaning that a newly independent State would "inherit", so to speak, the property left by its predecessor, while being freed from the financial obligations. It was doubtful whether that benefit to the successor State had been intended when the "clean slate rule" had first been agreed upon. As appeared from the wording of the last part of article 36, paragraph 1, and from the commentary to article 36 (A/36/10, p. 240, para. (64)), the difficulty inherent in the basic position adopted in article 36, paragraph 1, had been clearly seen by the Commission. His delegation, however, still had difficulties in that respect. In particular, it was not convinced that the basic position adopted by the Commission and the general principles cited by it in paragraph (63) of that commentary justified the exclusion of a greater degree of flexibility, such as the reference to equity in the context of decolonization. In that connexion, reference was made in article 36, paragraph 2, and article 14, paragraph 4, to the principle of the permanent sovereignty of every people over its wealth and natural resources. According to those two paragraphs, agreements between the predecessor State and the newly independent successor State did not infringe that principle. The formulation chosen by the Commission seemed to go quite far in establishing an infringement of the treaty-making power of States. The Commission thus seemed to have ventured into complicated legal issues which were situated outside the scope of the draft articles on State succession. In that connexion, the representative of Jamaica had made extremely useful comments. The Federal Republic of Germany took the view that the two paragraphs needed re-examination, at least with respect to drafting.

33. His remarks concerning some of the outstanding points of the draft articles on succession of States in respect of State property, archives and debts indicated that the conference recommended by the Commission would have to be well prepared. The setting of the date should therefore be deferred until 1982, and, in any case, the convening of the conference should take place only after a reasonable amount of time had elapsed, so that States could continue studying the draft articles.

34. Another important topic before the Commission related to treaties between States and international organizations. The Commission had adopted draft articles 1 to 26 in second reading. Several additional provisions had been thoroughly debated and forwarded to the Drafting Committee. The Commission had thus made definite progress. His delegation particularly welcomed the fact that the draft articles had been even more closely patterned on the 1969 Vienna Convention on the Law of Treaties, and that, at the same time, they contained largely improved solutions to the particular problems of substance. As far as articles 1 to 26 were concerned, almost all the unnecessary deviations from the 1969 Vienna Convention that had been criticized by his delegation and others had been eliminated in the second reading. The equal footing of States and international organizations, which was the logical corollary to the admission of international organizations as contracting parties to treaties on the basis

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of the principle of equality, had been essentially upheld in articles 1 to 26. Specifically, the provisions relating to the formulation of reservations and to the treatment of reservations made by others no longer implied discrimination against international organizations, with one exception, namely, the lack of a provision parallel to article 20, paragraph 3, of the 1969 Vienna Convention. His delegation welcomed the fact that international organizations had been included, in principle, in the liberal régime of reservations of the Vienna Convention.

35. While making a generally positive assessment of the Commission's work on the topic, his delegation regretted that some suggestions had not been followed. It did not seem necessary to create new notions in article 7 to designate the full powers of international organizations. Furthermore his delegation failed to see the need for the term "act of formal confirmation" instead of "ratification"; the designation in article 16, paragraph 2, appeared awkward and unwieldy. It was quite possible to designate instruments of international law for States and international organizations in the same terms. The new terminology did not conform to current practice.

36. His delegation trusted that the approach that had guided the Commission at its thirty-third session would prevail when the second reading was resumed. The Federal Republic of Germany was looking forward, in particular, to the final shape of article 36 bis, an article whose legal foundations the Commission had examined and defined in its thorough deliberations on part II, section 4. His delegation hoped that the Commission would be able to conclude the second reading in 1982. The Commission would once more be faced with some intricate questions arising from the peculiarities of international organizations as contracting parties to treaties, and from the different position of such organizations before the International Court of Justice. It was imperative to put international organizations, as far as the subject-matter warranted, on the same footing as States in respect of the conclusion and implementation of treaties.

37. In his delegation's view, the work on State responsibility was perhaps the most important topic currently under discussion by the Commission. In the long run, the work of the Commission on that topic might well prove to be as important as or even more important than its earlier work on the law of treaties. His delegation was pleased to note that the Commission seemed to be proceeding along the lines laid down in the two reports so far submitted by the current Special Rapporteur for the topic. It would support the idea of an article linking part 1 and part 2 of the draft (A/36/10, para. 154), and was basically in agreement with the five articles as proposed. The question of where the first three articles should ultimately be placed, should be left open for the time being. His delegation hoped that the Commission would arrive at a formulation of article 5 that was more accessible to the unprepared reader than the existing wording. It wished to urge the Commission, with its new membership, to continue the work on that topic with great care and on the basis of the structure outlined for future work in the two reports already submitted.

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38. There had been very intense debate in the Commission on the complex question of international liability for injurious consequences arising out of acts not prohibited by international law. The Commission's work was made even more complex by the proximity of the topic to that of State responsibility. The work did not seem to be far enough advanced to warrant substantive comments. His delegation saw, however, the importance and necessity of the work initiated by the Commission under the guidance of the Special Rapporteur for the topic. With ever-increasing frequency, States were engaging in hazardous activities which could cause damage beyond their borders, a fact which highlighted the interdependence of States. His delegation wished to encourage the Commission, with its new membership, to continue the work on that topic and trusted that it would adhere to the cautious approach followed thus far. The comments made by the Special Rapporteur at the 43rd meeting of the Sixth Committee had been extremely useful.

39. With respect to the jurisdictional immunities of States and their property, his delegation had felt a certain uneasiness in reading the report on the debate and the texts tentatively submitted to the Commission by the Special Rapporteur for the topic. His Government was of the opinion that international law, while by no means prohibiting the granting of absolute immunity, had been adopting, more and more, the functional approach. General international law currently required States to grant immunity to foreign States and their property in respect of all activities connected with official functions. On the other hand, the modern trend of international law was to include business activities of foreign States within the competence of the domestic courts. That was the trend in the Federal Republic of Germany and many other countries. Draft articles 7 and 8, submitted to the Commission at its thirty-third session, seemed to go in the opposite direction, by implying that the underlying principle was absolute immunity, from which deviations were possible only with the consent of the State concerned. Such an approach would not be acceptable to his delegation. While consent played an important role in all cases where immunity had to be granted on account of official activities, consent could not be the overriding principle in all cases involving foreign States and their property. Articles 7 and 8 therefore required much additional consideration by the Commission.

40. His delegation had favoured the inclusion in the Commission's agenda of the topic relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. It felt that the existing rules should be strengthened, particularly with respect to the unaccompanied bag. It was therefore grateful to the Commission and the Special Rapporteur for the topic, for the attention they had paid to the questions involved. It would, however, caution the Commission against over-ambition. It shared the concern of some members of the Commission that the establishment of one set of rules to cover all official communications might detract from the protection accorded to such communications by current law (A/36/10, para. 246).

41. There were winds of change in the field of international law. The international community was continuously calling for the codification of law, for the dynamic

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evolution of international law and for its extension to new activities and areas. The International Law Commission should not disregard those winds of change. If it did, it would be unable to continue occupying its high place in the international law-making process.

42. Nevertheless, both the Commission and the Sixth Committee should be aware that the sources of international law were still, by and large, those laid down in Article 38 of the Statute of the International Court of Justice. Nor should it be forgotten that the Commission had gained its place and its general recognition by approaching the codification and progressive development of international law in a generally balanced manner. In the twilight area surrounding international customary law, it had been guided by careful, but not over-restrictive assessments of practice and newly-emerging legal conviction. At the same time, the Commission had been aware of the danger of purely speculative definitions of new rules. The general acceptance enjoyed by its work on such topics as the law of treaties, the law of diplomatic relations and the law of consular relations testified to international recognition and justified the method chosen. The Sixth Committee should see to it that the Commission's working conditions were satisfactory. More importantly, the Committee and the Commission should see to it that the Commission was seized of genuinely important topics which were accessible for codification and progressive development, while obviating the need for the Commission to intrude into the field of speculative definition of new rules. The basic methodological approach which the Commission had developed over the years should not be abandoned. In that connexion, the representative of New Zealand had made many useful observations.

The meeting rose at 4.35 p.m.