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SUMMARY RECORD OF THE 22nd MEETING

Chairman: Mr. GASTLI (Tunisia)

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The meeting was called to order at 10.45 a.m.

AGENDA ITEM 129: REPORT OF THE AD HOC COMMITTEE ON THE DRAFTING OF AN INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING AND TRAINING OF MERCENARIES (continued) (A/38/43, A/38/106-S/15628, A/38/135-S/15678, A/38/327-S/15911, A/38/432-S/15992, A/38/171-S/15944 and A/38/507-S/16044)

1. Mr. SZEKELY (Mexico) said that his delegation proposed to spell out some of the measures to which he had referred earlier in connection with the question of the non-use of force in international relations, because it considered that they were definitely linked with the item on mercenaries. Mercenaries were one of the many indirect instruments used by the parties to a conflict for the unlawful use of force against a State. In many parts of the world there were conflicts in which, in addition to the regular troops of the belligerents, or Government troops against rebels or insurgents, a variety of armed groups of undetermined origin and purpose were involved.

2. Consequently, there was no doubt that the need to enhance the effectiveness of the principle of non-use of force in international relations was closely linked to the question of mercenaries, and it was inadmissible that mercenaries should be used as a means of evading compliance with the international legal norm of jus cogens which prohibited the use of force.

3. His delegation wished to collaborate with the international community in the drafting of a convention on the prevention and punishment of crimes committed by mercenaries. To that end, it had studied the documents prepared by the Sixth Committee and the report of the Ad Hoc Committee, and had reached the conclusion that the best way to do the work was to set forth Mexico's position in an informal document which, in addition to stating the views of his own delegation, would endeavour to reflect those of other States. Special attention had been paid to the contributions of the French and Nigerian delegations and to those of the Chairmen of the Working Groups of the Ad Hoc Committee which, taken together, constituted the foundations on which a convention on the question of mercenaries should be built.

4. Although it appreciated the work already accomplished his delegation was concerned that some of the comments and observations in the latest report of the Ad Hoc Committee (A/38/43) reflected an approach which, perhaps inadvertently and as the result of a justified but excessive desire to safeguard the sovereignty and jurisdiction of States, could be interpreted as protecting mercenaries and States using mercenaries. One example was the excessive requirements and restrictions for defining a mercenary.

5. The embodiment of such an attitude in the convention would eventually make it inapplicable and consequently ineffective. An important approach adopted by his delegation in its document was to resist that tendency by adopting a broader criterion encompassing any manifestation of the phenomenon related to mercenaries,

(Mr. Szekely, Mexico)

in order to prevent and suppress it, and by applying the provisions of the convention not only to mercenaries but also to any other person taking an active part in the criminal offences being described.

6. His delegation had requested that the document be distributed as an official document so that the Sixth Committee could transmit it to the Ad Hoc Committee; at the same time, as proof of its interest in the subject, his delegation was announcing its intention to request the Ad Hoc Committee to allow Mexico to participate in its work as an observer.

7. In the informal document it had prepared, his delegation attempted to define the characteristics of a mercenary without allowing them to be emasculated by excessively strict qualifications. Also, greater emphasis was placed on the specific obligations of States when the latter took an active part, directly, indirectly or through complicity, in the commission of criminal offences which should be punishable under international law. In some cases, responsibility should be attributed to the conduct of the State as the moving force behind mercenaries.

8. The basic structure of the various draft articles which had so far been dealt with had been maintained but his delegation's paper covered the definition of mercenaries in armed conflicts and other situations, without prejudice to the provisions of Additional Protocol I to the Geneva Conventions of 1949. The Mexican draft defined acts prohibited by the convention in relation both to mercenaries and any other physical or moral person, including States parties. In addition, there was a chapter on international co-operation for that purpose and before the final clauses there were articles relating to international responsibility and the peaceful settlement of disputes.

9. In view of the stage the Ad Hoc Committee had reached in its work, his delegation considered that it was no longer possible to separate it into two working groups since a number of questions were so closely intertwined that, for the sake of future effectiveness, the work should be continued on the basis of an integrated approach in the plenary of the Ad Hoc Committee.

10. There was still quite a long way to go, and his delegation was prepared to spare no effort to achieve the desired objective. In that connection, the proposal of Judge Elias, of the International Court of Justice on the need to establish an international criminal court to judge the crimes of mercenarism was of special interest and the international community should be prepared to develop that aspect of international law on mercenaries.

11. In conclusion, he said that in the reforms of Mexico's criminal legislation now being prepared, many aspects relating to individuals acting as mercenaries were dealt with in detail.

12. Mr. ROBINSON (Jamaica) acknowledged that the difficulties and complexities of the legal and political issues involved in the drafting of a convention on mercenaries required a reasonable degree of tolerance and patience on the part of

(Mr. Robinson, Jamaica)

the international community. The report of the Ad Hoc Committee (A/38/43) showed that the Committee was still debating a conceptual and practical problem: how to decide what constituted a mercenary and how to come to a definition of to the kinds of activity which the convention ought to prohibit.

13. Article 47 of Additional Protocol I to the Geneva Conventions of 1949 already contained a definition of a mercenary and several countries argued that the convention that was being drafted should not in any way interfere with that definition. At the same time, an approach which would leave that definition untouched did not mean that the convention should be silent on the situations to which the definition in Protocol I applied. There seemed to be a consensus that the convention should apply both to situations covered by the definition in the Protocol and to other situations.

14. It was important to note that the situations covered by the definition in Additional Protocol I were not necessarily limited to cases of international armed conflict. The main purpose of the convention was to outlaw certain activities of mercenaries. Neither the four Geneva Conventions nor the Protocol regarded the activities of a mercenary as criminal, since the main purpose of the definition in Additional Protocol I was to deny a mercenary the legal status of combatant or prisoner of war.

15. It would seem desirable, therefore, for the convention to preserve the definition of a mercenary given in Additional Protocol I but also to add penal sanctions against the activities of mercenaries. The question was what activities should be prohibited in terms of that definition.

16. In that regard, it should be noted that the definition in Additional Protocol I was active as well as passive, since it not only defined a mercenary according to whether he was or was not a member of the armed forces of a party to the conflict but also identified him in terms of the activities which he carried out.

17. Accordingly, the definition in the instrument could be regarded as a self-contained unit which the convention should simply make use of, applying in addition penal sanctions against the activities carried out by mercenaries in the wider context of the situations of armed conflict defined in article 1, paragraph 4, of Additional Protocol I.

18. No attempt should be made to build on that definition, since it might unnecessarily upset the régime to which the definition in Protocol I was subject. The ambit of the activities of mercenaries included in it was already very wide.

19. It followed from what he had said that his delegation had some reservations about article 5 in document A/AC.207/1983/CRP.5, which provided that it should be prohibited for a mercenary, as defined in articles 1 and 2, to commit any of the acts specified under article 3. The difficulty was that, if an approach was to be adopted that did not disturb the integrity of the régime to which the definition in Additional Protocol I was subject, it would have to be acknowledged that some of

(Mr. Robinson, Jamaica)

the activities enumerated in article 3 might not in strict terms be consistent with that régime. On the other hand, that régime related not only to armed conflict in the more traditional sense described in article 2, common to the four Geneva Conventions, but also to armed conflict in the wider sense of article 1, paragraph 4, of Protocol I. Despite the difference in the situations applicable to articles 1 and 2, article 5 in document A/AC.207/1983/CRP.5 outlawed the same activities by mercenaries both within and outside a situation of armed conflict.

20. That contradiction could be avoided if the convention simply referred to that part of the definition in Additional Protocol I which identified an activity on the part of the mercenary, i.e., paragraph (b), and made the carrying out of that activity criminal. Paragraph (b) referred to a mercenary as a person taking a direct part in hostilities. The convention could adopt a drafting technique which would ensure that the term "hostilities" was coterminous with both the traditional and the wider meaning of the term "armed conflict" used in the four Geneva Conventions of 1949 and in Additional Protocol I. That would make it unnecessary to define the activities constituting "hostilities" as far as mercenaries were concerned.

21. It should also be noted that, although article 5 in document CRP.5 related to mercenaries, as defined in articles 1 and 2, who committed any of the acts specified in article 3, the latter article limited the definition of "hostile act" for the purposes of article 2 with no mention of article 1. The draft articles set out in paragraph 56 of the report resembled CRP.5 in that respect.

22. A second aspect of his delegation's approach involved a definition of a mercenary in relation to situations other than those covered by Additional Protocol I. That wider meaning related to situations in which peoples were fighting against colonial domination, alien occupation and racist régimes in the exercise of their right of self-determination. Articles 2 (a) and 3 (c) of CRP.5 already referred to such situations, although article 3 (c) related both to situations of armed conflict and to other situations.

23. The approach taken by article 2 in respect of the definition of the term "mercenary" in relation to situations other than those of armed conflict was workable, but it should be noted that the situation of a people struggling for self-determination to which he had referred was already covered by article 1, paragraph 4, of Additional Protocol I.

24. His delegation believed that a definition of the term "hostile act" along the lines of article 3 in CRP.5 could be useful, subject to the reservation about the inclusion of a reference to the struggle of peoples for self-determination.

25. According to article 4 in document CRP.5, the definitions of the term "mercenary" were without prejudice to the provisions of article 47, paragraph 2, of Protocol I. It would have been preferable to refer to the régime of the four Geneva Conventions of 1949 in its entirety. In that context, the proposal of the Italian delegation perhaps went too far in referring not only to the Geneva Conventions but to all instruments relating to the law of warfare (para. 44 of the report).

(Mr. Robinson, Jamaica)

26. Document CRP.6 contained articles 7 and 8. It should be recalled that, at the Ad Hoc Committee's 1982 session, the developing countries had been asked not to insist on the drafting of provisions relating to the criminal responsibility of States, on the understanding that the convention would contain articles dealing with that responsibility in respect of certain duties. Article 7 defined those duties, but it was not clear what was meant by the phrase "in accordance with international law and national law". The list of duties in the article was not exhaustive since, under general international law, States had other duties in relation to the subject-matter of the convention. His delegation therefore supported the inclusion of a formulation along the lines of the proposal in paragraph 83 of the report to the thirty-seventh session (A/37/43).

27. In conclusion, he said that his delegation supported the content of article 8 in document CRP.5 and hoped that at the next session a consensus could be achieved on all the outstanding issues.

28. Mr. MAHBOULI (Tunisia) said that the establishment of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries was a reflection of the international community's anxiety about the activities of mercenaries, who constituted an ideal instrument for stifling the aspiration of peoples to freedom and for carrying out destabilizing operations. The fact that the "mercenary" concept was sometimes wrongly applied to persons inspired by humanitarian motives made it all the more urgent to draft a convention on the subject. The existence of a precise legal definition would prevent the politicization of the term "mercenary".

29. The definition of a mercenary, which was a fundamental element in the convention, nevertheless posed some particularly thorny problems. Working Group A had not succeeded in finding a wholly satisfactory definition. The search for such a definition had been hampered by the existence of a definition of the term "mercenary" in Additional Protocol I to the Geneva Conventions of 1949. In drafting the new convention, the existence of the definition in article 47, paragraph 2, of that Protocol could not be disregarded, given the danger of conflicts arising between the two conventions.

30. The search for a definition of "mercenary" must be based on two elements. Firstly, article 47, paragraph 2, of Additional Protocol I of the Geneva Conventions of 1949 related to armed conflicts of an international character. Secondly, observation of the international reality showed that the intervention of mercenaries took place in international armed conflicts, in armed conflicts of a non-international character and in peace-time. The convention should take into account those three different contexts and at the same time integrate the criteria already adopted in article 47, paragraph 2, of the said Protocol. Both article 1 of the document initially submitted by Nigeria and article 1 of the French draft, by reproducing word for word article 47, paragraph 2, might lead to the conclusion that the situation envisaged was one of international armed conflict. At the current stage of work, the definition which caused the fewest problems, although imperfect, was the one contained in article 1 appearing in paragraph 56 of the Ad Hoc Committee's report (A/38/43).

(Mr. Mahbouli, Tunisia)

31. With respect to the difficulties related to the wording of the text, he said that the prohibition laid down in article 3 (paragraph 56 of the report) against the act of enlisting as a mercenary seemed somewhat inadequate, since articles 1 and 2 made the status of mercenary dependent on a number of criteria, in particular that of direct participation in the hostilities, so that, strictly speaking, a mercenary could not be considered as such unless and until he fulfilled the necessary conditions laid down.

32. Article 4 (paragraph 56 of the report) which prohibited a mercenary from committing murder and other acts of violence, seemed superfluous in view of the fact that article 47 of Additional Protocol I refused to recognize a mercenary as a combatant and that both the proposed convention as well as various General Assembly resolutions emphasized the criminal character of the mercenary.

33. With regard to States, a considerable difference could be seen between the 1982 and 1983 sessions of the Ad Hoc Committee, since the most recent report made no more reference either to the crime of mercenarism or to the criminal responsibility of the State. Those were ideas which had given the initial Nigerian draft its originality and which would have permitted the further development of international law. It must be recognized however, that international positive law did not as yet recognize degrees of wrongfulness and that the distinction drawn by the International Law Commission between an international crime and a mere offence met with far from unanimous approval among Member States. The delegation of Tunisia accepted, therefore, the adopted solution of dropping all reference to the crime of mercenarism and the criminal responsibility of the State.

34. The dropping of the concept of the criminal responsibility of the State meant, however, that the convention should define the obligations of the State in a precise manner. The obligations which were set out in the various draft articles were formulated in a negative manner and consisted mainly of obligations to refrain from doing things. That was the case in article 6 of the draft convention submitted by France and in article 6 of the draft appearing in paragraph 56 of the report of the Ad Hoc Committee.

35. The obligation to refrain from doing things or to be vigilant already existed in general international law and had been referred to on many occasions in actual cases, such as the Alabama case. The general duty to be vigilant had been defined by the arbitrator Max Huber in the Isla de Palmas case. In the Corfu Channel case, the International Court of Justice had ruled that a State on whose territory an act contrary to international law had been committed could be called upon to give an explanation, and that that State could not respond by merely claiming ignorance of the circumstances or of the perpetrators of the act.

36. The obligation to refrain from organizing bands of mercenaries reiterated principles of international law which were already established and confirmed in General Assembly resolution 2625 (XXV). The convention needed to confirm the idea that merely to refrain in that respect was frequently synonymous with complicity. The obligation which therefore befell a State was not only an obligation not to tolerate, but also an obligation not to be unaware of operations directed from its territory against another State.

(Mr. Mahbouli, Tunisia)

37. With respect to the preventive measures examined by Working Group B, which were dealt with in article 8 of the Nigerian draft and in article 7 of the French draft, he said that the concept of prevention was fundamental within the framework of the proposed convention. He expressed reservations, however, concerning the use, in some draft articles, of formulations such as "undertake, in accordance with international and national law, to make every effort to adopt reasonable measures with a view to preventing the offences set forth ...". The convention could not merely mention undertakings that were not specified and applied in a strict manner.

38. With respect to the question of damage reparation, Working Group B had examined article 15 of the document submitted by Nigeria. It was vitally important that the convention should make provision for a State in whose territory mercenary activities had been prepared and organized to assume a specific obligation of reparation. It was regrettable that, as the debates continued, the question of the obligation to make reparation had been reduced to the marginal level of refusal to grant extradition or to prosecute the perpetrators of the crime.

39. Article 5 of the draft submitted by Nigeria, concerning the status of mercenaries, referred only to a situation of international armed conflict. It was to be hoped that the proposed convention would not represent, on that question, a step backwards for humanitarian law. Article 47, paragraph 1, of Additional Protocol 1 granted to the State which captured the mercenary freedom to grant or not to grant him the status of combatant and therefore of prisoner of war; article 5 to which he had referred seemed to eliminate that freedom. In the view of the delegation of Tunisia, what was important was not to reduce to the maximum the rights of the mercenary, but to attack the root of the evil by effectively prohibiting the recruitment of mercenaries and imposing on States the obligation to adopt the necessary measures, sanctioning them in cases where they supported or even tolerated the organization of activities in their territory.

40. The question of the settlement of disputes, provided for in article 16 of the draft submitted by Nigeria and in article 14 of the French draft, should be examined at the end of the work, once the substance of the content of the convention had been formulated. For those reasons, the delegation of Tunisia supported the renewal of the mandate of the Ad Hoc Committee.

AGENDA ITEM 120: CONSIDERATION OF THE DRAFT ARTICLES ON MOST-FAVOURED-NATION CLAUSES: REPORT OF THE SECRETARY-GENERAL (continued) (A/38/344)

41. Mr. BUDAI (Hungary) said that his country attached great importance to the question of most-favoured-nation clauses and was interested in the elaboration of a widely acceptable text on that topic.

42. Both in its written comments on the draft articles submitted to the Secretary-General and in the observations made on previous occasions during the consideration of that item in the Sixth Committee, the Hungarian People's Republic had made clear its position, which was based on the following points. Firstly, that position coincided with the approach of the International Law Commission: the draft articles constituted part of the general law of treaties and embodied a legal

(Mr. Budai, Hungary)

institution which had its practical application in all aspects of international relations. Secondly, it also colncided with the position of the ILC that the most-favoured-nation clause might be considered as a technique or means for promoting the equality of States or non-discrimination. In fact, without blurring the difference between the general principle of non-discrimination and the most-favoured-nation clause, it must be recalled that the ILC had referred approvingly to the opinion of the International Court of Justice as expressed in its judgement in the case concerning the rights of nationals of the United States of America in Morocco, according to which the intention of the clause was to establish and maintain at all times fundamental equality without any form of discrimination among all of the countries concerned. Thirdly, the Hungarian People's Republic welcomed the realistic approach reflected in the draft articles which took duly into account the differences in the degree of development of States or their particular geographical position. It therefore supported the provisions related to treatment accorded to developing countries under a generalized system of preferences in relation to arrangements between developing States, in order to facilitate frontier traffic, and in relation to rights and facilities extended to a land-locked third State. Fourthly, all those positive and meritorious aspects of the draft articles notwithstanding, there were a few articles, especially articles 12 and 13 on the most-favoured-nation clause made subject to compensation or to reciprocal treatment, respectively, which in their present form were highly controversial and could lead to unjustified demands by the granting State, especially in the field of international trade and economic relations.

43. His delegation was clearly in favour of concluding a legally binding international instrument in the near future, but it recognized the need to take into account all shades of opinion on the substance of the draft articles. While the predominant view was that it would be useful to elaborate such an instrument, critical remarks and proposals had been made concerning the draft articles by a substantial number of Governments and interested intergovernmental organizations.

44. It should also be admitted that since the elaboration of the draft articles by the International Law Commission in 1978, there had been some important developments which undoubtedly had a bearing on the scope and application of most-favoured-nation clauses, such as the adoption in 1979 by the Contracting Parties to the General Agreement on Tariffs and Trade of a decision on preferential and more favourable treatment, reciprocity and fuller participation for developing countries.

45. Future efforts for the adoption of the draft articles on the most favoured nation clause would help to enhance legal security in the application of that clause, a development clearly desirable in the field of international commercial relations, where discriminatory practices had spread increasingly over the past few years, as was demonstrated by the general practice of boycotts and sanctions contrary to the provisions of the Charter.

46. His delegation supported the proposal of the Byelorussian Soviet Socialist Republic to establish at a later session of the Sixth Committee a working group to complete the draft articles.

47. Mr. MANAWAPAT (Thailand) said that to the developing countries, most-favoured-nation treatment was by no means a new concept. Its history could be traced back to the colonial era, during which it had been conceived as a device to advance the commercial interests of colonial Powers in their relations with non-European countries. His delegation could recollect perfectly that in the nineteenth century the Asian States, notably Thailand, China and Japan, had had to grant commercial advantages and privileges to some Western Powers without receiving reciprocal advantages. The most-favoured-nation clause had also been used as a mechanism to monopolize the one-way flow of goods to a less strong Asian State which was prevented by the mechanism of the clause from increasing its import duties on those goods beyond a nominal rate of 3 per cent. Moreover, under that clause, goods from other Western Powers had been similarly entitled to the privilege of virtual exemption from import duties. Later an Asian country had also insisted on such most-favoured-nation treatment from other Asian countries. Today, the most-favoured-nation treatment as an institution had changed and assumed some of the characteristics of non-discrimination.

48. The untiring efforts of the International Law Commission in reaching consensus on the draft articles on most-favoured-nation clauses was to be commended and had rendered an appreciable service to the progressive development and codification of international law in the vital areas of economic and legal co-operation between States. However, it should be rememered that the acceptance of the draft articles on most-favoured-nation clauses in the form of a general convention could be meaningful only if it took into account the reality and future trends of international trade and economic co-operation between States, with the long-term aim of contributing to the establishment of a new international economic order.

49. Draft article 23 on treatment under a generalized system of preferences took into account in its application the level of economic development of the countries. The basis for that generalized system of preferences currently granted by some developed countries to certain developing countries was not difficult to understand but should be regarded as transitional and subject to progressive erosion or reduction, since it should be remembered that the final objective should be to help those countries emerge from a situation of permanent dependence.

50. Draft article 24 related to arrangements between developing States. The establishment of preferential treatment among developing countries had been acknowledged to be one of the most important instruments of trade expansion among them, as well as a practical means for promoting South-South co-operation. The concept had already been accepted by all, including the developed market-economy countries and the socialist countries. In that connection, Thailand, together with the members of the Association of South-East Asian Nations (ASEAN), had been actively co-operating to secure welfare and prosperity for the peoples of the region. The incorporation of such a provision into a general most-favoured-nation treaty would undoubtedly encourage that constructive trend of economic co-operation between developing countries.

(Mr. Manawapat, Thailand)

51. The International Law Commission had shown great wisdom in adopting draft article 30, which stated that the draft articles were without prejudice to the establishment of new rules of international law in favour of developing countries. Since the granting States tended to seak bilateral agreements providing for special treatment favourable to their political and economic aims, it was important to safeguard the legitimate interests of developing countries as well and to contribute to the practical realization of a new international economic order which would improve the situation of those countries.

52. Another exception to most-favoured-nation treatment, perfectly admissible in international practice, was the granting of rights and privileges exclusively to neighbouring or adjacent States. Such preferential treatment served the mutual interests of the neighbouring States in conformity with the principle of good-neighbourliness in friendly relations between States.

53. Lastly, he pointed out that if a convention on that delicate subject were to be concluded, a balanced attitude must be adopted and care taken to accommodate every legitimate concern, with a view to promoting the growth and economic development of all States, especially the developing countries. Only thus could the resulting legal instrument play a significant role in the establishment of a more just and equitable international legal order.

54. Mr. GOERNER (German Democratic Republic) recalled that in a statement made during the general debate at the current session of the General Assembly, the Minister for Foreign Affairs of the German Democratic Republic had stressed the necessity of taking measures within the framework of the United Nations, against the imposition of trade restrictions, blockades and other illegal sanctions. That would help to re-establish confidence in international economic relations and normalize international trade. There was no doubt that a universally recognized legal instrument on the most-favoured-nation clause would greatly help to normalize trade and international economic relations.

55. Most-favoured-nation treatment was an important means for promoting equal, non-discriminatory and mutually beneficial co-operation between States in the fields of trade, economy, transport, and scientific and technological co-operation and in other spheres, and also for overcoming the existing economic disparities between States, thus helping to strengthen international peace and security. His country therefore attached great importance to the codification and progressive development of the principle of most-favoured-nation treatment.

56. The draft articles on that question drawn up by the International Law Commission were a good example of the codification of norms developed on the basis of international customary law and constituted a suitable basis for the elaboration of a legal instrument to regulate the questions connected with most-favoured-nation treatment. Nevertheless, there were still a few articles which needed to be considered in further detail. The draft articles dealt, to a considerable extent, with the granting of most-favoured-nation treatment under the condition of compensation or reciprocal treatment. Placing emphasis on the conditional factor

(Mr. Goerner, German Democratic Republic)

conflicted with the fact that most-favoured-nation treatment had exerted its positive influence and been most successful when granted in an unconditional form. In that connection, the International Law Commission, in its commentary to articles 11, 12 and 13, had clearly stated that the conditional form of the clause was today largely of historical significance and that many sources agreed that that form of the clause had definitely fallen into disuse (A/33/10, commentary to articles 11 to 13, para. 11). The fact that the draft articles did not take that statement into account and gave too much importance to the conditional form of the clause raised considerable practical problems, since some States could make the granting of trade benefits dependent on political concessions which were in no way related to international economic relations. For the reasons he had stated, his delegation requested that those proposals contained in the draft articles that related to the granting of most-favoured-nation treatment on a conditional basis should be reduced or, if possible, dropped entirely.

57. Recent international events had shown how useful it was for the strengthening of peaceful international co-operation that international economic relations should be based on most-favoured-nation treatment. Another matter of great importance was that of exceptions to most-favoured-nation treatment. Although any exception, in principle, restricted the effects of the clause, it was recognized that some exceptions were indispensable. The International Law Commission had dealt with the matter of exceptions in a moderate and balanced way, and his country endorsed the Commission's work in that regard. However, it did not deem necessary the exception providing for preferential treatment, on a reciprocal basis, within a customs union or an economic community, since the complicated problems in relations with third States arising from the establishment of an economic community or a customs union should be regulated in agreements between the States concerned.

58. The situation was different in the case of economic communities between developing countries. That matter was dealt with in article 24, which provided that a developed beneficiary State was not entitled under a most-favoured-nation clause to any preferential treatment in the field of trade extended by a developing granting State to a developing third State, in conformity with the relevant rules and procedures of a competent international organization of which the States concerned were members. There was no doubt that that provision contributed to promoting economic co-operation between developing countries and helped them to mobilize their own resources and use them for economic and social development.

59. His delegation was in favour of an international convention on the most-favoured-nation clause. It believed, moreover, that the final work should be done within the Sixth Committee, through a special working group established for that purpose. However, it could also agree to the convening of a diplomatic conference if that was the wish of the majority. What was most important was that negotiations, regardless of the forum in which they were held, should result in a legally binding instrument that would win general approval.

60. Mr. KEMISHANGA (Zaire) pointed out the importance and usefulness, for his country, of the draft articles on most-favoured-nation clauses. Zaire had expressed its opinions in that regard in detail during the thirty-fifth and thirty-sixth sessions of the General Assembly. In addition to the general provisions, the draft contained a whole series of exceptions in favour of the developing countries, as reflected in articles 23 to 26. The basic idea of those exceptions was, on the one hand, that the benefits granted, on a non-reciprocal basis, by a developed State to a developing State within a scheme of a generalized system of preferences or by a granting State to a neighbouring or land-locked third State should not be claimed by any State on the basis of the most-favoured-nation clause and, on the other hand, that the preferential treatment accorded to each other by developing States in accordance with the relevant rules and procedures of a competent international organization to which they belonged could not be the subject of claims by any developed beneficiary State on the basis of the most-favoured-nation clause.

61. The draft articles derived all their importance from those exceptions, especially when it was borne in mind that, in addition to the work of codification of the norms and principles of international trade law, every effort must be made to accelerate the formulation of the new international economic order, which remained the final goal.

62. That was one of the reasons why his delegation associated itself with those who had proposed convening, as soon as possible, a conference of plenipotentiaries to adopt a convention on that subject. Neither the condition of reciprocity suggested by some nor the introduction of new exceptions proposed by others would further the objectives sought by the international community.

63. In conclusion, he referred to the statement made in the General Assembly by the Minister for Foreign Affairs of Zaire on the need to establish a new international economic order. Under such a new order the principle of the equal sovereignty of States could play its full role and, above all, the international community could make progress towards the achievement of peace and justice.

64. Mr. KAHALEH (Syrian Arab Republic) said that the draft articles on most-favoured-nation clauses could be considered one of the principal achievements in the process of codification of contemporary international law. It was also a positive step in the progressive development of international law relating to the new international economic order.

65. Draft article 1, establishing the scope of the articles, paralleled the 1969 Vienna Convention on the Law of Treaties and stated that the articles applied to most-favoured-nation clauses contained in treaties between States. Those rules should, however, be extended to entities other than States, in keeping with the spirit of the Commission's work in the general field of the law of treaties.

66. He pointed out that there was some discrepancy between article 7, concerning the legal basis of most-favoured-nation treatment, and article 4, in which the most-favoured-nation clause was defined. Articles 12 and 13, which were related to

(Mr. Kahaleh, Syrian Arab Republic)

article 2 (e) and (f) concerning conditions of compensation and reciprocal treatment, would be economically unjust and not in the interests of enterprises, since they would lead to discrimination and destroy confidence in the system of reciprocity. The most-favoured-nation clause should not be made subject to such provisions.

67. His delegation had reservations concerning articles 18 and 19, since the Arab countries granted each other preferential treatment which they obviously could not grant to non-Arab countries, in view of the special relationship which existed among them for reasons of a national character. Such arrangements should be taken into account for the purposes of international and regional organizations. Syria accepted the provisions of articles 23, 24 and 25, which reflected international practice with respect to exceptional cases of the application of the most-favoured-nation clause, taking into account the fact that expansion of the list of exceptions could reduce the scope of the clause.

68. Article 30 obviously reflected current trends in international law and international economic relations, and he hoped that it would be possible to take immediate action on it. Finally, he proposed the inclusion of a special provision on peaceful settlement of disputes concerning the most-favoured-nation clause.

69. Mr. YAKOVLEV (Union of Soviet Socialist Republics) expressed support for the Chairman's constant efforts to ensure that the discussions in the Committee proceeded in an orderly manner, and said that his delegation tried to comply by not reacting to the attacks made by certain delegations. He urged all countries to do the same, so that the work might progress.

70. The progressive development of international trade law was playing an increasingly important role in international relations. Consequently, measures formulated in the United Nations and other international bodies for establishing the most-favoured-nation principle deserved full support.

71. The USSR's position concerning the draft articles on most-favoured-nation clauses, submitted by the International Law Commission, had been explained in detail in the past. He would merely emphasize that the draft articles formed the basis for a definitive legal instrument, which could take the form of a convention.

72. The documents submitted by the Secretary-General since 1980 and the comments made by delegations showed the need to finalize the draft articles. The divergencies which had arisen during the discussion related to a few important articles; however, with good will, those differences could be overcome. That justified the establishment of a working group on the subject and his delegation was prepared to participate in its activities.

73. The United Nations should play an important role in the process of codification of international trade law, since ignorance of those principles on the part of some countries undermined the whole international trade system and violated the Charter and contemporary international law.

(Mr. Yakovlev, USSR)

74. The world had recently witnessed attempts to use sanctions, boycotts and blockades unilaterally and arbitrarily. The States which wanted to make such illegal practices the rule in international relations tried to justify those violations with arguments of a political and propagandist nature. Moreover, States which had recently attained independence in Asia, Africa and Latin America were often the target of that shameful policy.

75. The task of strengthening the principles and norms of international trade law was especially important. The United Nations should condemn arbitrary and discriminatory practices in international trade, strengthen the principles and norms of international law governing commercial and economic relations among States and urge all countries strictly to comply with them.

76. Mr. CEDE (Austria) said that the the granting of most-favoured-nation treatment was a frequent feature of the trade agreements which Austria had concluded with a great number of States. From the outset, Austria had taken a keen interest in the Commission's work on that subject. The in-depth study of most-favoured-nation clauses undertaken by the Commission for 10 years, culminating in the draft articles adopted at its thirtieth session in 1978, had greatly helped to clarify that complex issue.

77. Austria considered the painstaking analysis of State practice with respect to most-favoured-nation treatment useful and enlightening. That assessment, however, did not imply that Austria would be prepared to associate itself unreservedly either with the text of the draft articles on most-favoured-nation clauses or with the Commission's decision to recommend the conclusion of a convention on the subject, since it considered the draft articles essentially residual in character and so did not believe that they lent themselves to that form of codification.

78. As to the text of the draft articles, his delegation would point once again to the basic flaw which seemed to compromise its wider acceptability so far, namely, the omission of any exception for customs unions and free trade areas. Austria shared the belief that it was inconsistent with established international practice that a State which was not a member of a customs union or was not included in a free-trade area arrangement should be entitled, on the basis of a most-favoured-nation clause, to be granted those special benefits which accrued to members of such unions or free trade areas.

79. With respect to possible future consideration of the matter, he said that, bearing in mind recent experience of State practice and developments in the legal discussion on the topic, a thorough reassessment of the whole exercise to codify most-favoured-nation clauses would be appropriate. Although it seemed that both industrialized and developing States were satisfactorily putting into operation arrangements granting most-favoured-nation treatment, the debate on those clauses in the framework of the United Nations had, in the view of his delegation, reached a certain deadlock, so that a pause in the consideration of the issue might be in order.

80. Mr. ALEXANDROV (Bulgaria) said that the development of international economic relations was of undisputed importance for the relaxation of world tensions, the promotion of co-operation among States with different socio-economic systems and the strengthening of world peace and security, but it should be promoted only on the basis of equality and mutual advantage, without being constrained by short-term political considerations. In equitable economic relations among States, there was no place for sanctions and punishments, which could only lead to the exacerbation of confrontation and the aggravation of world tensions.

81. The draft articles on most-favoured-nation clauses were an appropriate foundation for the codification and progressive development of international law in that field. In their elaboration, due consideration had been given to the radical changes in international economic relations, and the concept of the elimination of all inequitable barriers and restrictions, the promotion of free trade and economic co-operation on the basis of mutual respect and equality had been established.

82. His delegation had taken a positive view of the definitions of the terms "most-favoured-nation clause" and "most-favoured-nation treatment" and supported the draft articles because they provided certain advantages for the developing countries, for land-locked countries and for neighbouring States in order to facilitate frontier traffic.

83. His delegation supported the inclusion in the draft articles of a provision which not only entitled developing countries to preferential treatment but also provided for the possibility of the future establishment of new rules of international law in favour of developing countries.

84. While his delegation's assessment of the draft articles as a whole was positive, it had certain reservations to make concerning some of the draft articles. Those reservations referred, above all, to the texts regulating the conditional form of the most-favoured-nation clause, since it was generally acknowledged that the conditional form was of limited application in international treaty practice and was mostly used in connection with consular functions and immunities and in the area of private international law.

85. In the opinion of his delegation, the application of the conditional form of the most-favoured-nation clause in commercial relations among States was unfair, and therefore unacceptable. Practice had demonstrated unequivocally that most-favoured-nation clauses made subject to compensation or reciprocal treatment resulted in unequal treatment of some States and thus violated the principle of sovereign equality among States.

86. It was the view of his delegation that the provisions of articles 12 and 13 should be omitted from the draft in order to bring it into conformity with the principle of soversign equality of States. The draft also contained some formulations which needed further clerification - for example, the term "generalized system of preferences".

(Mr. Alexandrov, Bulgaria)

87. If those shortcomings were taken into account and corrected, the draft could be made the foundation of a future convention and an effective instrument for encouraging international trade on an equitable basis.

88. Mr. YELCHENKO (Ukrainian Soviet Socialist Republic) said that his delegation supported the efforts made by the United Nations to codify international law on commercial and economic relations among States, with a view to eliminating manifestations of political domination, exploitation and discrimination.

89. Recent events indicated that the norms of international trade law were at present encountering considerable obstacles; there were frequent cases of discrimination, imposition of sanctions, embargoes and blockades. Numerous examples demonstrated the futility of such acts, which often recoiled on their authors. The Financial Times of London had recently pointed out that embargoes simply produced sensational headlines; their value was doubtful and their results unpredictable. Such acts did not only affect the countries at which they were aimed but also endangered international trade as a whole and were inconsistent with the purposes and principles of the Charter. The United Nations should condemn such illegal practices, which resulted in international blackmail and interference in the internal affairs of other States, and should strengthen the principles of international trade law.

90. The elaboration of a legal instrument on most-favoured-nation clauses was important for the development of commercial relations among States. The International Law Commission had undertaken the codification of the rules relating to most-favoured-nation clauses; the draft articles it had prepared were satisfactory as a whole, since they were in line with international practice, took into account the interests of States and afforded preferential treatment to developing countries. The comments made in the Committee showed that most delegations were in favour of a continuation of the work, with a view to the elaboration of a convention. Such an instrument should promote equitable relations among States, facilitate co-operation among them and constitute a further step in the establishment of the new international economic order.

91. His delegation favoured the establishment of a working group, under the auspices of the Sixth Committee, to draw up agreed provisions, where differences of opinion still existed, and thus facilitate the adoption of the convention.

The meeting rose at 1.10 p.m.