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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTIETH SESSION

Report of the Sixth Committee

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I. INTRODUCTION

1. At its 4th and 5th plenary meetings, on 22 September 1978, the General Assembly decided to include in the agenda of its thirty-third session the item entitled "Report of the International Law Commission on the work of its thirtieth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered this item at its 27th, 31st to 46th and 67th meetings, held on 23 October, from 26 October to 13 November and on 8 December 1978.

3. At the 27th meeting, Mr. José Sette Câmara, Chairman of the International Law Commission at its thirtieth session, introduced the Commission's report on the work of that session. 1/ The Committee also had before it a note by the Secretary-General (A/33/192), prepared pursuant to a decision adopted by the Commission at its twenty-ninth session, containing the text of the draft articles provisionally adopted so far by the Commission on topics under current consideration. A note (A/C.6/33/L.4), indicating the correspondence between the final and the provisional set of draft articles on most-favoured-nation clauses, was also circulated by the Secretariat. At the 46th meeting, the Chairman of the Commission commented on observations which had been made by representatives in the Sixth Committee on the report of the Commission. Members of the Sixth Committee expressed their appreciation to the Chairman of the Commission for his statements.

4. At the 32nd meeting, the observer for the European Economic Community made a statement.

5. At the 67th meeting, the Rapporteur of the Sixth Committee raised the question whether the Committee, in accordance with established practice, wished to include in its report to the General Assembly a summary of the main trends which emerged in the course of the debate on the item. After referring to General Assembly resolution 2292 (XXII) of 8 December 1967, the Rapporteur informed the Committee of the financial implications of the question. At the same meeting, the Sixth Committee decided that, in view of the subject matter, the report should include an analytical summary of the Committee's debate on the item.

II. PROPOSAL

6. At the same meeting, the representative of Colombia introduced a draft resolution (A/C.6/33/L.16) sponsored by Argentina, Austria, Bolivia, Brazil, Bulgaria, Canada, Colombia, Ecuador, Egypt, Finland, the German Democratic Republic, Germany, Federal Republic of, Ghana, Italy, the Ivory Coast, Jamaica, Jordan, Kenya, the Libyan Arab Jamahiriya, Mexico, Mongolia, the Netherlands, New Zealand, Peru, the Philippines, Spain, Turkey, Venezuela and Yugoslavia, later joined by Algeria, Sierra Leone and Zaire (see para. 288 below). During the same meeting, after the Sixth Committee had taken its decision on the draft resolution (see para. 287 below), the delegation of Chile expressed to the secretariat of the Committee its desire to be a co-sponsor of the draft resolution.

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

III. DEBATE

A. General comments on the work of the International Law Commission and the codification process

7. Representatives generally acknowledged that at its thirtieth session the International Law Commission had accomplished a substantial and impressive amount of work, as could be seen from its report, and expressed satisfaction with a number of important results achieved at that session as well as with the high quality of the work done. The Commission was able to discuss all the main topics on the agenda of the session and, following closely the recommendations made by the General Assembly in its resolution 32/151 of 19 December 1977, had completed the second reading of the draft articles on most-favoured-nation clauses and made further progress in the preparation of its drafts on State responsibility for internationally wrongful acts, succession of States in respect of matters other than treaties, and on the question of treaties concluded between States and international organizations or between two or more international organizations, by adopting a number of additional articles relating to those provisional drafts. Furthermore, important preliminary work had also been done by the Commission in connexion with other topics and questions such as the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the second part of the topic "Relations between States and international organizations", international liability for injurious consequences arising out of acts not prohibited by international law, jurisdictional immunities of States and their property, and the review of the multilateral treaty-making process.

8. It was generally considered that the report of the Commission was another valuable contribution to the codification and progressive development of international law, proving once more the central role played by the Commission in the codification process and, therefore, in the establishment and consolidation of a just and lasting international legal order. In the three decades of the Commission's existence, its work had been one of the most important factors in the evolving process of contemporary international law making through the United Nations system. This was shown by the positive and durable influence the Organization had exerted in laying the legal foundations for peaceful coexistence and co-operation among nations in accordance with the principles and purposes of the Charter of the United Nations. Many resolutions adopted by the General Assembly might be overlooked, but the legal instruments, the codification conventions, elaborated on the basis of drafts prepared by the International Law Commission, would always be useful and of a permanent value for States. In this connexion, it was observed that the methods and procedures set forth in the Statute of the International Law Commission (Assembly resolution 174 (II), annex) had withstood the test of another international diplomatic conference. In 1978, the resumed session of the United Nations Conference on Succession of States in Respect of Treaties completed the work started in 1977 by adopting the Vienna Convention on Succession of States in Respect of Treaties. The prudent and careful treatment of the subjects by the Commission, based on patient research of precedents, jurisprudence and doctrine, and able, conscientious and well-balanced drafting, had produced texts that were by no means academic exercises, but, on the contrary, the

very basis of the embryo of contemporary conventional international law. The Commission and its members were to be commended for the constructive efforts they had consistently deployed in the performance of the difficult task entrusted to the Commission by the General Assembly.

9. Some representatives observed that the International Law Commission was probably on the threshold of a new phase of its existence in which, as a consequence of its own established authority and the current needs of the international community, it would have to confront increasingly complex questions referred to it by the General Assembly and to do so in an essentially realistic perspective, close to the thinking of Governments. The report adopted by the Commission at its thirtieth session already reflected the large number of extremely important issues under consideration by the Commission as well as the need for adaptation of the former customary law to the contemporary codified international law.

10. Some representatives emphasized the importance their respective Governments attached to the promotion of the progressive development and codification of international law and the work of the International Law Commission. They stated that the United Nations codification process, including the work done by the Commission within that process, should not be circumscribed to the study of technical legal matters, but should serve the needs of the international community. The codification process should aim at obtaining results of practical interest to States. The Sixth Committee and the International Law Commission should, therefore, concentrate their efforts on those questions which were important to the maintenance of international peace and security and the development and strengthening of friendly relations among States. In this connexion reference was made to the new constitution of a Member State which contained a special provision basing foreign relations on a number of principles, including that of the scrupulous observance of the universally recognized rules of international law.

11. It was stated that the principles and rules of international law elaborated in an earlier time in vastly different circumstances did not correspond necessarily, and in all cases, to the requirements of the international order which had emerged since the Second World War. The former political, social and economic patterns had been radically changed by the breaking-up of former colonial empires and the emergence of an impressive number of newly independent States, as well as by a series of other great political, social and economic transformations. It was, therefore, imperative, according to some representatives, that the current process of codification of international law should take duly into account the requirement of the progressive development of that law so that the codified rules should reflect to the fullest extent possible the new structures of the international community and keep pace with the changes which had occurred. Only by encompassing the needs and aspirations of the contemporary community of nations could the codification process enhance the effectiveness of the principles and rules of international law in international relations and by so doing fulfil its true mission, namely, the consolidation and development of peaceful and harmonious relations between States.

12. It was also stated that international law should be codified in such a way as to make it an instrument of justice in international relations by facilitating the regulation and development of equitable and mutually beneficial co-operation among States not only in the political and legal fields but also in trade and other economic matters. Thus, the process of codification of international law should also follow closely the requirement of and be instrumental towards the establishment and consolidation of a new international economic order, so that the codification instruments adopted would reflect the basic axioms of that new international economic order, namely the needs and aspirations of developing countries, the principle of permanent sovereignty over natural resources, the requirements of technological development, etc. In the interdependent world of today, it was said, genuine international peace and security and the economic and technological development of nations could not be attained unless all States would co-operate in solving existing major problems in the framework of a just and equitable new economic and legal order.

13. It was emphasized that there was an immediate and basic link between the effective operation of a system of fundamental principles relating to the conduct of States - including the prohibition of the threat or use of force - and the progressive development and codification of international law, regarded as a process whereby efforts were made to translate those principles into specific legal obligations. Other major factors had led States to attach growing importance to the continuing process of adapting international law. Among them were the growing interdependence of States, technological progress, and the increase in the number of Members of the United Nations. Nothing less than co-operative action could serve the cause of international peace and security. In its resolution 2501 (XXIV) of 12 November 1978, the General Assembly had emphasized "the need for the further codification and progressive development of international law in order to make it a more effective means of implementing the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations and to give increased importance to its role in relations among nations". In the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Assembly resolution 2625 (XXV), annex), the Charter principles embodied in Articles 1 and 2 were declared to constitute basic principles of international law. As for the Declaration on the Strengthening of International Security adopted by the General Assembly in resolution 2734 (XXV) of 16 December 1970, it reaffirmed the Charter's prohibition of the threat or use of force against the territorial integrity and political independence of other States; it also reaffirmed that the territory of a State should not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. In that same resolution, the General Assembly recommended that the Security Council "take steps to facilitate the conclusion of the agreements envisaged in Article 43 of the Charter in order fully to develop its capacity for enforcement action as provided for under Chapter VII of the Charter". The need to develop enforceable legal norms of conduct was also reflected in the current report of the Secretary-General on the work of the Organization, 2/ which contained a warning regarding the effect of violations of the

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2/ Ibid., Supplement No. 1 (A/33/1).

Charter and Security Council resolutions, which had no effective legal means of implementation. Such violations dangerously affected the authority and prestige of the Organization. That issue touched directly upon the functioning of the system of international security and the legal order created by the Charter. It was a vital legal and political problem which related to the effective functioning of the Organization in its primary responsibility for the maintenance of international peace and security and which was still very acute. If legal measures for collective United Nations action were not instituted and could not be applied where appropriate in order to compel implementation of Security Council resolutions, it would hardly be possible to curb the acts of aggression and other international crimes committed by States or groups of individuals using sophisticated weapons. States Members of the Organization were gradually becoming conscious of that compelling need, but many of them were still hesitant. In the area of international security, the United Nations had tended up to the present to adopt more emphatic declarations and to draft new conventions affirming the rights and duties of States in order to strengthen the Organization and its Charter. However, the very core of the problem, which was to ensure the implementation of Security Council decisions, had been left untouched and unresolved.

14. The International Law Commission's central position in the law-generating activities of the international community imposed upon it, it was said, a special responsibility to preserve the integrity and clarity of the language of international law. The Commission should try to avoid giving different meaning to the same term in different and not always analogous contexts. As an example, reference was made to the expression "third State" which appeared with no less than four different meanings in the report of the Commission on the work done at its thirtieth session. Moreover, in reaching its conclusions on terminological matters, the Commission should also bear in mind the meaning attached by States to terms and expressions used by them in international legal texts originated in forums other than the International Law Commission as, for instance, the Third United Nations Conference on the Law of the Sea.

15. Several representatives stressed the importance for the codification process of developing further the relationship between the Sixth Committee and the International Law Commission, by involving the Sixth Committee more directly in the various stages of the codification process. Thirty years after the establishment of the International Law Commission, the Sixth Committee should reflect on the ways and means by which it should fulfil its own functions in the field of the codification and progressive development of international law through the draft resolution recommended every year to the General Assembly. Regarding, for instance, the last stage of such a process, certain representatives considered that the Sixth Committee should be entrusted, to an extent greater than in the past, with the task of elaborating codification instruments on the basis of drafts prepared by the International Law Commission. That would not only enhance the authority of the Sixth Committee but also help to save funds that were being spent on various diplomatic conferences which usually received the Commission's drafts for further consideration with a view to adopting the corresponding international codification conventions.

16. With respect to the initial and intermediate stages of the codification of a given topic, it was recalled that the Sixth Committee regularly had the opportunity to review the codification work in progress within the International Law Commission during the consideration of the report that the Commission submitted annually to the General Assembly. The Commission had a central role to play as the only subsidiary body in the United Nations system with a specific and continuing general mandate to formulate proposals for the progressive development and codification of international law, but it was the responsibility of the Sixth Committee to undertake the difficult task of giving guidance to the Commission. Reference was made in this connexion to the responsibility of the Sixth Committee in submitting to the General Assembly recommendations concerning the study of new topics by the Commission, the priority to be attached to the study of topics on the Commission's programme and the definition of the scope of topics referred to the Commission. 3/

17. It was also stated that the first reading of several major topics under current consideration by the Commission was coming to an end and that, consequently, the Commission would soon be in a position to move on to the systematic study of other topics. The increase in the number of those other topics posed a question relating to the general orientation of the Commission's future activities with regard to the codification and progressive development of international law. The time was coming when the Commission, with the guidance of the Sixth Committee, should review its entire codification programme from a long-term standpoint.

18. Other representatives emphasized the need to find a more effective way of dealing with the Commission's report in the Sixth Committee. In their view, the method of work followed in this respect by the Sixth Committee should be reconsidered. Thus, it was suggested that the present practice of holding a single over-all debate on the entire report should be changed and the Sixth Committee should hold a separate debate on the various topics included in a given report. Such an approach would be more useful for the work of the Commission on the topics concerned than the present practice. It was also stated that the Commission could provide guidance, in case of an eventual restructuring of the Sixth Committee's debate along the lines suggested, by indicating the topics that, in view of the working requirements of the Commission, would deserve separate debate at the Sixth Committee.

19. The statements made at the Sixth Committee, within such a restructured debate, should not, however, be regarded as a substitute for the interim written comments by Governments that the Commission, pursuant to the relevant provisions of its Statute, was always free to request. Rather, they served as an additional contribution to the follow-up of the Commission's work on the topics concerned.

20. The question of the continued production of the analytical reports of the Sixth Committee's discussion of the report of the International Law Commission was also raised. It was said that such analytical reports were done in an

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3/ For more detailed comments on this point, see paragraphs 266 to 276 of the present report in the section entitled "Programme and methods of work of the Commission".

excellent manner and, on the academic level, were extremely useful; they were also an expensive undertaking and it was debatable whether they were really necessary for the work of the Commission. The Commission should therefore be invited to express its views on the need for such analytical reports in the future.

21. Lastly, some representatives indicated that in commenting on the report of the Commission, they had to adopt a selective approach because of the wealth of material discussed at the thirtieth session of the Commission, the organic link between several questions dealt with at that session and those considered at previous sessions, and the need for further and more detailed study by Governments of the draft articles under preparation.

B. The most-favoured-nation clause

22. The International Law Commission was congratulated for its valuable work in submitting a final set of draft articles on most-favoured-nation clauses, thus carrying out the General Assembly's recommendation contained in paragraph 4 (a) of resolutions 31/97 of 15 December 1976 and 32/151 of 19 December 1977. Many representatives were of the view that the completion by the Commission of the second reading of the draft articles on such an important and complex topic, together with the commentaries thereto, was a major achievement for 1978 and an important contribution to the progressive development of international law and its codification. Praise was voiced for the two Special Rapporteurs on the topic, Mr. Endre Ustor and Mr. Nikolai A. Ushakov, for their outstanding contributions in the preparation of the draft articles.

23. The completion by the Commission of its second reading of the draft articles on most-favoured-nation clauses was considered all the more noteworthy since most-favoured-nation treatment involved a very difficult set of problems, as was borne out by the discussion in the Commission and by its report. Most-favoured-nation treatment could have an exceedingly favourable impact on equal and mutually advantageous co-operation between States, particularly in the area of international economic relations. The topic of the most-favoured-nation clause was viewed as being one of fundamental importance for international relations, as was evident from the treaty practice of States, and as one of particular interest to developing countries. It was said that the importance of the most-favoured-nation clause had grown in connexion with the application of the principle of peaceful coexistence and co-operation among States on the basis of equality and the exclusion of any discrimination.

24. Several representatives were of the view that while it could be argued that much of the progress achieved in economic relations and development in the past two decades had been due to exceptions to the most-favoured-nation clause, that clause was still the main pillar of international trade relations. The most-favoured-nation clause was described as one of the soundest institutions of international treaty law, occupying a fundamental position in the treaty practice of States. The use of that clause enabled world trade to be expanded and liberalized on the basis of non-discrimination and the equality of sovereign States. It remained the best means of attaining the objectives of the elimination of discriminatory treatment

and the reduction of customs tariffs, which were essential to the development of international trade, and could be crucial in regulating inter-State relations in a mutually beneficial manner. It was further stated that the most-favoured-nation clause must serve to foster the elimination of inequality and discrimination in economic relations between developed and developing countries. It was said that the dominant aspect of the debates held in the Commission and in the Sixth Committee was that of the role and place of the most-favoured-nation clause in the formation of legal rules which could contribute to the establishment of the new international economic order. In addition, it was noted, the dynamic relationship of all components of an increasingly interdependent world had given the most-favoured-nation clause an added dimension extending beyond strictly legal factors and the traditional boundaries of international trade.

25. Questions regarding the underlying philosophy of the most-favoured-nation clause were, however, raised by certain representatives. Bearing in mind that the aim of the clause was to establish machinery to equalize the situation of States, enabling them to compete under equal conditions, it was emphasized that such formal equality could easily lead to unfavourable treatment of the weakest countries, as had been shown in the Commission's report. Therefore, the question arose of the role the most-favoured-nation clause should play in the contemporary world, which was seeking to move away from such formal equality towards relations which took more account of differences in concrete situations, regional economic integration systems, relationships specific to categories of States having special affinities and different degrees of development. The view was expressed that it could safely be said that the philosophy underlying the clause was no longer valid in the modern world, at least as far as its application in economic matters was concerned, and that the equal treatment of States irrespective of the stage of their development or economic integration at the regional level was no longer a viable basis for a world-wide economic order. The emphasis was currently on differential treatments which gave rise to the need for more and more exceptions to the operation of the classical most-favoured-nation clause and made it necessary to ensure that the policies of such groupings of States corresponded to the provisions of the Charter, were outward-looking and had full regard for the legitimate interests of third countries, especially developing countries, as provided in the Charter of Economic Rights and Duties of States. That the international community had turned, as was observed in paragraph (3) on page 33 of the Commission's commentary to article 3, 4/ toward the quest for "differential measures" not only ran counter to preferences in the context of multilateral trade negotiations, but also had broader implications that affected the over-all concept of the most-favoured-nation clause. In the light of the fundamental changes that had occurred in international relations, it was urged that the most-favoured-nation system should be reconsidered with a view to the establishment of the new international economic order.

26. A considerable number of representatives commented upon the final set of draft articles on most-favoured-nation clauses. Such comments related to the draft

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

articles as a whole, to their specific provisions and to the final phase of the codification of the topic. Many representatives noted that the observations advanced were of a general or preliminary nature and that their Governments would make known their position in a more detailed and final manner at an appropriate time. In addition, some representatives referred to the oral observations made on behalf of their Governments at previous sessions of the General Assembly on the draft articles on the topic provisionally adopted by the Commission in 1976, as well as to their Governments' written comments thereon, annexed to the report of the Commission on the work of its thirtieth session.

1. Comments on the draft articles as a whole

27. Many representatives viewed the draft articles on most-favoured-nation clauses as being generally acceptable, susceptible to a large measure of support, and as providing a sound basis for the finalization of the codification of the topic. The Commission's work on the topic was a commendable effort to codify and progressively develop international law, particularly in the field of international trade. In the course of the second reading of the draft articles, it was felt that many articles had been formulated more clearly and considerably improved, the Commission having taken into account the observations of Governments, United Nations organs and interested intergovernmental organizations. The draft articles were the result of a very thorough study of State practice and judicial decisions and of a review of the most authoritative doctrine on the matter. The draft constituted an up-to-date codification of international law with substantial elements of progressive development and responded to the legal questions raised by the utilization of the clause and to the challenge of expanding international trade and payments, the new global dimensions of international transport and communications, and the development of international co-operation in many other fields.

28. The inclusion in the draft of useful elements of flexibility was favourably commented upon by several representatives. The Commission was commended for having taken into account the interests of developing countries and for having succeeded in relating international law to problems connected with the new international economic order and global economic development, which was very important for the emerging principles of international economic relations. At a time when international economic relations between States were undergoing a critical scrutiny because of the imbalance between developed and developing States, the draft articles were a significant contribution to the establishment of a new international economic order. The concept of the most-favoured-nation clause as expounded in the Commission's report was a valuable contribution to the universal quest for a more equitable international economic régime. Demonstrating the high quality of the Commission's work, the draft articles were considered a masterpiece of technical craftsmanship, as the terminology used was in keeping with contemporary legal technique.

29. As the most-favoured-nation clause played a very important role in international trade and in the development of mutually advantageous economic relations, representatives stressed that the codification and progressive development of the norms and rules of international law governing the subject was of major importance. Such codification and development would further the evolution of rules for the organization of international trade and the development of contemporary international law, as well as strengthen the economic and developmental interests of developing countries in the field of international trade. Enhancing the legal institution of the most-favoured-nation clause would help to abolish unjustified trade barriers and promote mutually advantageous and equitable economic relations among all States on the basis of sovereign equality and co-operation. Furthermore, the draft, which condensed a whole body of practice, doctrine and judicial decisions into a few systematically classified rules, would help clarify the principles of law on and serve as a useful guide to the interpretation and application of the most-favoured-nation clause, as well

as help clarify rules concerning the clause which were gaining general acceptance. The commentaries adopted by the Commission showed that the issues dealt with by various articles could give rise to varying interpretations. It would doubtless be useful to proceed at present to a codification of the norms and principles generally applied by States, defining them and adding elements likely to promote the progressive development of international law, so as to facilitate understanding of a subject whose legal aspects were often quite complicated. The draft articles contained various elements that would be of assistance to those countries concluding treaties including a most-favoured-nation clause.

30. Some representatives, however, expressed regret that there appeared to be certain omissions in the draft articles which seriously diminished usefulness of the draft and rendered it unacceptable in its current form. According to these representatives, the draft clearly needed further improvement. A number of important issues had been left unsolved, leaving gaps in the draft and creating an imbalance. It was said that the full impact of new developments in international economic relations on the most-favoured-nation system was not reflected in the draft. To some representatives the most glaring deficiency of the final draft was that it largely ignored and failed to grapple with the series of problems posed by the modern development of regional economic co-operation and particularly by the existence of customs unions and its impact on the application of the clause. The draft articles were also said to have not sufficiently met the requirement that the rules of law governing world trade must of necessity recognize the diversity of levels of economic development and differences in economic and social systems. In particular the impact of the new international economic order and the development of such mechanisms as "differential measures" were not adequately reflected in the draft. Any approach to the codification of the most-favoured-nation clause was bound to reflect a certain bias if it was based on precedents and practice that had evolved in a structure of inequitable international economic relations. Representatives stressed that any general rules on the most-favoured-nation clause, regardless of their final form and legal status and even if they were only of a supplementary nature, would not be accepted unless they constituted a well-balanced set of rules which, as a whole, reflected practical reality and, in particular, took account of various points to which they had referred.

31. It was further elaborated that that apparent lack of adaptation of the draft to new developments in international economic relations was not particularly tragic, since draft articles expressly provided that it applied only to most-favoured-nation clauses in future treaties, and that, in negotiating such future treaties, the parties could agree on any provision derogating from the rules of the final draft. Moreover, the final draft clearly recognized that the obligation to accord most-favoured-nation treatment might be subject to conditions and was not even presumed to be unconditional. Changes made in the draft during the course of the second reading had greatly enhanced the flexibility of the clause, and, thereby, the possibility of adapting it to the requirements of modern international relations, particularly in the economic field. Nevertheless, it was said, under draft articles 15 to 18 some relationships between a granting State and a third State were still irrelevant for the acquisition by the beneficiary

State of a right to treatment not less favourable than the treatment extended to the third State. Furthermore, the final draft still mentioned only some relationships between a granting State and a third State as not giving rise to a right for the beneficiary State to treatment at least as favourable as that given to that third State (arts. 23 to 26). The technique of establishing negative and positive lists of conditions for treatment at least as favourable as that accorded to any third State would require those lists to be complete, or at least to cover all the situations which currently occurred in international practice. Furthermore, with the application of such a technique, the beneficiary State either had the full right to be treated at least as favourably as a particular third State, or it had no right to any specific treatment at all in connexion with the treatment accorded to a particular third State.

32. Certain other representatives stated that the draft articles touched on some complicated issues which needed clarification. The draft should include a provision urging States to agree on most-favoured-nation clauses between themselves, in order to realize equal and mutually advantageous co-operation between them. Most-favoured-nation treatment could become fully effective only if the scope of the application of the most-favoured-nation clauses covered major areas of co-operation and was sufficiently wide. The present draft did not make provision for the definition of the scope of application, but merely proceeded on the assumption that States agreed on the scope of application if and when they agreed on the clause itself. It was also said that the draft articles had been based on a case-by-case system, rather than on a doctrinal method with general principles predominating. That had made it difficult to make a precise assessment of the draft articles, particularly since they were not exhaustive in that they did not touch on all the aspects of a very varied and rich practice. Furthermore, the observation was made that while the draft articles on matters other than international trade reflected national and international practice and judicial decisions, generally speaking those decisions were not very recent and might not reflect more contemporary State experience on a particular matter.

33. Still other representatives questioned the Commission's decision to change the title of the draft from "draft articles on the most-favoured-nation clause", adopted for the draft on first reading, to "draft articles on most-favoured-nation clauses", adopted on second reading. Changing the title from singular to plural might create more difficulties than it solved. It was stated that the reason given for that change was that a most-favoured-nation clause could be conditional or unconditional and that the parties could, under article 20, draft their own provisions. The soundness of that argument could, however, be questioned, since the Commission had dealt not with particular most-favoured-nation clauses in treaties but with the legal implications of such clauses. Just as the expression "most-favoured-nation" had been retained, although the word "nation" was no longer used in relations between States, the word "clause" should have been retained in the singular in order to avoid confusion.

34. Finally, it was remarked that statements made during the Sixth Committee's discussion on the topic had implied that the Committee must now either accept the draft articles as a whole or reject them. A different view was held: the Committee could still make changes, even basic changes, to the Commission's draft,

which was only a point of departure. If there was some confusion on that point, the manner in which the Commission appeared to view its role might to some extent provide the explanation. Essentially, the Commission saw its task as one of giving systematic form to rules of international law. Where no clear rules were discerned, the practice of States was examined by the Commission and new rules based on the practice were drawn up. Sometimes, where there were no clear instances of State practice, the Commission engaged in progressive development of the law. The Commission could not make law; it might only point the direction in which it considered the law should move. States might disagree with the Commission and reject the suggestion, but the possibility of such rejection should not discourage the Commission from making its considered and warranted suggestions.

(a) The most-favoured-nation clause and the principle of non-discrimination

35. Most representatives who referred to this matter agreed with the Commission's view that the most-favoured-nation clause may be considered as a technique or means for promoting the equality of States or non-discrimination. It was noted that the International Court of Justice had made a pronouncement to the same effect in 1952 in the Case concerning rights of nationals of the United States of America in Morocco. Support was expressed for the Commission's view that the rule of non-discrimination in international law was a general rule which followed from the sovereign equality of States. That rule notwithstanding, however, States were free to grant special favour to other States on the ground of some special relationship of a geographical, economic, political or other nature. Article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations did not, it was pointed out, regard the most-favoured-nation clause as a form of discrimination. That view was confirmed and elaborated in the Commission's commentary on the matter found in paragraph 50 of its report.

36. Certain representatives, however, made critical comments concerning the Commission's concept of the relationship between the most-favoured-nation clause and the principle of non-discrimination. While the Commission had been right in its conclusion that the clause could be considered as a technique or means for promoting the equality of States or non-discrimination, the close relationship between the clause and the general principle of non-discrimination should not blur the differences between the two notions. In fact, it was said, the granting of most-favoured-nation treatment was still subject to unacceptable conditions, which was not favourable to good relations between States. In that regard, the Commission had concluded that both doctrine and State practice currently favoured the presumption of the unconditionality of the clause. Furthermore, according to another view, while the differentiation made by the Commission between the most-favoured-nation clause, based on a contractual agreement, and the principle of non-discrimination, derived from the general principle of sovereign equality of States, was correct in substance, it had not proposed a sufficient conceptual differentiation that would be applicable in practice. To indicate the legal difference, the Commission had merely referred to article 47 of the Vienna Convention on Diplomatic Relations. However, it followed from the content of that provision that its purpose was the general observance of the obligations stipulated by the Convention for all States. By stipulating those obligations as a

minimum standard in diplomatic relations, the Vienna Convention made it possible for States to grant each other broader advantages, for example, in the form of the most-favoured-nation clause. However, such a standard did not exist in other fields, particularly in the commerical-political field. Consequently, there was an urgent need for codified rules specifying the principle of non-discrimination, especially in the economic field, in addition to rules applying to the most-favoured-nation clause.

37. Finally, it was remarked that it was apparent from paragraphs 47-49 of the report that the Commission had proceeded on the basis of the principle of the sovereign equality of States in so far as it was connected with the principle of non-discrimination, which derived from it. That point of view, however, did not reflect reality, for if the clause favoured non-discrimination, it was to that extent not based on the principle of the sovereign equality of States. Utilization of the clause always served a specific purpose which corresponded to the particular interests of States, not to a general, overriding principle. That question was not purely academic, since if one accepted the Commission's hypothesis, any limitation on the application of the clause would impair a basic principle of international relations, that of the sovereign equality of States. However, in so far as the clause basically reflected the particular interests of States, one could not interpret or apply it without taking account of those interests or subordinate them to other interests, however lofty they might be.

(b) The most-favoured-nation clause and the different levels of economic development

38. Representatives expressed satisfaction with the fact that in its preparation of the draft articles the Commission had taken into account the different levels of economic development of States and had recognized the problem which the application of the most-favoured-nation clause created in the field of economic relations when a striking inequality existed between the development of the States concerned. The application of the clause should not only be based on the principle of equality of States but should also take into account the inequities existing among them so that it could become a mechanism, inter alia, for correcting such disparities. As indicated in the report prepared by the secretariat of the United Nations Conference on Trade and Development (the "UNCTAD memorandum") and quoted in paragraph 51 of the Commission's report, application of the most-favoured-nation clause to all countries regardless of their level of development could satisfy the conditions of formal equality, but would in fact involve implicit discrimination against the weaker members of the international community. This applied, it was said, not only to the sphere of trade relations, but to other spheres as well, such as the question of the more equitable régime in the field of intellectual property, i.e. the transfer of technology. But in so far as the field of trade was concerned, the developing States, most of which were newly independent, had not yet established solid trade relations either between themselves or with developed States. Certain relations of a colonial type persisted in the field of trade: newly independent States continued to be a source of raw materials and a market for the finished products of their former colonizers, and developing countries which manufactured goods had difficulty in exporting them to developed countries because of the many tariff and

non-tariff barriers which existed. Even the markets of other developing countries were generally reserved for transnational corporations. Therefore, the most-favoured-nation clause as applied to bilateral relations among developing countries or between them and developed countries must avoid perpetuating such discrimination. Moreover, it was a well-known fact that the elimination or reduction of barriers to international trade could adversely affect the interests of economically weaker countries and perpetuate rather than reduce the existing economic disequilibrium. It was therefore necessary that special provisions should be formulated in favour of countries whose economies were in the early stages of development. The firmly established principle that developing countries were entitled to special economic assistance was reflected in the provisions of the new Part IV of the General Agreement on Tariffs and Trade (GATT) and in the current work of UNCTAD. Articles 18 and 19 of the charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX)) contained provisions regarding tariff preferences for the developing countries and measures to be taken to accelerate their economic growth and bridge the economic gap between them and the developed countries. Efforts to expand trade between developed and developing countries could serve more than merely the immediate ends towards which such efforts were directed. Legislation aimed at protecting trade and commerce had also helped to win recognition within States of a number of basic constitutional rights. There was no reason why the same could not happen in the international sphere. Action by the Commission to advance the interests of the developing countries in the field of international trade was therefore significant, and satisfaction was expressed that such action seemed to have unanimous support.

39. A number of representatives welcomed, in the light of the preceding considerations, the inclusion by the International Law Commission of articles 23, 24 and 30 in the draft articles. They were gratified that, within the sphere of its own competence, the Commission had endeavoured to combat economic inequality, which constituted one of the greatest challenges currently facing the world. Conscious of the inequalities resulting from different levels of economic development, the Commission had considered the various documents in the area, particularly those relating to the new international economic order, those prepared by UNCTAD and GATT and the Charter of Economic Rights and Duties of States. The Commission had not confined itself to codifying existing rules, but had also striven to supplement existing rules, taking due account of the fact that the trade needs of the developing countries differed from those of the developed countries. Those efforts aimed at the progressive development of international law had been successful as was shown, for example, in draft articles 23 and 24, which were aimed at promoting the economic inequalities between developing and developed countries. That would serve the interest of the international community as a whole and therefore justified the exceptions to the application of the most-favoured-nation clause in the case of treatment extended under a system of generalized preferences or preferential treatment granted under arrangements between developing States. It was stated that from the standpoint of international law, the new article 24 and articles 23 and 30 contributed to the establishment of the new international economic order. The Commission had clearly shown that it was possible to draw up rules of international law which were universal in scope and were in favour of the developing countries. Those

rules might admittedly be a minimum but only that minimum now had a chance of resulting in the adoption of an international convention on the topic. The content of the three articles, moreover, corresponded in general to the declaration adopted at the Conference held recently in Belgrade (see A/33/206) in which the Ministers for Foreign Affairs of the Non-Aligned Countries had emphasized that the principle of non-reciprocity of concessions in trade relations between the developed and the developing countries was of special significance and would lead to the establishment of a more equitable foundation for the participation of the developing countries in the GATT trade negotiations. For many of the representatives who supported the content of articles 23, 24 and 30, the inclusion of those articles in the draft and in the final codification instrument was crucial and of cardinal importance. It was said that the draft could not be supported if those three articles were not included.

40. While the Commission had attempted to enter into the field of progressive development of the law by adopting articles 23, 24 and 30, certain representatives expressed doubts concerning those articles. It was remarked that it would be preferable to see those draft articles contain comprehensive, clear legal rules which would secure special treatment for developing countries in the field of international trade. By their insertion in the draft, such clear rules would not by that fact alone be turned into binding rules of law. But States would have been given greater encouragement to agree on the law in that area. Since the first United Nations Conference on Trade and Development in 1964, the desire to provide special treatment to developing countries with a view to enabling them to develop their international trade had been reflected over the years, both in the measures adopted by such international organizations as GATT and in actions taken by individual States. The time had come for that trend to be expressed in legal norms. Another view expressed was that the needs of the developing countries had not been fully taken into account by articles 23, 24 and 30. The Commission should not have focussed its attention only on the question of trade and the generalized system of preferences, but, through the mechanism of "differential measures", should have probed the wider areas of economic relations as well. Although some improvements had been made in the draft articles, the impact of the new international economic order and the developments relating to the most-favoured-nation clause were not adequately reflected. In addition, it was stressed that studies of the ejusdem generis principle (reflected in articles 9 and 10) should pay special attention to differences in levels of development in order to prevent the dislocation of economies. The developing countries as a whole should be granted new tariff and non-tariff preferences and should not agree to extend to others the preferential treatment they granted each other. Furthermore, the trade and development needs of the developing countries might require the non-application of the most-favoured-nation clause for a period of time with respect to certain types of international trade relations.

41. It was stated that the Commission had rightly endeavoured to avoid the economic issues which surrounded the sensitive questions of exceptions to the application of the most-favoured-nation clause. While there was a real need for such exceptions, particularly in view of the different levels of economic development of States, action to provide a legal basis for special and differential

treatment for developing countries should be taken by the international institutions concerned. It was noted that the Commission had felt that it could not enter into fields outside its functions and that it was not in a position to deal with economic matters and suggest rules for the organization of international trade. In support of that reasoning, it had been argued that the Commission did not have sufficient information with regard to doctrine and practice to pronounce on such matters or to justify progressive development of the pertinent rules, a question which was contemplated only tentatively in article 30. However, it was maintained, in reality the beginnings of an international development law already existed, formulated on the basis of three different sources: firstly, a collection of declarations and resolutions in which a coherent international doctrine could already be identified; secondly, a set of rules of prevailing positive international law; and thirdly, a whole juridical framework which was being developed daily at the bilateral level and could not be dissociated from the multilateral action taken, in particular, in the framework of the United Nations. On the basis of that collection of texts general principles had been established which had been sanctioned by the General Assembly in its resolutions 2626 (XXV), concerning the International Development Strategy, 3201 (S-VI) and 3202 (S-VI), concerning the Declaration and Programme of Action on the Establishment of a New International Economic Order, and 3281 (XXIX) concerning the Charter of Economic Rights and Duties of States. If the rules elaborated were to have practical application, it was important, in embarking on the codification exercise, not to lose sight of international reality, otherwise the rules would either not be accepted by the majority of States, or they would be outmoded even before they could be adopted. In general development strategy, law was not an end in itself; it must be the instrument for the transformation of international society, which, under the influence of the new force represented by the third world, was currently embarked on the irreversible course leading to the new international economic order. Henceforward, therefore, it must serve the cause of development, which, as Pope Paul VI had said, was the new name for peace.

42. Finally, certain representatives noted that owing to lack of agreement, the Commission had not attempted to define the relationship between the most-favoured-nation clause and treatment extended in accordance with the Charter of Economic Rights and Duties of States or the relationship between the clauses and treatment extended under commodity agreements, which had been the object of two proposals before the Commission at its thirtieth session (articles A and 21 ter). It had left it to States to take a final decision on these important questions when undertaking the final stage of codification of the topic. It was stated that those two proposals should be studied especially with a view to ensuring protection of the interests of the developing countries, which needed to develop their own resources. The immediate application of the Charter of Economic Rights and Duties of States was advocated, which would also further the establishment of the new international economic order on sound and just bases.

(c) The most-favoured-nation clause in relation to customs unions and similar associations of States

43. Several representatives were of the view that it was contrary to the general spirit of the draft, in which the Commission had endeavoured to codify and reflect

the progressive development of international trade, to ignore such phenomena as customs unions, free-trade areas and regional or subregional groupings.

43a. It also seemed to contradict the Commission's wish, stated in paragraph 63 of its report, to take into consideration all modern developments which might have a bearing upon the codification or progressive development of rules pertaining to the operation of the clause. Many developing countries, as well as developed countries, were members of customs unions or free-trade areas, and it would clearly be unacceptable if States participating in such ventures in regional integration were obliged to extend to third States the advantages which they accorded to each other as an essential condition of their membership of such an association. It was unsatisfactory for the Commission to have failed to include a specific article on the customs union exception because of the alleged "inconclusiveness" of the comments to which reference was made in paragraph 58 of the report. It was only fair to point out that the majority of intergovernmental organizations which had submitted written comments were favourable to the inclusion of a specific exception for customs unions and free-trade areas. Such comments included those submitted by the Economic Commission for Western Asia, the secretariat of the General Agreement on Tariffs and Trade (GATT), the Board of the Cartagena Agreement (Andean Pact), the Caribbean Community Secretariat, the European Economic Community and the European Free Trade Association. Some representatives in their remarks on this matter referred to or endorsed the comments submitted by certain of these organizations.

44. The reluctance to deal squarely with the issue was considered all the more remarkable in view of the fact that under article 12 of the Charter of Economic Rights and Duties of States, all States had the right to participate in subregional, regional and interregional co-operation in the pursuit of their economic and social development and that the General Agreement on Tariffs and Trade in article XXIV explicitly envisaged a non-application of its general most-favoured-nation clauses in cases of formation of customs unions and free-trade areas. It was therefore incomprehensible, it was maintained, that the Commission should have failed to take a positive decision on that matter.

45. It was noted that the Commission had had before it a proposal by one of its members which stated that a beneficiary State other than a member of a customs union was not entitled to treatment extended by the granting State as a member of the customs union to a third State which was also a member. If articles 23, 24 and 30 exemplified the progressive development of international law, the absence of any exceptions protecting the position of customs unions and free-trade areas was surprising. Such associations existed everywhere in both the developed and the developing world. No one had been able to cite a single case where the treatment which States members of a customs union granted each other had been claimed to apply to a State beneficiary of the most-favoured-nation clause. Although articles such as 23, 24 and 30, which in no way represented the codification of pre-existing international law, had been included, probably rightly, in the draft, agreement had not been reached on the exception for customs unions, since it was claimed that it constituted a political issue which only the General Assembly would be able to solve. On the contrary, it involved a well-established practice which had originated in the nineteenth century and which article XXIV of GATT had simply consolidated. Great importance was attached to that point and the conviction was

expressed that the exception in favour of customs unions corresponded exactly to the current state of international law and was perfectly in line with the interests of all States, especially developing countries. It was said, moreover, that this classic exception had long been accepted by jurists and had been sanctioned by the practice of States as evidenced by the frequency of explicit exceptions in treaty practice, in the same way as the exception that was extended for frontier traffic (art. 25). For these representatives, therefore, the draft did not come up to expectations in view of the current state of international relations, and unless their comments were taken into account, the otherwise laudable work of the Commission on this topic could not be considered complete, viable or constructive.

46. It was furthermore stressed by certain of these representatives that the parties to a treaty containing a most-favoured-nation clause did not normally intend the clause to be applicable to benefits which either of them might subsequently grant to another State in connexion with the establishment of a customs union or free-trade area. An exception for such cases should therefore normally be considered to be implicit in the most-favoured-nation clause, and that should be reflected in the draft articles. Otherwise, a State bound by such a clause might be prevented from becoming a member of a customs union or free-trade area. This would be an unfortunate result, for such associations were regarded as instruments of trade liberalization and economic development. Existing regional and subregional integration processes constituted exceptions to the most-favoured-nation clause, and obviously must do so, otherwise they would simply be unable to function. Clearly, as recognized in article XXIV of the General Agreement on Tariffs and Trade, the internal benefits generated by an integration process could not create rights for third parties and therefore could not be claimed automatically by third parties, on the basis of the clause, without permanently undermining integration systems.

47. Certain representatives who favoured the inclusions of a customs union exception in the draft articles mentioned State practice and the experience of their respective regions, recalling their membership in various regional co-operation or integration schemes, including, for example, the Andean Pact, the Community of West African States, the European Economic Community, the Latin American Free-Trade Association, the League of Arab States and the Yaoundé and Lomé Conventions. For a number of these representatives, there was no doubt that the development of regional and subregional economic co-operation had had a definite impact on the application of the most-favoured-nation clause and that the clause had played a very important role in the integration process. The view was expressed that third world countries which had appeared on the international scene were currently seeking to define their own development objectives and that international society must, therefore, adapt itself to the new circumstances and elaborate new rules aimed at eliminating phenomena of dependence, at promoting development and reducing inequality as much as possible, in other words, at preparing the establishment of a new international economic order. The legal formula adopted in that context by the developing countries was that of the association or multilateral unions and reflected the current integration effort. But simultaneously, a similar trend was perceptible among the developed countries. The entities thus established defined, in their constituent instruments, their concept of the most-favoured-nation clause and regulated the conditions of its application.

48. Certain representatives referred to other articles of the draft which might have a bearing on the most-favoured-nation clause in relation to customs unions and similar associations of States. Attention was drawn to article 9 which embodied the general condition that a most-favoured-nation clause could only generate rights which fell within the limits of the subject matter of the clause. It might be argued, it was said, that the treatment which members of a customs union or free trade area granted to one another as a consequence of such a union necessarily fell outside the limit of the subject matter of a most-favoured-nation clause in bilateral treaties with States which were not members of such unions. Furthermore, under the new wording of draft article 17, the mere fact that the treatment granted by members of such a union to one another was extended under an international agreement did not affect the acquisition of rights by a non-member State under a most-favoured-nation clause. Nevertheless, it would have been preferable, according to this view, if the final draft had provided for a clear-cut exception for customs unions and similar arrangements along the lines of those provided for in articles 23, 24, 25 and 26. Such a provision would be all the more justified since it would apply only to arrangements between States which conformed to international standards, including rules and procedures of competent international organizations designed to protect the legitimate interests of States which were beneficiaries of most-favoured-nation clauses and which did not take part in the relevant regional arrangements. Attention was also drawn to article 29, according to which the granting and beneficiary States might agree on most-favoured-nation treatment in all matters which lent themselves to such treatment and might also specify the sphere of relations in which they undertook most-favoured-nation obligations. The belief was therefore expressed that article 29 was one of a residuary nature within which the question of customs unions and free-trade areas could be accommodated. Finally, although the Commission had stated that its silence on the question should not be interpreted as a recognition of the existence or non-existence of a rule on the subject (para. 58 of the report), 4/ there appeared to one representative to be evidence to the contrary in article 17, which dealt explicitly with the link between the clause and multilateral treaties.

49. On the other hand, other representatives supported the approach adopted by the Commission in not including in the draft a customs union exception. The exclusion of an article such as the proposed article 23 bis was fully justified by political and legal considerations, the arguments adduced in favour of inclusion not being convincing. Under article 12 of the charter of Economic Rights and Duties of States, States belonging to economic communities were obligated to ensure, where their attitude towards outside parties was concerned, that the policies of the groupings to which they belonged were consistent with their international obligations and with the needs of international economic co-operation, and had full regard to the legitimate interests of third countries, especially developing countries. That was in line with the practice of certain existing groupings, such as the Council for Mutual Economic Assistance. The most appropriate way of resolving problems arising from existing most-favoured-nation clauses was by negotiation between the States concerned, for which purpose draft article 29 provided the necessary latitude. The question was viewed as being one of limited practical importance, whereas the inclusion of an additional exception in the draft would weaken the scope of its application and should thus be resisted. Customs unions, free-trade areas and other forms of regional groupings which constituted exceptions to the general rule should be legislated upon by the

appropriate bodies, not included in the draft articles under consideration. Attention was drawn in that connexion to the fact that the suggested new article 23 bis did not define a customs union, whereas article XXIV of GATT clearly defined under what conditions exceptions could be made for customs unions. The GATT provisions obviously could not be changed or weakened. In any event, it was said, it was unlikely that customs unions would ultimately be covered because members of such unions would probably not become parties to a treaty containing a most-favoured-nation clause.

50. Also mentioned by certain representatives who supported the Commission's approach to the matter was their opinion that customs unions were unions of developed countries and that acceptance of a provision along the lines of the proposed article 23 bis would be tantamount to erecting a wall between the developing countries on the one hand and the developed countries on the other. The inclusion of an article providing for a customs union exception would discriminate against developing countries, as they could not ask for the terms which developed States granted to each other within a customs union. The Commission's approach, it was further said, had blocked the attempts of some States to put the so-called supranational organizations on the same level as sovereign States. Such attempts had been completely unjustified.

51. With reference to the statements made to the effect that the non-inclusion of customs unions and free-trade associations constituted a glaring omission. It was said that there was nothing in the draft articles that went against the sovereign right of States to form themselves into regional or subregional economic groupings in accordance with the charter of Economic Rights and Duties of States. The Commission had acknowledged that right of States and had taken a deliberate and reasoned decision regarding the application of the most-favoured-nation clause. The question was not whether States could form themselves into economic groupings but rather whether or not the most-favoured-nation clause system applied in those circumstances. The Commission had answered in the affirmative, except for cases where a developed country conferred benefits on a developing country within the framework of a generalized system of preference (art. 23) or where two or more developing countries agreed to extend certain privileges among themselves (art. 24). Moreover, in the latter case, the draft laid down two important conditions relating to the application of the exception by stating that the preferential treatment in question should relate to the field of trade and be in conformity with the relevant rules and procedures of a competent international organization of which the States concerned were members. The principal aim of the most-favoured-nation clause was to eradicate State-imposed barriers to trade, and such a barrier certainly existed when some States were accorded advantages that were not extended to others. The reasons for exempting developing countries, on a temporary basis, from some of the effects of the clause were well known. Those reasons did not apply in the case of developed countries, and the fact that such countries might have joined together in customs unions did not change the situation. It was regrettable that the absence of any exemption covering customs unions among developed countries seemed to have led such countries to an almost total rejection of the draft articles, since it was essential for the developed countries to accept in a concrete way the principle of special treatment for developing countries if the latter were to benefit from international trade while their economies remained undeveloped.

52. Still other representatives stressed the fact that further examination was needed of the Commission's decision not to include advantages accorded by one member of a customs union or free-trade area to another among the exceptions to the application of the most-favoured-nation clause. It would be necessary to examine whether giving such an application to article 12 of the charter of Economic Rights and Duties of States would entail benefits that would outweigh the inherent danger that an exception to the most-favoured-nation clause might be used for discrimination against States not members of customs unions. Careful examination would be undertaken in the light of recent developments regarding the establishment of customs unions or similar arrangements, which were not a monopoly of the developed countries. It was also said that as it was legally difficult to demonstrate the existence of a customary rule establishing an implicit exception in the case of customs unions, such a rule should be adopted by a political decision at a plenipotentiary conference or in the General Assembly in the final phase of the codification of the topic. Any such conference would have to consider the matter in relation to developing countries, since many States in Latin America, Africa and Asia had grouped themselves in several integrationist movements in order to strengthen their respective economics and to free trade among themselves.

53. Finally, certain representatives concluded that it was necessary to state the principles applicable to these questions, as well as to the question of special treatment for developing countries, in a manner acceptable to both developing and developed countries. That did not mean that the Commission's draft articles as they stood should be rejected. The draft articles had the advantage of bringing out clearly the conflicting considerations underlying that issue and represented valuable groundwork in a difficult area of law. It was therefore important to continue to search for solutions both in the Sixth Committee and during the period prior to the convening of a diplomatic conference, if one was to be held. The success of the draft articles depended first and foremost on the support, co-operation and collaboration of the greatest number of Member States and of the main economic and trading Powers in particular. Division or confrontation would inevitably bring all efforts to naught. One of essential aims of the draft articles was to help overcome legal obstacles to the development of trade relations, not to create new obstacles. The success of the work would depend on the achievement of a consensus.

(d) The general character of the draft articles

54. Satisfaction was expressed that the International Law Commission had once again placed consideration of the most-favoured-nation clause in the context of the general law of treaties. The 1969 Vienna Convention on the Law of Treaties was currently the authority in the field, and the proposed articles should therefore be interpreted in the light of its provisions, on which most of them were based. Representatives welcomed the decision by the International Law Commission to follow as closely as possible the structure and terminology of the Vienna Convention on the Law of Treaties in order to create a coherent uniform set of rules embodied in the draft articles on the most-favoured-nation clause. Nevertheless, the draft articles were conceived as an independent set of legal rules which were not intended to become an annex to that Convention. They were considered to have made a new contribution to the development of the law of treaties. Their residual

character was, moreover, explicitly established in article 29. It was remarked, however, that in relation to the sphere of application of the draft articles, the draft went considerably beyond the Vienna Convention on the Law of Treaties, as that sphere was not restricted to obligations of most-favoured-nation treatment contained in treaties between States but also dealt with the relations of States as between themselves under international agreements which contained a clause on most-favoured-nation treatment to which other subjects of international law were also parties.

(i) Scope of the draft

55. Support was indicated for the decision of the International Law Commission to consider the subject of the most-favoured-nation clause in a wider perspective, dealing not only with trade matters but also with rights and privileges for persons and things, such as the treatment of foreigners, their access to courts, the treatment of ships, aircraft, trains, automobiles and other means of transport, and the privileges and immunities of diplomatic missions. The difficulties encountered in the preparation of the draft nevertheless related essentially to trade and economic relations between States, with regard, for example, to treatment under a generalized system of preferences (art. 23), arrangements between developing States (art. 24) and new rules of international law in favour of developing countries (art. 30). But the Commission had amply demonstrated that the most-favoured-nation clause was applicable in other areas of international relations and that the draft should not be concerned with the application of the clause in the area of trade alone. Thus the Commission's original approach was endorsed, namely that it should not confine its studies to foreign trade but should explore the operation of the clause in a much broader range of international relations.

56. In addition, certain representatives noted that the Commission had recognized the difficulties of applying the most-favoured-nation clause to all areas of international economic relations, and had also recognized that it was not in a position to resolve economic questions which were the concern of other institutions, such as the General Agreement on Tariffs and Trade and the various United Nations economic bodies. It had thus come as no surprise, as it was said, that the Commission found, as indicated in paragraph 54 of its report, that the operation of the clause in the sphere of economic relations was not a matter that lent itself easily to codification of international law, because the requirements for that process, as described in article 15 of the statute were not easily discernible, namely, extensive State practice, precedents and doctrine. The Commission had therefore attempted to enter the field of progressive development of the law by adopting articles 23, 24 and 30 and by devoting special attention to the manner in which the needs of developing countries for preferences in the form of exceptions to the most-favoured-nation clause in the field of economic relations can be given expression in legal rules.

57. Certain other representatives referred critically to recognition by the Commission of the particular question of the application of the most-favoured-nation clause between countries with different economic systems, but yet the lack of any attempt on its part to resolve that question, as well as others, which were considered, according to paragraph 62 of its report, to be of a technical economic

nature belonging to fields especially entrusted to other international organizations. The application of most-favoured-nation treatment in relations between countries with different socio-economic systems would have no real effect unless the conditions in which such treatment was accorded were based on the principle of reciprocity. That principle applied to international economic relations as a whole and had been embodied in the preamble to the section of the Final Act of the Conference on Security and Co-operation in Europe concerning co-operation in the field of economics, of science and technology and of the environment. The concept of reciprocity was defined therein as permitting, as a whole, an equitable distribution of advantages and obligations of comparable scale, with respect for bilateral and multilateral agreements. That concept was insufficiently covered by the provisions of draft articles 13 and 2, subparagraph 1 (f), concerning the most-favoured-nation clause made subject to a condition of reciprocal treatment. In addition, the concept of different socio-economic systems should be given a precise legal definition if it was to be valid in as wide a framework as that of the United Nations system. It was emphasized that relations between States with different socio-economic systems depended upon certain rules and that, in particular, application of most-favoured-nation treatment in that respect would be without any real meaning if the conditions under which such treatment was granted were not spelt out in mutually measurable facts, which made it possible to evaluate the results achieved. Reference was made to the rules adopted by GATT, whereby, upon the accession to the agreement of certain States with a socio-economic system different from the one applied in market-economy countries, it had been necessary to establish special protocols taking those differences into account. A proposal suggested by one organization in order to take that fact into account with regard to the most-favoured-nation clause had not been accepted by the Commission, for reasons which were neither clear nor satisfying. The Commission's explanation did not seem to be consistent with the fact that questions of an economic nature were dealt with in certain other articles and drafts adopted by the Commission, such as draft articles 23 and 24, which dealt with issues that were currently being examined and negotiated within GATT. It was considered that the question of the application of the most-favoured-nation clause between countries with different socio-economic systems should have been included in the recent developments which the Commission had decided to take into consideration. Such a question should not be excluded from a general review of problems in connexion with the most-favoured-nation clause.

58. It was remarked that the Commission had wisely omitted from its draft any provision on the obligations or rights of individuals, thus making the scope of the application of the draft articles coincide with that of the Vienna Convention on the Law of Treaties. Also, the proposed provisions of the draft, referring often to internal law, would undoubtedly bring into play the rules applicable to the conflict of laws; since such conflicts were inevitable in the matter, it was desirable to adopt general international legal norms governing the application of the clauses.

59. Some representatives believed that explicit provisions should be made in the draft articles for the settlement of disputes. They referred to an article proposed on that matter by one member of the Commission and set out in paragraph 68 of its report, for which some support was expressed, and to the Commission's decisions to

refer the question to the General Assembly, and Member States and, ultimately, to the body which might be entrusted with the task of finalizing the draft articles. Some of these representatives said that any final convention based upon the draft should include provisions on the compulsory settlement of disputes which might arise from the interpretation and application of its provisions, having the same scope as those contained in the Vienna Convention on the Law of Treaties. Such a provision would be welcome inasmuch as the draft articles in their present form would not provide an automatic solution to all questions which might arise in connexion with the interpretation and application of most-favoured-nation clauses.

60. It was stressed that the question of including a provision in the settlement of disputes should not be referred to the General Assembly, as proposed by the Commission, for that would be tantamount to prolonging the work of that body. It would be preferable for the Commission itself to find time to study the question, especially since the experience acquired at similar conferences proved that it was difficult for them to find new solutions in that sphere. Another representative, however, agreed with the Commission that the matter should be left to the body which might be entrusted with the task of finalizing the draft articles.

61. Certain other representatives, however, were of the view that an article on the settlement of disputes should not be incorporated in the draft articles. Since disputes could arise only from a treaty in which a specific most-favoured-nation clause had been agreed with reference to the articles dealing with that subject, it was appropriate to settle them pursuant to the procedure for settlement of disputes established in the treaty in question. The disparity between dispute settlement provisions in existing treaties containing such clauses and those that might be included in the eventual convention on the topic would only complicate matters. As it was for the States concerned to define the scope of the clauses in each case, it was normal that each treaty should prescribe therein its own procedure for the settlement of disputes. Nor could the inclusion of an article on the settlement of disputes be justified by invoking articles 65 and 66 of the Vienna Convention on the Law of Treaties, since those articles were concerned only with a limited set of problems and not with dispute settlement in matters relating to the interpretation of the entire Convention.

62. On the other hand, one representative, while sharing the view that there was no need to include provisions in the settlement of disputes in the draft, said that the régime applicable to other treaties under the Vienna Convention on the Law of Treaties should apply to any dispute arising in relation to the most-favoured-nation clause.

(ii) Scheme of the draft

63. Those representatives who spoke on this aspect of the draft in general agreed with the Commission's assessment that the draft articles on most-favoured-nation clauses contained elements both of progressive development and of codification of the law, and, as was the case of several previous drafts, it was not practicable to determine into which category each provision fell. The draft articles were said to represent a harmonious balance between the codification and progressive development of international law.

2. Comments on the various draft articles

Articles 1 and 3

64. Articles 1 and 3 were commented upon mainly from the standpoint of defining the basic scope of the present draft. Article 1 was specifically supported by some representatives who considered it very important, both theoretically and practically, since it limited the scope of the draft articles to most-favoured-nation clauses contained in treaties between States, thus faithfully reflecting international practice. Attempts to consider certain supranational organizations as sovereign States in the draft articles were completely unjustified. Furthermore, attempting to extend the scope of application of the draft articles to relations between States and international organizations or between two or more international organizations could cause problems, including that of defining the fundamental framework of the draft articles themselves. It was therefore felt that article 3 was sufficient for the time being. While the legal scope of the Commission's codification was somewhat limited, it was nevertheless useful in view of the greater accuracy and clarification introduced by the draft articles.

65. With regard to article 1, some other representatives did not agree that the articles should apply only to most-favoured-nation clauses contained in treaties between States. That provision took no account of the phenomenon of economic integration, which was one of the characteristics, not only of the countries of Western Europe, but of the modern world as a whole. Whether such integration took the form of a customs union or a free trade area or any other system, the result was almost always that the formulation and application of commercial agreements, which were the agreements most often affected by the most-favoured-nation clause, was the responsibility of supranational or other bodies which were not identifiable with their member States. In that connexion, it was recalled that the States members of the European Economic Community (EEC) had transferred to the Community their competence with regard to commercial policy and that, accordingly, questions concerning application of the most-favoured-nation clause within that important area were exclusively a matter for the Community.

66. One representative inquired why the word "clause" had been used in the plural in article 1, as well as in the title of the draft articles (see para. 33 above).

Article 2

67. Comments were made concerning subparagraph 1 (f) of article 2, which contains a definition of "condition of reciprocal treatment", in conjunction with views expressed by certain representatives on the need for the draft to take into consideration the question of the application of the most-favoured-nation clause between countries with different socio-economic systems (see para. 57 above).

Article 4

68. Those representatives who referred to article 4 expressed support for the article.

Article 5

69. While a few representatives explicitly indicated their satisfaction with article 5, a few other representatives raised questions concerning its completeness. It was said that one of the main provisions of the draft articles was found in article 5, according to which most-favoured-nation treatment was not confined to international trade but also covered other aspects of relations between States, including the treatment of foreign physical and juridical persons, intellectual property, access to courts and administrative tribunals, administration of justice and so forth. Since the most-favoured-nation clause was a treaty provision, i.e. based on mutual agreement as to the obligations it would entail and the sphere of relations to which it would be applied, he considered it appropriate to list the cases in which most-favoured-nation treatment could be accorded. Such a list, while not necessarily exhaustive, would explicitly broaden the scope of application of such treatment and would thus make it more effective.

70. It was also pointed out that whereas the relationship between the granting State and the beneficiary State was defined in the draft as being always in the nature of a treaty relationship, the relationship between the granting State and the third State was made clear only in paragraph (6) of the commentary to article 5. It was regrettable that such a useful definition was not included in the actual wording of article 5. Lastly, as to the drafting of the article, one representative said reference should be made to "the same kind of relationship" rather than "the same relationship" since, as was pointed out in paragraph (4) of the commentary to article 5, the nationality laws of States were very diverse.

Article 6

71. Certain representatives supported the idea reflected in article 6 of extending the scope of the rules set forth in the other draft articles to include 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 were also parties. By including this article, the Commission had extended the scope of the draft as a whole. It was questioned, however, if the idea which the article was intended to convey was reflected precisely in the current formulation of article 6 and thought, consequently, that the formulation and placement of that article should be given careful examination.

72. It was also said that it was not sufficient to remark that under article 6 the draft articles would apply to 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 were also parties. That situation, which could be defined as double participation in an international agreement (by the States members of a "metanational" body and by the body itself), could arise, but it was also possible that such a body could itself negotiate with third States and grant or be granted the most-favoured-nation clause, which would have effect with regard to its member States. That, in fact, was increasingly the case. The Commission had not examined that question in sufficient depth and the commentary on article 6 was rather obscure.

Article 7

73. General satisfaction with the article was expressed by most of those representatives who made remarks thereon. The important element in the draft was said to be that most-favoured-nation treatment, i.e. the right of a beneficiary State to claim the treatment accorded by the granting State to a third State, was an international obligation which was not a part of customary international law, but supposed the prior conclusion of a treaty between the granting State and the beneficiary State. The article was not superfluous, in that it constituted a logical whole together with the other articles and should be preserved in its present wording. Nevertheless, it was stated that the need for article 7 was questionable when one considered that article 1 clearly defined the scope of application of the draft articles to most-favoured-nation clauses contained in treaties between States.

Article 8

74. Representatives who addressed themselves to this article did not object to its provisions. It was remarked that article 8, inter alia, underscored the point that rights acquired by States under most-favoured-nation clauses were not third-party rights and that States receiving such rights enjoyed them by virtue of their own treaties containing such clauses. It was suggested that in paragraph 2 of article 8, the phrase "the same kind of relationship" should replace the present phrase "the same relationship", for reasons adduced above in connexion with article 5 (see para. 70).

Articles 9 and 10

75. Articles 9 and 10 were singled out as evidence of the Commission's attempt, first of all, in its elaboration of the draft articles on most-favoured-nation clause, to codify the more or less well-established rule of customary law governing the practical application of the clause. They contained a clear formulation of the ejusdem generis rule which would facilitate the clause's application. The provisions of articles 9 and 10 were therefore considered very appropriate.

76. As to article 9, it was pointed out that while at first sight the rule embodied in the article might appear straight-forward enough, when applied it became more difficult to interpret. A particular most-favoured-nation clause might simply state that a beneficiary State might be granted most-favoured-nation treatment in respect of customs duties, without stating who was to benefit directly. Also, as noted earlier (para. 48 above), it was suggested that the article might be construed to mean that treatment which members of a customs union granted to one another necessarily fell outside the limits of the subject-matter of a most-favoured-nation clause in bilateral treaties with States non-members of the union. With regard to the drafting of the article, the view was expressed that its present wording should be preserved.

77. Concerning article 10, it was said that paragraph 2 contained several vague

phrases, but that the text of the article could not be made more precise; the Commission's commentary should facilitate its interpretation. According to another view on subparagraph 2 (b), the reference should be made to "the same kind of relationship" rather than "the same relationship", for the reasons indicated above in connexion with article 5 (see para. 70).

Articles 11, 12 and 13

78. Articles 11, 12 and 13, dealing respectively with the effect of most-favoured-nation clauses not made subject to compensation, made subject to compensation and made subject to reciprocal treatment, were generally welcomed by several of the representatives who referred to them. Certain representatives believed the three articles were better formulated than the corresponding articles of the 1976 draft. It was said that the most-favoured-nation clause in an agreement must specify clearly whether most-favoured-nation treatment would or would not be subject to compensation or to reciprocal treatment. Articles 11, 12 and 13 set forth the effects produced by an unconditional clause and by a conditional clause in practice, for, although the Commission referred to the most-favoured-nation clause "not made subject to a condition of compensation" and to that "made subject to a condition of compensation", the distinction essentially corresponded to the traditional classification of clauses into unconditional and conditional clauses. That classification depended on the economic system of the States concerned. One could say that the conditional form of the clause corresponded to customs protectionism while the unconditional form was linked to free trade or economic liberalism. Currently, it was the unconditional form that prevailed and was embodied, for example, in article 18 or the Treaty of Montevideo establishing the Latin American Free Trade Association.

79. Certain representatives stressed their complete agreement with the Commission's view set out in paragraph (22) of the commentary to articles 11, 12 and 13 that both doctrine and State practice today favoured the presumption of the unconditionality of the most-favoured-nation clause. While the Commission thus recognized the presumption of unconditionality as a general rule for the application of the clause, it had included articles 12 and 13 relating, respectively, to clauses made subject to compensation and reciprocal treatment, because the presumption of unconditionality did not generally preclude another option of States to couple their most-favoured-nation clause agreement with the conditions of compensation or reciprocal treatment. It would still, however, be a mistake, these representatives believed, to assume that the draft articles denied the presumption of unconditionality which must also be considered in the light of the four applications of the rule of irrelevance contained in articles 15 to 18. It was, however, stated that articles 11, 12 and 13 did not sufficiently emphasize their unconditionality vis-à-vis developing countries.

80. However, certain other representatives maintained that the final draft articles clearly recognized that the obligation to accord most-favoured-nation treatment might be subject to conditions and was not even presumed to be unconditional. The deletion of article 8 of the earlier draft, which was entitled "Unconditionality of most-favoured-nation clauses", the introduction of the new draft article 14

concerning compliance with agreed terms and conditions and the redrafting of articles 12 and 13 greatly enhanced the flexibility of the clause, and thereby the possibility of adapting it to the requirements of modern international relations, particularly in the economic field.

81. Another representative pointed out in that connexion that the position maintained by GATT of absolute and universal unconditionality did not coincide with that of regional or subregional bodies endeavouring to create or broaden their own markets under a protectionist régime which excluded international competition. GATT had nevertheless not lost sight of that fact, as demonstrated by its protocol of 8 December 1971.

82. While some representatives favoured the present formulation of the three articles and welcomed the changes introduced in the terminology of the draft relating to "compensation" and "reciprocal treatment", other representatives believed that those concepts deserved more careful attention. It was stressed that the draft was based on the principle of an unconditional and bilateral most-favoured-nation clause, the primary purpose of which was to overcome the particularistic nature of the norms of international law in order to create a universal legal order. To introduce elements of compensation would interfere with the application of the clause. The question of the existence of such elements of compensation was of crucial importance and required further careful study by Governments.

83. Concerning article 12 in particular, it was maintained that it did not represent a substantial improvement over the corresponding article of the 1976 draft.

84. Reciprocal treatment, dealt with in article 13 of the draft, could have been included in article 12 concerning the clause made subject to compensation. However, the existence of certain specific fields of application, such as consular immunities and functions, as well as certain questions of private international law or questions relating to establishment treaties, justified a separate provision. As indicated in paragraph (31) of the commentary, the application of the clause conditional on reciprocal treatment was restricted to certain fields. It could not be applied to commercial matters, as that would presuppose trade between two States in the same products and on the same conditions. That would not happen in practice and therefore article 13 was interpreted as applicable only to certain clauses embodied in agreements other than trade agreements, the unconditional form of the clause being used in such trade agreements.

Article 14

85. Article 14 was endorsed in principle by representatives who made specific comments thereon. The inclusion of this new article in the draft was described as an improvement, since it guaranteed respect for the sovereignty of all States and contributed to the flexibility of the most-favoured-nation clause as conceived in the draft. It was stated that the new article defined the conditions for the exercise of rights arising under a most-favoured-nation clause; in that respect, a distinction should be made between the conditions for granting most-favoured-nation treatment to the beneficiary State and the conditions for the exercise by the beneficiary State of its rights deriving from the clause.

Article 15

86. A view was expressed in favour of article 15, even though, it was maintained the practice of States was at variance with the solution adopted by the Commission.

87. According to another view, the formulation of the corresponding article of the 1976 draft was preferable to that of the present article. The version of the provisional draft, on the irrelevance of the fact that treatment was extended against compensation, did not specify the character of the clause and it could therefore be inferred that the latter could have been concluded with or without compensation. The corresponding article of the present draft, article 15, related to a clause not made subject to compensation. It was felt that that provision should also apply when the clause had been concluded subject to compensation, and therefore the original wording was preferred.

Article 17

88. Certain representatives commented that the current wording of draft article 17 could be interpreted as automatically extending to third States which could invoke most-favoured-nation treatment, the advantages which members of a customs union or a similar association granted to each other. However, those advantages could not be separated from the obligations assumed by the parties to a customs union or similar association as between themselves. Moreover, the parties to a treaty containing a most-favoured-nation clause did not normally intend the clause to be applicable to advantages which one of them might subsequently grant to another State in connexion with the establishment of a customs union or similar association. Article 17 in its current form might discourage both developing and developed States from taking part in integration processes that might accelerate their development.

89. Some representatives expressed reservations of principle concerning article 17, as well as articles 18 and 19 in their present form. Those articles required careful consideration in the light of treaties concluded by their countries and the policies applied within a grouping of States where relations among themselves were governed by special considerations. It was pointed out that, as indicated in the written comments submitted by the League of Arab States, these articles were not consistent with the policy applied to treatment among Arab States, whether on a bilateral or on a multilateral basis. The privileges granted by an Arab State to another Arab State might not be applicable to non-Arab parties. It could be said that there was a customary rule covering exceptions made for regional groupings and that that rule must be reflected clearly in any codification exercise.

90. Finally, it was suggested that giving a fresh look to article 17 would be appropriate, particularly in view of the situation of developing countries. The feeling was expressed that the exception provided for in article 24 with regard to customs arrangements among developing countries might be taken into account, *mutatis mutandis*, in article 17.

Article 18

91. Certain representatives expressed support for article 18. It was said that the rule of "national basis" had been applied as a normal procedure and that the restrictive provisions adopted unilaterally by a number of countries with regard to immigration would have to be revised in order to correct many anomalies and abuses.

92. Other representatives expressed reservations concerning the article as indicated in paragraph 89 above. It was pointed out that his country was bound by agreements to countries with which it maintained special relations, those agreements giving to those countries and their citizens and institutions the same treatment as that accorded to his country's citizens. His country could not undertake to be bound by a text that made the concept of the most-favoured-nation clause involve unilateral extension to others of the treatment currently accorded to its own citizens. A distinction must be made in the proposed text.

93. In addition, one representative felt somewhat diffident about calling in question the soundness of the rule embodied in article 18, which was supported by the judicial practice and an official interpretation of his country, mentioned in paragraph (4) of the commentary to the article. However, in previous years his delegation had already expressed doubts about the timeliness de lege ferenda of recommending such a rule. His country's recent experience led it to share the opinion of the author mentioned in paragraph (7) of the commentary, which had also been upheld by others, namely that most-favoured-nation treatment should be that accorded to most-favoured aliens, which precluded national treatment. There were gradations in the benefits extended to a foreign State and in practice granting most-favoured-nation treatment implied a refusal to grant national treatment. Currently his Government extended national treatment only to States with which it wanted to maintain very specific relations and thus did not want such a benefit to be extended automatically under the terms of the most-favoured-nation clause.

Article 19

94. A few representatives explained that in State practice, foreigners or foreign property were generally treated in different ways. Sometimes all foreigners were treated in the same way or some were accorded preferential treatment or most-favoured-nation treatment or, in some cases, national treatment. However, according to the definitions of most-favoured-nation clause and most-favoured-nation treatment provided in articles 4 and 5, that treatment could be national treatment or preferential treatment or any other kind of treatment. Furthermore, the Commission had specified that national treatment was not necessarily the superior form of treatment. Under article 19, the beneficiary State was thus entitled to opt for the type of most-favoured-nation treatment which gave it the most advantages, whether it was equivalent to national treatment, some other type of treatment, or the cumulative treatment of all, some or parts of the various treatments concerned.

Article 20

95. According to one representative, the provisions of article 20 were logical and flowed from the very nature of the most-favoured-nation clauses. Another

representative, however, pointed out that although the most-favoured-nation clause constituted a conditional obligation, since its application depended upon the treatment accorded to a third State, it could nevertheless assume the character of a simple obligation if, at the time of its entry into force, certain third States already enjoyed more favourable treatment than the beneficiary State. The draft articles should have provided for that possibility, which the Commission mentioned in its commentary. Article 20, paragraph 2, provided that the right of the beneficiary State to treatment under a clause made subject to a condition of compensation arose at the moment when the relevant treatment was extended by the granting State to a third State and when the agreed compensation was accorded by the beneficiary State to the granting State. The according of compensation by the beneficiary State was a condition for the applicability of the clause and did not determine merely the coming into being of the right to a particular treatment. Conceptually, the applicability of the clause as from the moment when the beneficiary State accorded the agreed compensation should be distinguished from the coming into being of the right of the beneficiary State, which could occur at the same moment if the granting State had already extended more favourable treatment to a third State or subsequently if the granting State extended that treatment at a later date. The same could be said for article 20, paragraph 3. The effective according of reciprocal treatment served as a condition for the entry into force of the clause, the right of the beneficiary State to the relevant treatment being, conceptually, subsequent to its entry into force. Finally, the Commission quite rightly made it clear in its commentaries that the rights deriving from a clause did not have retroactive effect. The question was raised if a provision to that effect should not be included in the draft.

Article 21

96. While certain representatives maintained that article 21 raised no problem, it was also said that those provisions clearly were not exhaustive and did not preclude other causes of termination or suspension, such as the expiry of the term of the clause, agreement by the granting State and the beneficiary State with respect to termination or the union of the granting State with the third State. One representative, moreover, had certain reservations regarding article 21, particularly paragraphs 2 and 3, since it appeared from those provisions that the suspension or termination of the compensation or of the reciprocal treatment would terminate or suspend the clause itself and would indirectly have the same effect on the right to most-favoured-nation treatment. It seemed that the draft was technically imprecise at that point.

Article 22

97. Support was expressed for article 22 which, it was said, guaranteed respect for the sovereignty of all States. Stress was placed on the importance of the second sentence of the article, which contained a necessary restriction on the competence of the granting State in the exercise of its rights. On the other hand, it was maintained, while agreeing in general of the principle embodied in article 22,

it was clear that, especially in relations between countries with different socio-political, and therefore legal, systems, application of the article might give rise to quite serious problems, underlining the need for inclusion of a provision on the settlement of disputes.

Articles 23 to 26 in general

98. Several representatives referred in general to the section of the draft relating to exceptions to the application of the most-favoured-nation clause, namely articles 23 to 26. These exceptions were viewed as being of cardinal importance to the entire set of draft articles and merited serious and careful attention. It was noted that the Commission had devoted a considerable amount of time and effort at its thirtieth session to the subject of exceptions to the clause. Once it had been established that the clause in question was, in the current circumstances, a reality at the international level, and once the clause itself had been defined, the codification work had consisted essentially in regulating the exceptions to its application. If one considered what happened with regard to the clause in practice, it was clear that its content differed according to whether it was envisaged by developing or developed countries. Furthermore, at the current stage the aim was no longer to reaffirm the legal equality of States but to rectify the economic inequality which would in the future constitute the major concern of the international community. The effectiveness of the most-favoured-nation clause depended, inter alia, on the agreed number of exceptions to most-favoured-nation treatment. Some representatives stressed, moreover, that if too many exceptions were agreed on, even a generously defined scope of action could not have its potential positive effect.

99. In view of the residual character of the draft articles and since the most-favoured-nation clause was not compulsory in every treaty, it would seem to follow that no exception to its application could be implied or presumed when it had been agreed upon. Nevertheless, it was generally agreed that in some circumstances certain exceptions proved necessary and desirable, particularly in the application of the clause in favour of developing countries, frontier traffic and land-locked States. Exceptions to the clause, it was said, should be carefully worded to ensure that their application would not be abused and should be restricted to exceptions already established within the international community or to extraordinary situations which should not have the effect of heaping more benefits on States which already enjoyed an advanced level of economic development. Thus the Commission was commended for having wisely included articles 23 to 26 in its draft constituting four exceptions to the application of the clause. Those articles reflected existing realities and thus constituted part of the progressive development of contemporary international law in that field. The exceptions to most-favoured-nation treatment referred to in the draft articles reflected legal theory and generally accepted practice in relations between States. It was maintained that while there was a real need for such exceptions, particularly in view of the different levels of economic development of States, action to provide a legal basis for special and differential treatment for developing countries should be taken by the international institutions concerned.

100. With regard to the need to take into consideration specific situations which would justify a broader range of exceptions, some representatives opposed adding in the draft any further exceptions to the application of the clause which would weaken the draft's application. While it was admitted that such situations deserved consideration at the current stage, in the long run and in view of expanding international co-operation, they might not justify narrowing the field of operation of the most-favoured-nation clause. On the other hand, it was questioned whether the structure of the draft was complete and whether the exceptions noted included all those accepted in State practice. The Commission itself admitted the possible existence of other exceptions that were not expressly included in the draft. The absence of hypothetical exceptions to the application of the clause, particularly with regard to treatment granted through unilateral measures, could not be regarded as a negation of the existence of such exceptions.

Article 23

101. Several representatives who singled article 23 out for comment approved its inclusion in the draft and agreed in principle with the substance of the rule embodied therein, stressing that a provision of the kind of article 23 was justified and indispensable in that it constituted a welcome reflection of current international economic relations. The exceptions reflected in the article were considered as involving a subtle and interesting mix of law and economics. Article 23 took into account those aspects of economic co-operation which had had a decisive influence on the establishment of the Charter of Economic Rights and Duties of States, article 18 of which stipulated that developing countries should enjoy tariff preferences and preferential treatment in other areas whenever possible. Certain representatives considered that the text of article 23 was sufficiently liberal to cover what was commonly known as a generalized system of preferences with all its variations and ramifications. Although the generalized system of preferences needed substantial improvement, mainly in terms of duration and coverage, it was a useful scheme intended to give developing countries access to markets of developed countries for their manufactured and semi-manufactured products. The rule set forth in article 23 prevented the solution of unequal problems by equal means and was consistent with the resolutions of the General Assembly and the principal decisions of such bodies as UNCTAD and GATT. Attention was drawn to General Principle Eight formulated by UNCTAD at its first session in 1964, according to which the trade needs of developing economies were different from those of a developed economy and should not therefore be subjected to the same rules. It could not be denied that only measures such as the one proposed by UNCTAD in 1964 could enable the developing countries to compete with the developed countries in world markets. The developed countries should therefore demonstrate a sense of responsibility by granting temporary duty-free entry into their markets for the exports of developing countries.

102. It was noted with regret that some representatives in the course of the debate expressed the view that international trade practice had not yet reached a stage that would warrant the inclusion of article 23, as well as article 24. UNCTAD resolution 92 (IV) of 30 May 1976 had urged the developed countries and the United Nations system to provide support and assistance to developing countries in

strengthening and enlarging their mutual co-operation by abstaining from any measures prejudicial to developing countries and by supporting preferential trade arrangements among those countries. The Charter of Economic Rights and Duties of States had also emphasized the need for generalized, non-discriminatory and non-reciprocal preferences in favour of developing countries. It was also noted that reference had been made to the results of continuing negotiations which might affect the most-favoured-nation clause. No incompatibility was seen between the draft and the hoped-for outcome of those negotiations. Countries participating actively in the international trade negotiations at Geneva and Lomé would not be privy to any action that might in any way prejudice those negotiations, to which the greatest importance was attached in the larger context of establishing a new international economic order. The results of the Commission's work should be seen as complementary to those negotiations and not as potentially prejudicial to them.

103. Some representatives, while in favour of the general principle underlying article 23 and its importance, believed that the article was too restrictive and ambiguous and that it should be closely studied and improved in the light of relevant contemporary and future developments, particularly those related to improving the situation of the developing countries. In the area of trade, the generalized system of preferences was covered as an exception to the provisions of article 1 of GATT - an exception that was at the moment merely transitional, for a period of 10 years, but which was to become a permanent feature. Basic differences of opinion on that subject existed between the developing countries and the granting developed countries: for example, what should be the basis for characterizing a country as a developing one entitled to such preferences? Should those preferences be limited to manufactures and semi-manufactures? Should special preferences given by some States to selected developing countries be maintained?

104. In addition, the generalized system of preferences was based on the principle that donor countries had the right to select the beneficiaries of their system. With a few exceptions the developed countries applied the generalized system of preferences in a restrictive manner so as to limit preferential treatment to manufactures and semi-manufactures. Thus, that system could lose all effectiveness for the developing countries and lead to non-reciprocal and inequitable advantages. It would have been preferable for article 23 clearly to exclude only the developed countries from the application of the clause in the context of a generalized system of preferences. Moreover, articles 18 and 26 of the Charter of Economic Rights and Duties of States called upon the developed countries to extend, improve and enlarge the system of generalized non-reciprocal and non-discriminatory tariff preferences to the developing countries and to give consideration to the adoption of other differential measures in areas where that was feasible in order to meet the trade and development needs of the developing countries.

105. Representatives had, it was said, advocated at preceding sessions of the General Assembly that, when the Commission embarked on the second reading of the draft, it should establish the necessary exception in favour of the developing countries, in the light of their different levels of development, and thereby establish the differential treatment referred to in the Tokyo Declaration in areas not limited to trade tariffs, but extending to broader fields of co-operation among developing and developed States. Accordingly, although the general thrust of

article 23 was positive, it did not reflect specifically the expectations of the developing countries regarding the exclusivity of the benefits of the clause within a generalized system of preferences. Nor did it provide for the possible extension of differential treatment to countries in the light of their respective levels of development. It was considered regrettable that the broader concept of differentiated treatment, as suggested by some delegations at earlier sessions, had not been embodied in the article and that it had been made conditional on the outcome of the current multinational trade negotiations. The current limitations under article 23 could be improved, if, as suggested in UNCTAD resolution 96 (IV), the developed countries agreed to take additional measures to increase the utilization of preferences. Finally, pursuant to UNCTAD recommendation A.II.1, preferential arrangements between developed countries and developing countries which involved discrimination against other developing countries should be abolished pari passu with the effective application of international measures providing at least equivalent advantages for those countries.

106. Certain representatives expressed support for the point of view that the exception from the most-favoured-nation clause as envisaged in draft article 23 should cover not only preferential treatment given by unilateral decision by developed States or other entities to developing States on the basis of non-reciprocity within a generalized system of preferences, but also preferential treatment agreed on the same basis through international agreements between developed States or entities and developing States, for the benefit of the latter. In addition, although it was desirable to move toward the establishment of a generalized exception applying to all developing countries, equivalent measures should be adopted to compensate some of those countries for the loss of special preferences which they enjoyed at the present time. That was clearly articulated in General Assembly resolution 3362 (S-VII).

107. Certain representatives also stressed that the situation regarding preferences for developing countries was rapidly evolving, and the Commission had itself conceded in paragraph (18) of its commentary on article 23 that it was not yet possible to foresee to what extent the results of the current round of multilateral trade negotiations might affect the generalized system of preferences. While the situation was still so fluid, it was not easy to formulate precise rules. It was stated that the generalized system of preferences had not yet been given any stable and definitive framework. International practice with respect to that system had not yet developed to the stage where article 23, as well as article 24, could be included in a convention on the most-favoured-nation clause, although the article would assist the international institutions concerned in legislating the needed exceptions where a failure to recognize the existence of different levels of development would involve a form of discrimination between States.

108. With regard to the formulation of article 23, as well as article 24, certain representatives referred to the words "developed" and "developing" which qualified the word "State". Some representatives noted that there was no general agreement among States concerning the concepts of developed and developing countries and that those expressions were becoming increasingly ambiguous. If a treaty on the most-favoured-nation clause were contemplated, it was stated that the words "developed" and "developing" must be defined, which was an excessively ambitious task, at least

in treaty drafting. Others stressed that the terms "developed countries" and "developing countries" were used in numerous economic and political texts to indicate different levels of development without creating any confusion. Moreover, there was no lack of generally accepted parameters for characterizing a country as belonging to one or the other of those categories.

109. It was pointed out that the formulation by admitting the exception made in article 23 solely within a generalized system of preferences "recognized by the international community as a whole" was too broad and too ambiguous and might operate against the interests of the developing countries. In fact, the exception should apply whenever a generalized system of preferences was established, by means of an international agreement, by bodies representing developed countries, but in favour of developing countries. Another representative thought the article ambiguous, drawing attention to the phrase "in accordance with its relevant rules and procedures" which, he said, was liable to give rise to various interpretations. Since the process of international organizations was multiform and took place at different levels, the text of that article needed further elaboration, especially regarding the status of customs unions and regional economic organizations or arrangements; it should have contained a clear exception in the case of such regional arrangements. On the other hand, the view was expressed that the Commission had been quite right to refer to the relevant rules and procedures - present and future - of competent international organizations.

Article 24

110. Several representatives welcomed the inclusion in the draft of new article 24 which was of special importance, as it stated unequivocally a new rule in favour of developing countries and was of practical use with regard to the limitation of the right to preferential treatment to countries at the same level of development. That article took into account the interests of developing countries; it was in harmony with the present efforts to establish a new international economic order and was inspired by the principles and recommendations of UNCTAD, the Conference of the Group of 77 and particularly by articles 21 and 23 of the Charter of Economic Rights and Duties of States. Article 24 was fully justified, in that it was aimed at promoting the rapid economic development of developing countries. Intensification of economic co-operation among developing countries was currently an important element of a development strategy. The principle embodied in that article was based on equity and a full appreciation of the disadvantaged situation of developing countries. Many conferences concerned with economic issues had emphasized the need for developing countries to grant trade preferences to each other without having to extend such preferences to developed countries. Article 24 was of considerable importance in view of the efforts now being taken by the UNCTAD secretariat to establish a system of global preferences among developing countries.

111. Furthermore, it was stressed that article 24 would apply to preferences granted by developing countries among themselves in the context of a customs union or other similar association of States, which must necessarily be an exception to the application of the clause.

112. It was noted that article 24 laid down two important conditions relating to the application of the exception by stating that the preferential treatment in question should relate to the field of trade and be in conformity with the relevant rules and procedures of a competent international organization of which the States concerned were members. The formulation requiring that the preferential treatment should be granted in accordance with the rules and procedures of a competent international organization seemed, to certain representatives, prima facie, to limit the scope of the article, although it appeared to be an acceptable compromise wide enough to cover regional and subregional organizations of developing countries such as the Association of Southeast Asian Nations (ASEAN), the Mekong River Committee and other arrangements. However, other representatives believed the conditional phrases included in the article unduly limited its scope and placed unjustified restrictions on the granting State. Any necessary approval of preferential treatment granted under the terms of article 24 should be left to the granting State or any international organization of which it was a member. The present formulation was likely to detract from the objective of promoting the interests of developing States to the full extent. The granting of trade preferences by one developing State to another was necessary for their mutual economic growth and should not have to be carried out through an established international organization of developing States. That would impair the freedom of developing States to negotiate preferential treatment. Article 24 should therefore be reviewed, so that the developing States might reap the benefit of quick economic growth in close co-operation with one another.

113. It was felt that the last portion of the article, starting with the words "in conformity", should be rephrased so as to clarify its meaning and, in particular, specify what the term "competent international organization" meant. Could such an expression apply to the Group of 77, for example? Furthermore, article 24 confined the application of the exception to trade relations. It could be asked, however, whether the scope of the exception should not be broadened, in the light of the progressive development of international law, to include wider programmes of economic co-operation, such as industrial complementation arrangements which utilized inputs from several developing countries and were based on multi-governmental ownership. Finally, it was suggested that the article be redrafted to cover clearly multilateral economic arrangements as well as arrangements made between developing countries on a bilateral basis. It was further suggested that it should have contained a clear exception in the case of regional economic arrangements.

114. Still other representatives expressed doubts concerning the inclusion of article 24 in the draft. It appeared questionable whether the article, as currently worded, was appropriate or needed. Matters covered by the article were currently the subject of negotiations within the so-called Group "Framework" of the GATT Trade Negotiations Committee, and an agreement on certain aspects of those problems had not yet been reached.

Article 25

115. Many representatives who spoke on article 25 supported its provisions and considered the important rule embodied therein as desirable, entirely justified and generally recognized in State practice.

116. It was said that the connotations acquired by frontier traffic, when the granting State was a land-locked country, could take on special characteristics because of the difficulty of establishing the exact extent of the frontier zone and of exercising proper vigilance in extensive zones with a considerable flow of traffic. Another view was to the effect that paragraph 2 of the article was superfluous.

Article 26

117. Support was expressed by most representatives who addressed themselves to article 26. The rule set out in the article was considered generally recognized, desirable, and as corresponding to the actual practice of States. Article 26 was particularly welcomed by representatives of certain land-locked countries as it took the special situation of such countries into account. It was noted with satisfaction that its provisions were in full accord with the 1965 New York Convention on Transit Trade of Land-Locked States and with the relevant article contained in the informal composite negotiating text of the Third United Nations Conference on the Law of the Sea.

118. One representative, stressing the importance of article 26, said it was a generally recognized fact that the rights and facilities extended to land-locked States were an exception to the most-favoured-nation clause and did not imply any reciprocity. His country, one of the least privileged land-locked States, greatly needed easy access to the sea in order to engage in international trade and enjoy all the liberties to which it was entitled under international law in that area.

119. It was also pointed out that the granting of special treatment to land-locked States was fully justified by the disadvantages which those countries suffered as a result of their geographical situation. The disadvantage suffered by land-locked States was not according to still another representative, simply that they had no access to the sea but also that they had no seaports of their own and therefore could not grant any advantages in the use of such ports; furthermore, for the most part, they had no maritime shipping. Consequently, it was desirable to extend the content of article 26 to all advantages granted to land-locked States in connexion with their unfavourable geographical location. Reservations were expressed with regard to paragraph 2 of article 26, one representative regarding it as too restrictive while another representative considered it superfluous.

Article 27

120. It was noted that as article 27 essentially followed the language of article 73 of the Vienna Convention on the Law of Treaties, it did not require specific comment. But certain representatives indicated they were not convinced that article 27 was either necessary or useful. No legal justification was seen for the inclusion of the article which merely reproduced the text of article 73 of the Vienna Convention and which had no relevance in a convention on the most-favoured-nation clause. Also, the need for article 27 was questionable since article 1 clearly defined the scope of application of the draft articles.

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Article 28

121. Representatives who referred to article 28 generally did so with approval, noting that the rule reflected in the article contributed to the flexible application of the draft and facilitated its wider acceptance. It was felt that article 28 could alleviate some of the concern of countries that would have preferred to increase the range of exceptions.

122. A few representatives found no necessity for the inclusion of article 28. It was stated that if the purpose of inclusion was the same as in the Vienna Convention on the Law of Treaties, the provisions should be brought into line with article 7 of that Convention, which allowed for some degree of retroactivity. Although the Commission had indicated that the States bound by the draft articles would not necessarily be parties to the Vienna Convention, a State not a party to the Convention would be bound by international customary law as at that date, since the Convention was regarded as a codification of generally accepted international customary law.

Article 29

123. General support and approval of article 29 was expressed by representatives who made comments thereon. Representatives welcomed the fact that by this article the Commission recognized that in negotiating future treaties containing most-favoured-nation clauses the parties could agree on any provision derogating from the rules of the final draft. While placing the question of the most-favoured-nation clause in a comprehensive legal framework, the Commission had felt that it was desirable not to formulate strict rules but to allow States autonomy to develop their own substantive provisions on the question. Thus, in its draft, it had not set forth general rules of international law but only residual rules, leaving the parties free to adopt different treaty provisions, as provided in article 29. It must be remembered, however, that the freedom given the parties to deviate from the provisions of the draft would not be detrimental to those provisions but would lead to their enrichment and hence to a further development of the law. The autonomy which the draft granted the parties gave it a useful element of flexibility. Article 29 enunciated a well-known principle of international law concerning the sovereign liberty of action of States.

124. It was stressed that, while article 29 was acceptable, it should not be interpreted in such a way as to prejudice the rights of third parties.

Article 30

125. Several representatives noted with satisfaction that the Commission had retained an article in the draft along the lines of article 30. Several of them specifically voiced their support for the article, as it showed maximum flexibility, took into account the interests of developing countries and was in harmony with the present efforts to establish a new international economic order. Appreciation was expressed for the efforts made by the Commission to leave open the

possibility of further rules of international law in favour of developing countries; the Commission's optimism in that regard was shared. It was noted that GATT was currently considering the granting of differential measures and more favourable treatment to developing countries, which would be without prejudice to the existing draft articles. The hope was expressed that the new norms of international law in favour of developing countries would be established before the convening of a diplomatic conference to adopt a convention based upon the draft articles.

126. Article 30, it was said, clearly indicated the sensitivity of the Commission to new developments on the international scene. Important international documents such as the Tokyo Declaration and the Charter of Economic Rights and Duties of States emphasized the necessity of granting preferential treatment to developing countries.

127. Some representatives, however, were of the view that article 30 could be improved in the light of ongoing negotiations relating to preferences and needed further development to promote the economic development of developing countries and their objectives which could not be achieved by the type of generalization contained in article 30.

128. It was suggested that article 30 should be further developed to include, inter alia, trade in raw materials and agricultural goods, the removal of barriers to such trade and the provision of other facilities to promote the economic development of developing countries, including the transfer of technology.

3. Final phase of the codification of the topic

(a) Form to be given to the codification of the topic and procedure by which the topic is to be codified

129. Many representatives expressed support for the recommendation of the Commission contained in paragraph 73 of its report that the General Assembly should recommend the draft articles on most-favoured-nation clauses to Member States with a view to the conclusion of a convention on the subject. The draft articles were viewed as a sound basis for such a convention. The convention approach was said to be the most appropriate one in view of the political and economic importance of the most-favoured-nation clause. Such a convention would help to strengthen the most-favoured-nation régime, assist in clarifying the legal content and meaning of most-favoured-nation clauses and remove any grounds for disputes or contradictions in their application. The most important prerequisite for the effectiveness of the clause was its broadest possible application, based on the provisions of a multilateral convention of universal character. Some of these representatives believed that the time had come for a conference of plenipotentiaries to be convened as soon as practicable to adopt a convention on the topic on the basis of the Commission's draft articles. Other representatives believed the task of preparing an international convention could be entrusted to the General Assembly and more specifically to its Sixth Committee in order to strengthen its role in the codification and progressive development of international law. Still other representatives, while supporting the Commission's recommendation, did not express a position as to the question of the body which should be entrusted with the task of elaborating a convention.

130. Other representatives, on the other hand, did not agree with the Commission's recommendation concerning the form to be given to the codification of the topic. It was considered premature to take a decision at the present time recommending the draft articles to Member States with a view to the conclusion of a convention on the subject. An analysis confirmed that many of the draft articles were essentially guidelines to the interpretation and application of the clause in its various forms and were not substantive rules of law. The need for saving clauses of the nature of articles 29 and 30 showed that there might be hesitations about the utility of seeking to convert the draft into a convention and that the matter was not one of urgency. To one representative, the draft articles on this topic was a paradigm case for an alternative to the convention method, namely the model law approach, which would not change clauses in effect and would still be a useful guide for interpretation. In addition, the many exceptions to the clause would make it very difficult to draft a treaty on the matter. Another representative stated that harmonization of the universal goal of a new international economic order with the further development of regional economic co-operation, as well as with the fair treatment of those countries which did not participate in such regional co-operation, was a task which could not be fulfilled by abstract legal rules alone. It required institutional frameworks for continuous consultation, negotiations and decisions. To a certain extent, such frameworks already existed. It was difficult to see how the adoption of a convention on most-favoured-nation clauses could contribute to that effort.

131. Certain other representatives were of the view that the draft articles should be reconsidered. It was said that the number of important issues that had been left unsolved and the concerns expressed in the Committee during the discussion of the draft articles strengthened the view that the Commission should be asked to re-examine the draft articles in the light of the Committee's debate and submit a further report in 1979 or 1980. It was further suggested that the Commission should give some of the articles a third reading before a final decision is made by the General Assembly on the Commission's recommendation.

(b) Request for comments

132. Independently of their position as to the final form of the codification of the topic, a majority of representatives held the view of the importance and complexity of the matter; Governments of Member States should be invited to submit their written comments on the final set of draft articles on most-favoured-nation clauses adopted by the Commission at its last session. Some representatives stressed the need for allowing sufficient time for a careful examination of the draft articles by Governments in the light of the results of current negotiations and developments in the field. Also, some representatives suggested that organs of the United Nations, specialized agencies and other interested intergovernmental organizations should also be requested to submit their comments on the draft articles. Some representatives suggested that Member States be requested to submit their comments on the question of the form to be given to the final codification of the topic and the procedure by which the topic is to be codified. They believed that the matter should not be dealt with hastily and that it was not necessary to take a decision at the present session. A decision could be made at the thirty-fourth or thirty-fifth session of the General Assembly.

C. State responsibility

133. The importance and urgency of the codification and progressive development of the rules of international law governing State responsibility was emphasized by many representatives. The topic, according to their views, was fundamental to international law and complemented all its basic principles and rules, including those relating to the maintenance of international peace and security. It was evident that a codification of the topic would have a far-reaching political impact. Clarifying instances of failure of States to discharge their international obligations and the consequences attached to such a failure at the international level would certainly enhance the effectiveness of international law and, consequently, contribute to the preservation and consolidation of international peace and security and the expansion of international co-operation. A rational and viable international order could not survive unless it was based on the premise that the States which composed the international community were capable of acting in a wrongful manner and should assume, in such cases, responsibility under international law. State responsibility paralleled State sovereignty.

134. Since the United Nations had already codified the law of treaties in the 1969 Vienna Convention on the Law of Treaties, success in the near future in the codification of the topic of State responsibility would mean that the United Nations would have achieved the codification of the two most important chapters of

international law, which would surely gain in clarity. But the reason for codification was not only to seek for more clarity in the law. Codification generally took place after major upheavals and was aimed at satisfying new aspirations and responding to new needs. The Napoleonic code, for instance, had been drawn up after the French Revolution. The current United Nations work on codification, including the codification of the topic of State responsibility, should, therefore, be aimed at meeting the basic aspirations and needs of an international community that in the past 25 years had experienced numerous transformations. It should preserve. on one hand, the relevant heritage of centuries of formation of international law and adapt, on the other, that heritage to the requirements of the contemporary world.

1. Comments on the draft articles as a whole

135. Several representatives expressed satisfaction for the work so far done by the International Law Commission in the preparation of its draft articles on State responsibility as well as for the outstanding contribution made by the Special Rapporteur. In the codification and progressive development of international law in such a highly complex area, efforts should always be made to maintain a very careful balance between generalizations yielding abstract rules and the need to adapt those rules to international realities. For those representatives, the Commission had performed that task adequately, although, of course, individual draft articles provisionally adopted by the Commission were susceptible of a number of improvements.

136. Some of those representatives commended the Commission for having borne in mind the contemporary requirements of the international legal order in preparing its draft articles on State responsibility. They encouraged the Commission to resort, whenever the need arose, to the progressive development method, taking account of the current interests and needs of individual States, including those of the newly independent States, as well as of the interests and needs of the international community as a whole. In this respect, representatives noted with approval the conclusion of the Commission that State responsibility was one of the topics of international law in which the progressive development of the law could play a particularly important part, especially with regard to the distinction between different categories of international offences and the contents and degrees of responsibility.

137. While recognizing the progress already accomplished in the preparation of the draft articles, other representatives warned the Commission against certain approaches which, in their view, could endanger the viability of the final product. First of all, it was said, the Commission should adhere strictly to the distinction made by it between "primary rules" of international law and the "secondary rules" governing State responsibility proper, and should deal in the draft articles exclusively with the latter. Secondly, the Commission should avoid the insertion in the draft articles of aspects of jurisprudential philosophy which were not necessary and might even be harmful in a set of articles intended to form the basis of an international convention. The draft articles should be concerned in a pragmatic way with setting forth rules of conduct as the basis for a statement of the law in given hypotheses to which States would agree. The Commission should,

therefore, refrain from making subtle philosophical or theoretical distinctions. Thirdly, the Commission should avoid too abstract a formulation of the provisions embodied in the draft articles, since it was difficult to anticipate its scope of application. Instead of establishing greater legal certainty, such kinds of provisions might tend to create escape clauses detrimental to customary international law. They might also seem impractical to States which were less deeply rooted in the continental European legal tradition, because they did not easily lend themselves to the pragmatic approach prevailing in international law. Fourthly, the Commission should not yield to the temptation of establishing a parallel with domestic penal law relating to individuals. There was not room for such a parallel in the rules of international law governing State responsibility.

138. For other representatives, the draft articles already prepared by the Commission held out a good prospect of elaborating a convention on State responsibility, a major topic of international law which had defied codification for decades. It was important, however, not to lose sight of the fact that the interest of the international community in the regulation of State responsibility by a multilateral treaty with the widest possible participation was motivated by the expectation that the codification work would be directed towards the preparation of an instrument that would play a significant role in the preservation and consolidation of international peace and security and the development of international co-operation.

139. Representatives generally agreed upon the scope of the draft articles and in particular with its limitation to State responsibility for internationally wrongful acts, which must be distinguished from the liability arising out of acts which were not prohibited by international law. Endorsement was also given to the conclusion of the Commission that the sedes materia of draft articles under preparation should be the "secondary" rules which governed all the new legal relationships to which an internationally wrongful act on the part of the State might give rise in different cases, and not the "primary" rules of international law imposing on States obligations the breach of which could be a source of responsibility. The fact that the draft articles were not limited to a particular sector but covered State responsibility for internationally wrongful acts "in general" was also noted with approval. In doing so the Commission proceeded, it was recalled, in accordance with the recommendations made by the General Assembly several years before to the effect that it had become necessary to broaden the scope of the study by the Commission of State responsibility and not limit the scope of the topic, as it had been frequently the case in the past, to the question of State responsibility for damage caused on its territory to the person or property of aliens.

140. The general structure of the draft articles under preparation by the Commission, with its division into parts I (the origin of international responsibility) and II (the contents, forms and degrees of international responsibility) and an eventual part III (implementation of international responsibility and settlement of disputes), did not give rise to any critical comment. Certain representatives reiterated, however, the view of their delegations that in its final form the draft should contain provisions concerning the implementation or enforcement of State responsibility as well as flexible procedures for the settlement of disputes.

141. Regarding teminology, it was said that in the Spanish text the term "acto ilícito" was preferable to the term "hecho ilícito", because a "hecho" as such did not entail any responsibility. The word "hecho" referred basically to an event not necessarily connected with or attributable to human action. The use of the word "hecho" might be justified by the fact that the term included not only actions but also omissions as a source of responsibility, but it placed nevertheless too much emphasis on the concept of event as a result of an action or omission rather than on the action or omission which had produced the event. It was also felt, however, that the use of the word "hecho" would avoid the introduction into the draft articles of any doctrinal militancy seeking elements of "guilt" in State responsibility. The view was also expressed that there was a subtle difference between the concepts expressed by the words "fait" and "acte", the former being regarded in a static perspective and the latter in a dynamic perspective, but in the present context the two concepts tended to merge.

142. Representatives welcomed the progress made by the Commission at its thirtieth session in the preparation of the draft articles on State responsibility. Different views were, however, expressed with regard to the assessment of such a progress. Some representatives considered the progress impressive or important, while others were of the opinion that the progress made at that session was rather modest. Different views were also expressed with regard to the evaluation in that respect of the work so far made by the Commission in the preparation of the draft articles since the inception of its work on the subject.

143. Thus, some representatives underlined the fact that the preparation of the draft articles was proceeding slowly, since the Commission had been working on the topic for more than 10 years and the end of the work was still far off. It was also stated in this connexion that it was becoming increasingly difficult to judge the contents of the draft articles that the Commission added from year to year to the series without having a complete over-all picture of their actual legal consequences. How, in international practice, could the origin of State responsibility be separated from its content and implementation? Only with a complete text of parts I, II and III of the draft could a realistic judgement be made of the meaning of each article and its impact on actual international practice.

144. Other representatives considered that while it might seem that progress had been slow such an assessment was wrong. Actually, the Commission had already adopted in first reading 27 draft articles covering the three first chapters and the beginning of chapter IV of part I of the draft. It was therefore approaching the completion, as requested by the General Assembly, of the first reading of part I which contained five chapters. Then, the Commission could devote its attention to the other parts of the draft and to the second reading. For those representatives, a realistic evaluation of the work so far accomplished should take into account the fact that in the field of State responsibility it was necessary for the Commission and the Special Rapporteur to study an enormous heritage of State practice, international judicial decisions and doctrine, which demanded the most careful consideration, and to examine that heritage in the light of the profound political, social and legal transformations which had occurred in the international community. It was also stated with regret that the Commission

found itself compelled each year to give substantial consideration to a number of other topics in order to comply with the General Assembly's recommendations. The inevitable result was the fragmentation of the Commission's annual debate, concretized in a small number of additional draft articles on various topics, to the detriment of the urgent completion of drafts on topics closely connected with the strengthening of international peace and security, especially the topic of State responsibility.

145. The opinion was expressed that it was all the more urgent to codify the legal rules concerning State responsibility, since the General Assembly had on its agenda for the current session an item entitled "Draft Code of Offences against the Peace and Security of Mankind". The Draft Code dealt with the individual responsibility of State organs and thus covered a branch of international law which was distinct from that relating to State responsibility for internationally wrongful acts. The two were, however, complementary aspects of the legal regulation of internationally wrongful acts. In its commentary to article 19 on "international crimes" and "international delicts" the Commission had referred to the matter, not only because the development in international law of the criminal responsibility of individual State organs emphasized the increasing importance attached by international law to the subject-matter of certain international obligations on matters of peace and security, but also because it must be made clear that the punishment of organs liable to criminal prosecution did not absolve the State from its international responsibility. Those two notions of responsibility were intended to discourage the commission of graver forms of wrongful acts affecting the vital interests of the world community as a whole on matters of international peace and security.

146. Representatives generally agreed that the Commission should try to complete the draft articles under preparation as early as possible and that, in any case, the first reading of part I of the draft should be completed within the term of office of its present membership. The Commission should try to overcome the problems posed by the departure from the Commission of the present Special Rapporteur, a Judge-elect of the International Court of Justice, and try to proceed with its work on State responsibility in accordance with the established time schedule. The hope was expressed that the present Special Rapporteur would be able to submit his final report on the remaining of part I of the draft articles before leaving the Commission. One representative suggested that before the appointment of a new Special Rapporteur for the topic, whose first report could be expected no sooner than 1980, the Commission should devote a few meetings to a general debate on the direction it should take, in the light of the reactions of substance to the work it had accomplished on the topic.

147. Several representatives welcomed the decision taken by the Commission, in accordance with articles 16 and 21 of its Statute, to communicate to Governments through the Secretary-General chapters I, II and III of part I of the draft articles on State responsibility for internationally wrongful acts and to request them to submit their observations and comments on the provisions of those chapters. It was, however, observed by other representatives that the requested observations and comments could be only preliminary or provisional, since Governments would not have yet at their disposal the whole set of draft articles, particularly part I,

and, consequently, they would not have an over-all view of the relationships between the various provisions. In this connexion, it was suggested that the deadline for submission of such observations and comments should be extended until the end of 1980 and if possible until chapters IV and V were available. One representative also stated that the decision of the Commission to request the said observations and comments might be premature in itself in view of the need to proceed to the appointment of a new Special Rapporteur for the topic and to an eventual general evaluation by the Commission of the work so far done on the topic.

2. Comments on the various draft articles

148. A number of representatives made specific comments on the five articles of the draft (arts. 23 to 27) provisionally adopted by the International Law Commission at its thirtieth session. A few comments were also made by certain representatives on articles of the draft provisionally adopted by the Commission at its previous sessions. In making such comments, representatives underlined the tentative character of their observations and the need for further detailed study of the draft articles by their respective Governments.

Articles 5, 7, 8, 10 and 14

149. Regarding the above-mentioned draft articles it was said that because of the very complexity of the State machinery, the representative nature of the organs envisaged in article 5 should be established in terms of its functions as well as by reference to the definitions of internal law. It was also stated that a more detailed study would be necessary in order to identify better the entities referred to in paragraph 2 of article 7. Serious doubts were also expressed concerning the provision in subparagraph (b) of article 8 because on more than one occasion political factions had set themselves up as instruments of authority, although their representative nature lacked any legal basis. The same observation was made with regard to article 10. Reservations were also expressed with respect to article 14 on the grounds that the article would appear to assume that an organ of an insurrectional movement established in the territory of the State existed with the consent of the State concerned. Furthermore, the attributability of the conduct concerned to the State was defined in article 14 in an even more clear-cut manner than in the cases referred to in articles 5 to 10 of the draft. Reference was also made, in connexion with these matters, to the valuable experience of recent events in which States allowed armed bands or paramilitary forces to perpetrate acts affecting international peace and security.

Article 19

150. Emphasizing that the draft articles on State responsibility must be viewed especially from the standpoint of the preservation and consolidation of international peace and security, some representatives commended the International Law Commission for the distinction made in article 19 between "international crimes" and "international delicts". Such a distinction, which took into account the concept of jus cogens codified in the 1969 Vienna Convention on the Law of Treaties, was

considered of particular significance for the evaluation of the entire draft. Those representatives praised the advancement in the development of the concept of State responsibility which was represented by such a provision as the one embodied in paragraph 3 (a) of the article, according to which an international crime might result from a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression. In the opinion of certain representatives, the wording of other provisions of the article was, however, less unambiguous and in the light of the recognized norms of international law defining "international crimes". With regard to aspects of the drafting needing further improvement, reference was made in general terms to the distinction between internationally wrongful acts that were injurious to one State or a small number of States and those that were injurious to the entire international community, as well as to the inclusion of certain examples given in paragraph 3 of the article. Specific reference was made to the protection of non-nuclear Powers from intimidations or threats from a nuclear Power, to a constant threat to the peace and to war propaganda as examples of eventual "international crimes" deserving to be expressly mentioned in paragraph 3 of the article.

151. Other representatives trusted that the Commission would keep its task fully in mind in drawing its legal conclusions from the distinction made in article 19 between "crimes" and "delicts" in respect of internationally wrongful acts. What was meant in legally significant terms by the notion of "criminal responsibility" introduced in the draft articles? That notion might sound appealing at the political and emotional levels but its conceivable legal consequences needed to be clarified. The Commission's task was to prepare provisions on the responsibility of States. That did not include the personal liability of individuals even where their conduct was attributable to the State. Personal liability of individuals for action in the international field was an entirely different matter. On the other hand, it should be noted that the concept of international crimes included the notion of crimen erga omnes. That concept should not lead, however, to the conclusion that any kind of countermeasure was admissible. The prohibition of the use of force under international law within the meaning of the Charter of the United Nations must be observed also where measures against an "international crime" were concerned. The inclusion of the concept of "international crime" in article 19 must not lead to a restriction of the concept of the prohibition of the use of force under international law. Apart from that, any other countermeasures must likewise be in proportion to the crime or delict concerned. In order that its work might have the largest possible impact the Commission should realize that international law could be developed further only through realistic steps and with due regard to its already existing rules.

152. In this connexion it was explained that in distinguishing between "international crimes" and "international delicts" the Commission had based itself on the most recent conclusions drawn from international practice and also on the works of highly qualified authorities. Moreover, the definition of "international crime" given in paragraph 2 of article 19 was in keeping with the definition of norms of jus cogens embodied in article 53 of the 1969 Vienna Convention on the Law of Treaties. The fundamental interests that the Commission had had in mind when drafting the

definition in paragraph 2 of article 19 were the maintenance of international peace and security, the safeguarding of the right of peoples to self-determination, the international safeguarding of the human being and the international safeguarding of the environment. Such a concept of an "international crime" was not new. The provision that an "international crime" must be recognized as such by the international community as a whole did not mean that it must be recognized by every single member of the international community - for such a provision would be tantamount to conferring a right of veto - but that all the essential groupings making up the international community must concur on the point and that there must be a general consensus among such groupings, whether social, economic or geographical. The list contained in article 19, paragraph 3, was not exhaustive. Moreover, all the examples given had been taken from existing positive law. Any excessively facile interpretation or implementation was thereby obviated. In making the distinction between "international crimes" and "international delicts", the Commission felt that different régimes of responsibility should be attached to each of those two types of internationally wrongful acts, but considered it to be logical that, as in domestic legislation, the definition of a breach of an obligation must precede the determination of the consequences of such a breach. The Commission would revert, therefore, to that aspect of the question in part II of the draft articles dealing with the contents, forms and degrees of international responsibility. At some time, the Commission must also specifically indicate the bodies and organs which were to identify the existence of an "international crime" and the consequences that must follow therefrom. The Commission had agreed that that was essential. The determination of the existence of an internationally wrongful act sufficiently grave to be regarded as a "crime" and the consequences thereof could not be left to any individual State. Article 66 of the Vienna Convention on the Law of Treaties stipulated that any one of the parties to a dispute concerning the application or the interpretation of article 53, relating to treaties conflicting with peremptory norms of general international law, must submit it to the International Court of Justice for a decision. Similarly, the determination of the existence of an "international crime" could be entrusted only to a supreme international political or juridical body, whose procedures provided every safeguard for the alleged offender, as was done in domestic legislation.

Articles 20 and 21

153. The basic distinction between international obligations "of conduct" or "of means" and international obligations "of result", embodied by the Commission in articles 20 and 21 of the draft, was expressly supported by some representatives. The different nature of the international obligations falling under each of those two categories required, in the opinion of those representatives, that the general legal conditions which should be present to determine the existence of a breach of an obligation falling under the category "of conduct" or "of means" should be defined separately from the conditions to determine the existence of a breach of an obligation belonging to the category of obligations "of result". Moreover, the distinction was not at all a theoretical one, but had a series of practical incidences for the international law governing State responsibility for

internationally wrongful acts. It was explained that the fact that a rule or a distinction was expressed through codification in an abstract form did not mean that that rule or distinction was substantially an abstract elaboration. A norm or a distinction was only abstract when established by theoretical deduction from theoretical principles; it was not abstract when it was formulated by induction from the position taken in actual cases, as was the case with the distinction made by the Commission in the draft articles between obligations "of conduct" or "of means" and obligations "of result".

154. Other representatives wondered, however, whether that distinction was actually justified or needed. Those representatives recalled that every international obligation, including the obligations described as obligations "of conduct" or "of means", aimed at a specific result and that, conversely, every international obligation, including the obligations described as obligations "of result", imposed upon States the adoption of a certain course of conduct. Furthermore, it had yet to be demonstrated that the distinction served any practical purpose from the standpoint of the codification of the rules of international law governing States responsibility. The Commission should, in the opinion of those representatives, re-examine the distinction made and avoid intellectual refinements which might complicate matters in practice.

155. A third group of representatives did not dispute that the distinction made by the Commission might be useful for the codification of the law relating to State responsibility, but considered that, as it appeared from some of the examples given by the Commission itself, the distinction was not as clear-cut as the draft articles implied. In practice it was not easy to identify a given obligation as one "of conduct" or "of means" or as one "of result", and many international obligations would appear to be rather mixed in nature. In this connexion, it was observed with concern that there appeared to be a tendency to characterize as obligations "of conduct" or "of means" what objectively and according to State practice ought to be characterized as obligations "of result". All those representatives wished to reflect further before pronouncing themselves definitely on the distinction made by the Commission. 5/

5/ For further comments on the matter made in connexion with obligations "to prevent a given event" referred to in article 23 of the draft, see paras. 162 to 166 below.

Article 22

156. Regarding article 22, it was recalled that a State was not responsible merely because an alien had suffered an injury in its territory or within its jurisdiction. For a State to incur responsibility for an injury suffered by an alien it was necessary that some commission or omission could be attributable to the State itself. The responsibility of the State would arise only if the State was obliged in the case to prevent the injury suffered by the alien or to take certain remedial steps following its occurrence and failed to do so.

157. Certain representatives referred with approval to the inclusion of the principle of "exhaustion of local remedies" in article 22 of the draft as a prerequisite for the establishment of the existence of a breach of an international obligation relating to the treatment of aliens. They considered, however, that for the principle to be applicable it was necessary that the local remedies were not only theoretically available but effective and sufficient to redress the injury complained of by the alien concerned. The Commission should therefore study further, from the standpoint of the progressive development of the international law governing State responsibility, the possibility of allowing exceptions to the application of the principle of "exhaustion of local remedies". For example, an existing right of appeal against decisions of lower municipal courts might be so illusory or unsubstantial as to excuse its not being exercised; an application for local remedy might be unreasonably delayed or prolonged, etc. Reference was made to the precedent set forth in article 5 of the Optional Protocol to the International Covenant on Civil and Political Rights.

158. In addition to the principle of "exhaustion of local remedies", other factors, such as the rule of nationality and the time element, were also mentioned as relevant for the establishment of an international claim for injuries suffered by aliens. There should be a bond of nationality between the claimant State and the injured person as well as a genuine and effective link between them. The inhabitants of a protected State or aliens serving in the armed forces or on the merchant ships of a claimant State might be an exception to the rule of nationality. The bond of nationality not only should exist at the date of the original injury but also should continue until the date of the judgement or award. On the other hand, it was said that in the absence of a period of limitation for international claims the precise time of the breach of the obligation of the State, whether before or after the "exhaustion of local remedies", might have no effect upon the claim.

Article 23

159. Some representatives considered that the international obligations "to prevent a given event" referred to in article 23 were certainly obligations belonging to the category of obligations "of result" but that the result aimed at by such obligations was a very specific one, namely the prevention by the State of the occurrence of an event caused by factors in which the State played no part. They deduced therefrom that the obligations dealt with in article 23 were a particular type of obligations "of result" that, because of its specific nature, would need to

be treated, for the purpose of determining the conditions required to establish the existence of a breach, separately from other obligations "of result" in which only action by the State was involved in the achievement or non-achievement of the result specified by the obligation, as was the case in article 21 of the draft. Those representatives shared the Commission's conclusion that in order to establish that there was a breach of an international obligation "to prevent a given event" the actual occurrence of the event that the State was required to prevent was necessary, as provided for in article 23. Further, such an occurrence must have been made possible by the conduct that the State chose to adopt in the case in question, whereas it could have prevented the occurrence of the event had it adopted a different conduct.

160. For those representatives, the separate specific definition of a breach of an obligation "to prevent a given event" contained in article 23 had practical importance, particularly with regard to the determination of the moment and duration of the breach of an international obligation. Moreover, the wording of the article as well as its commentary took duly into account that the subject matter of article 23 might be one instance in which the principle of force majeure would apply and preclude State responsibility.

161. It was also stated that under obligations of the kind referred to in article 23 the obliged State was expected to act with reasonable care; otherwise it could not disclaim responsibility for the event which occurred.

162. Other representatives accepted in principle article 23 but considered that the identification of the obligations "to prevent a given event" might be difficult and might create problems for the interpretation and application of the rule laid down in the article. It was not always easy to distinguish in concrete cases between obligations "of conduct" or "of means" and obligations "of result" and still less between obligations "of result" and obligations "to prevent a given event". In this connexion it was said that article 23 would seem to lie somewhere between objective responsibility and responsibility based on fault. It was also stated that if the obligations concerned related only to the prevention of an event by a State, and not to its conduct in that respect, limitless controversies might arise about the permissible and impermissible conduct in relation to that event. It was also said that the article could be interpreted to mean that the responsibility of a State was not in respect of a breach of an international obligation but in respect of the result of the occurrence of a given event, because according to its wording there was no breach of the international obligation when the State failed to adopt measures to prevent an event which did not occur. The opinion was expressed that, in any case, article 23 would have to be looked at in the light of the provisions on circumstances precluding wrongfulness and aggravating and attenuating circumstances that the Commission intended to include in chapter V of part I of the draft. All those representatives shared the view that the Commission should give some further thought to the formulation of the provision embodied in article 23.

163. Some points concerning the relationship between articles 23 and 21 were singled out by certain representatives as matters requiring further thought by the Commission. Of particular regard were the distinction between "event" and "result", the

definition of the conditions required for concluding that a breach of an obligation "to prevent a given event" existed, and the relationship between those conditions. Thus, for some representatives, the distinction between "event" and "result" and the need for such a distinction was not made sufficiently clear in the commentary to article 23. In any case, it would seem advisable to avoid using the term "event" in the article without further qualification, bearing in mind that the "event" in question was an event which in itself did not necessarily constitute "damage" or "a breach of law" and that the breach of the obligation to which the article referred could occur even where there was no injurious consequence. Article 23 should also define more clearly the two conditions required for the conclusion that a breach of an obligation "to prevent a given event" existed, namely: (a) the occurrence of the event which the State had the obligation to prevent and (b) the establishment of the State's failure to prevent it. It would also seem preferable, in drafting the article, to avoid negative forms of expression and to follow the model of articles 20 and 21. With reference to the problems of causality which come into play in article 23, it was said that the word "by" preceding the words "the conduct adopted" suggested an impossible causal link, for it was not "by" that conduct that the State did not achieve the result of preventing the occurrence of the event, but rather by what it failed to do. In order to render clearer the causal link that should exist between the occurrence of the event and the conduct adopted, as the Commission explained in the commentary to the article, it was suggested to reword the article to read as follows: "... There is a breach of that obligation only if, as a result of the defects of the conduct adopted the State does not achieve that result". It was also said that the words "by the conduct adopted" could be deleted since cases could well be conceived where the State in question was obliged to have recourse to a particular conduct, which might well be the only possible one.

164. It was also stated that the obligation to prevent an event entailed an obligation to act prior to the occurrence of the event which was to be prevented. The State assuming such an obligation must therefore take all appropriate measures to prevent the event. It might, however, not be possible in practice to verify the existence of such measures and their appropriate character and, hence, it might be necessary to wait for the event to occur in order to be able to establish lack of due diligence on the part of the State in question. That was the case when the State was under an obligation to prevent injury to persons. If it seemed obvious, however, that the conduct of the State must inevitably lead to the occurrence of the event which was to be prevented, it would be logical not to have to wait for the event in order to be able to establish the breach of the obligation. The Commission should, it was maintained, reconsider the article along those lines.

165. Some other representatives expressed reservations about the substance of article 23 because it was based on a distinction between obligation "of conduct" or "of means" and obligations "of result" which was of difficult, if not impossible, application in practice. Many international obligations were of a mixed nature, involving elements akin to the obligations "of conduct" or "of means" as well as to the obligations "of result". A number of obligations considered by the Commission, in paragraph (3) of its commentary to article 23, as obligations "of result", did not seem to correspond, in the opinion of those representatives, to that concept in

the practice of certain Governments and, in any case, very few of the examples cited constituted an obligation whose character was as clear-cut as it was implied. It was true that the sharp distinction between the two said categories of obligations had been attenuated in articles 21 and 23 by the use of the words "if, by the conduct adopted", and in the case of article 23 by the considerations contained in paragraph (6) of the commentary to that article, but those words and considerations showed even more that in practice obligations "of result" could not be distinguished from obligations "of conduct" or "of means". Actually, the introduction in article 23 of the concept of obligations "to prevent a given event" as a subcategory of the obligations "of result" mentioned in article 21 contributed to making increasingly blurred the original doubtful distinction, from a practical standpoint, between obligations "of conduct" or "of means" and obligations "of result".

166. The representatives referred to in the preceding paragraph expressed bewilderment at the distinction made by the Commission between an obligation "of result" and an obligation "to prevent a given event" when, in fact, the specified result aimed at by the latter obligation was precisely the prevention of a given event. It would appear, it was said, that article 23 was only repeating in a negative formulation the obligation formulated in positive terms in article 21. Those representatives wondered whether the distinction between a positive obligation and a negative obligation was significant for the purpose of the draft articles under preparation. It was also questioned whether an obligation "to prevent a given event" could always be separated from the obligations "of conduct" or "of means" of article 20. Furthermore, the draft articles were mute on the question of whether an obligation under article 20 might conflict with an obligation under article 23. Lastly, it was also stated that article 23, read together with articles 20 and 21, obscured unnecessarily the provisions contained in articles 16 and 17 of the draft which defined the existence of a breach of an international obligation and the irrelevance of the origin of the international obligation breached. All those representatives agreed with the Commission that when a particular obligation required a State to secure the prevention of a given event there could be a breach of that obligation only if the given event occurred, but they did not share the Commission's conclusion that the nature of these international obligations was such as to make it necessary to include in the draft articles a special rule concerning the determination of a breach of such an international obligation. Such a determination could be covered by other articles of the draft, particularly if the present article 21 was to be retained.

167. In addition to their reservations concerning the substance of article 23 and the need for such an article, some representatives stated that they would have further difficulties with the present wording of the article which they considered to be too absolute. Thus, for example, it was said that the drafting of the article did not embody some of the necessary qualifications outlined by the Commission in the third and fourth sentences of paragraph (6) of the commentary to the article. Attention was also called to the inappropriateness of the present wording of article 23 from the standpoint of provisions of the draft relating to the attributability of conduct, particularly in the case of situations covered by draft articles 7, 8, 9 and 10.

168. A reference was made to the importance of the notion of "damage" as a condition for international responsibility and noted that the problems posed by article 23 would seem to support that position. The Preparatory Committee of the 1930 Hague Conference, mentioned in paragraph (8) of the commentary to article 23, had considered that the existence of "damage" and not the occurrence of an event as such, constituted the source of international responsibility. Furthermore, contrary to what was stated in paragraph (5) of the commentary to article 23, it was hard to see how an attack on a person which caused no physical, moral or material damage could engage the responsibility of the State for having breached the obligation to prevent such attacks.

169. Finally, it was also suggested that article 23, as well as article 22, should be amalgamated with the present article 21. In such a manner a single article would cover the questions to be dealt with specifically for establishing the existence, in the various hypotheses, of a breach of an international obligation belonging to the category called "obligations of result".

Articles 24, 25 and 26

170. Several representatives supported generally the proposed provisions in articles 24, 25 and 26 and considered that these articles reflected a laudable effort to determine the "moment" and the "duration" of the breach of an international obligation. An internationally wrongful act could be a simple act, not extending in time, or an act extending in time ("continuous act"; "composite act"; "complex act"). It could also be an act relating to the prevention of the occurrence of a given event which, in turn, might continue in time. The attempt made by the Commission took duly into account, in the view of those representatives, the concept of "thickness" of time with respect to those various types of internationally wrongful acts. At first glance the provisions on the tempus commissi delicti drafted by the Commission might appear very detailed and even complicated, but such detail and apparent complications were inseparable from the subject matter. Once the decision had been taken to incorporate the element of tempus commissi delicti in the draft, there was no alternative but to make detailed provisions such as the ones embodied in articles 24, 25 and 26.

171. For those representatives the decision to include in the draft articles provisions on the tempus commissi delicti was fully justified because of the practical bearing of the determination of a series of questions of the great importance for the rules of international law governing State responsibility. The tempus commissi delicti was essential, for example, in determining the gravity of the breach and, therefore, on its eventual qualification as an "international crime" or as an aggravating circumstance. It was also of very practical significance in determining other questions such as the existence of a denial of justice, the measure of the prejudice caused, the amount of reparation or compensation, the possibility of restitutio in integrum, the period of limitation for the submission of a claim, the nationality of the claim and the competence rationae temporis of an international tribunal or jurisdiction.

172. It was explained that the determination of the "moment" meant the determination of the time at which the existence of the breach of an international obligation was established and responsibility came into being. A breach of justice might consist of a whole series of acts and omissions on the part of judicial and administrative organs at different levels. The existence of an internationally wrongful act in respect of an obligation in international law could be established only when the act of the State was completed by the final act, i.e., when the organ of the last instance intervened and confirmed what had been done by the lower organs. It was only then that international responsibility could be established and international legal action taken. Determining the "moment" at which one State could charge another with violations of international obligations was therefore an extremely practical matter.

173. But even more significant was the determination of the "duration" of a breach of an international obligation. For example, in the case of an unlawful military occupation the gravity of the act was very different if the occupation lasted one day or several years. And it was obvious that the prejudice to be assessed was that which occurred throughout the entire duration of the unlawful military occupation. The "duration" of the breach was, generally, of great practical importance in determining the existence of a breach and the prejudice caused in instances where the wrongful act was an act extending in time, particularly a "composite act" or a "complex act". A denial of justice, although deemed to take place on the day the supreme court brought the injustice to its culmination, was the result of actions by a whole series of judicial organs. The extent of the harm caused would have to be calculated right from the beginning, not from the final moment when the supreme court had set its definitive seal on the act of the breach itself.

174. The determination of the "duration" of a breach was also of particular relevance in connexion with international obligations prohibiting certain discriminatory practices in matters such as, for instance, racial discrimination or apartheid. In such instances the act might be of a complex nature, a series of wrongful acts committed in different concrete circumstances. An initial act of discrimination against a certain national of a foreign country was followed by another act of discrimination against another national of that country and so forth. At a certain point, it was no longer a series of separate distinct acts but a discriminatory practice. It was at that point that the rule prohibiting the discriminatory practice in question must be regarded as having been violated. If 10 such separate acts were committed, the tenth would confirm the existence of a violation of the rule prohibiting the discriminatory practice, but would not by itself constitute a violation of that rule. If it were not for the set of nine acts before it, the tenth would constitute a single act, not entailing a violation of the rule prohibiting the discriminatory practice concerned. It was precisely for this reason that one needed to "refer back". Moreover, there might be cases of discrimination against individuals of various nationalities. At the point where it was established that what the State had done constituted a discriminatory practice, for instance a racial discrimination practice, then all States previously affected could take action and complain officially against that practice.

175. Some representatives wondered, however, whether it was really necessary or advisable to have in the draft such detailed and complex provisions as those embodied in articles 24, 25 and 26 and expressed reservations concerning the retention of such provisions in the draft. The "moment" and the "duration" of a breach of an international obligation were matters that might be left to a competent tribunal or other international institution to decide. The articles did not constitute a progressive development of the law and could complicate the application of the rules governing State responsibility. Moreover, some passages of the commentaries to the articles might give the impression that the Commission had been more concerned with the impact of time on the jurisdiction of an international tribunal than with the impact of time on the existence, nature or continuation of a situation giving rise to an instance of State responsibility. It was also said that article 25 did not add anything to what was already stated in article 18.

176. The question was raised why the abstract doctrine of tempus commissi delicti had been introduced in the draft and why, once introduced, an attempt had been made to create a theory of "relation back". The commentary on article 25, for example, suggested that the "relation back" was vital in such cases as discrimination against non-nationals of a State. In his delegation's view an evidentiary point was being confused with a point of legal substance. It was desirable to establish general rules, but they had to be capable of specific application.

177. Some doubts were expressed about the utility of the series of articles on the time factor, recalling the link between articles 24, 25 and 26 and article 18. Further doubts were expressed about the placement of paragraph 2 of article 18 and about the content of paragraphs 4 and 5 of that article as had been explained to the Sixth Committee two years earlier. Such doubts about the two latter paragraphs applied mutatis mutandis to the content of article 25. Articles 24, 25 and 26 raised the fundamental point of whether the complicated provisions on the tempus commissi delicti were relevant to the codification of the law on State responsibility. While the "moment" of the occurrence of the breach and the "duration" of the breach were perhaps decisive, as stated in paragraph (5) of the commentary to article 24, one should not fall into the trap of trying to codify the whole of international law under the rubric of codifying the law of State responsibility. The question of the time factor in relation to the jurisdiction of a court was in principle distinct from that of the time factor in relation to the commission of the breach of an international obligation. The determination of the "moment" and "duration" of the breach was largely a procedural rather than a substantive matter, as was the question of prescription, and the need for rules for that purpose in the context of codifying the law of State responsibility was questionable. It was the nature of the obligation allegedly breached that was decisive in determining whether a breach occurred, when a particular act was performed or when the latest in a series of separate acts occurred. Except for article 19, and to a lesser extent article 22, the draft did not distinguish between different types of obligation on the basis of their nature.

178. It was also said that the legal determination of the "moment" and "duration" of the breach of an international obligation could make sense only within the context of other rules of international law for which such a duration was relevant. The

difficulty was that those other rules did not necessarily and a priori require an identical legal determination of the points in time at which a particular conduct on the part of a State was considered to have begun and to have ended. Was it wise to adopt a set of articles purporting to give a legal determination of the duration of conduct, irrespective of the context in which such duration was relevant? One such context was the rule of international law laid down in article 18. Another was the competence of an international court or tribunal, or other international institution, to take cognizance of and appreciate the conduct of a State. However, the legal determination of the points of time within which the conduct in question was considered to have taken place would not necessarily be the same in both contexts. Indeed, it would seem that the interpretation and application of the relevant international instrument creating the competence of a particular court, tribunal or other international institution was often, if not always, governed by considerations other than those underlying the interpretation and application of international rules creating rights and obligations between States. It seemed doubtful whether articles 24, 25 and 26 really added anything to article 18 or helped in its application. It was recognized that article 18 did not necessarily refer to the period during which an international instrument was in force. It might well be that rules laid down in a treaty were relevant for the appreciation of acts of a State occurring before or after the period during which the treaty was in force. Indeed, article 18, paragraph 2, gave somewhat sweeping retroactive effect to peremptory norms of general international law. Furthermore, it might well be impossible to separate in law acts and omissions of a State occurring at different points of time. It might be that the acts and omissions tainted each other or that, taken together, they constituted the conduct to which the international obligations referred. Although that point was taken care of, to a certain extent, in article 18, paragraphs 3, 4 and 5, one could not help wondering whether the corresponding paragraphs of article 25, namely paragraphs 1, 2 and 3, were not really a mere repetition of those paragraphs.

179. Certain representatives who did not have objections in principle to articles 24, 25 and 26, questioned, however, whether in view of different factors involved it would be possible to find a priori definitions that would apply in all circumstances. They also asked whether those factors which had important procedural aspects should not have been examined in connexion with the part of the draft articles dealing with the "implementation" of international responsibility. Some of those representatives wondered, for example, whether the scope of articles 25 and 26 was intended to cover situations in which the internationally wrongful act might have retroactive effects or might produce consequences reaching far into the future or occurring long after the act concerned had been terminated. Lastly, it was said that articles 24, 25 and 26 would require, in any case, further consideration by the Commission in view of the fact that they were closely related to questions to be dealt with in parts II and III of the draft articles.

180. Comments were also made by certain representatives on some specific aspects of the formulations adopted for articles on tempus commissi delicti included in the draft. Regarding article 24 it was considered proper to have chosen the expression "act not extending in time" instead of the expression "instantaneous act", since it did not exclude a breach whose effects continued subsequently. It was also

important that by the formulation adopted an "instantaneous act" having continuous effects was distinguished from a "continuous act". It was considered that the formulation of article 24 should be amended. The first sentence was redundant and could be deleted leaving only the second sentence, which could begin: "The time of commission of the breach of an international obligation by an act of the State ... does not extend beyond ...".

181. With respect to article 25 some misgivings were expressed by certain representatives about the difficulties of interpretation deriving from unusually complicated concepts such as "continuous act", "composite act" and "complex act". Article 25, it was also stated, presented certain "choice of law" problems for an international lawyer, in the absence of a convention on the "choice of law" rule applicable to tortuous acts. In the case of a "continuous act", the problem of "choice of law" might arise where a State applied the double "choice of law" rule, in which case the act must be wrong by the law of the place where the action was instituted and by the law of the place where the act was committed. The view was expressed that it would be appropriate to specify the meaning of the expression "moment when that act begins" used in paragraph 1 of the article. It was also stated, with reference to paragraphs 2 and 3 of the article, that from a legal point of view it seemed difficult to take the position that breaches though "composite acts" and "complex acts" could be retroactive, relating to a period which pre-dated the commission stricto sensu. Those cases should be strictly interpreted and should follow the rule laid down in paragraph 1 of article 25.

182. So far as article 26 is concerned, certain representatives reserved their position in the light of their attitude concerning the need to introduce in the draft articles special provisions dealing with international obligations "to prevent a given event". On the other hand, it was stated that the occurrence of the event which the State should have prevented being the sine qua non of the existence of a breach of the obligation "to prevent a given event", article 26 was correct in considering that fact as decisive in the determination of the moment and the duration of the breach. It was stated that an "event" might be instantaneous in character and the Commission might consider a formulation specifying that the violation of the obligation took place at the moment "when the event occurred or when it began", the violation extending in the latter case, as provided for in article 26, over the entire period during which the event continued. Lastly, deletion of the word "Nevertheless" at the beginning of the second sentence of the article was suggested.

183. Finally, it was suggested that articles 24, 25 and 26 could be combined into a single article, as originally proposed by the Special Rapporteur. It was also mentioned that articles 23 and 26 could be combined into a single article which would deal separately with the determination of the "moment" of the breach and with the determination of the "duration" of the breach, with respect to both events having an instantaneous character and events having a continuing character.

Article 27

184. Several representatives underlined the great importance of article 27 concerning aid or assistance by a State to another for the commission of an internationally wrongful act and supported the retention of the article in the draft. Those representatives agreed generally with the Commission's determination that the requirements of the progressive development of international law could not be ignored in this case, as well as agreeing with the Commission's view regarding the need to consider the subject matter in that perspective. A provision such as the one set forth in article 27 would deter States from participating, even by means of acts otherwise lawful, in the internationally wrongful act of another State. Aid or assistance rendered by one State to another State which contributed to or facilitated the commission or continuation of an internationally wrongful act ought to be regarded as a wrongful act even if, in isolation, the act by which such aid or assistance was given, was not unlawful. For instance, the sales of arms by one State to another in order to enable the latter to perpetrate an act of aggression or to assist in perpetrating an act of aggression was a different matter from the sales of arms made without any such intention. The sales of arms might be tainted with wrongfulness, even if the act was not in itself wrongful.

185. Some of those representatives emphasized that article 27 constituted an important step towards including in the draft articles some international legal rules that were particularly important for the defence of international peace and security. It should not be forgotten that, as the commentary to the article indicated, breaches of the peace frequently involved and were sometimes a direct result of actions by States other than the States carrying out the principal wrongful act. Reference was made in this connexion to the interdiction and sanctioning by the provision contained in article 27 of certain acts of aid or assistance relating to the perpetration of an act of aggression, as the one referred to in article 3 (f) of the 1974 Definition of Aggression, as well as to the maintenance of colonial domination by force, the maintenance of a régime of apartheid, or the violation of national independence and sovereignty.

186. Other representatives considered that by including article 27 in the draft the Commission had departed from its decision not to deal with "primary rules", since in the context the notions of "joint tort-feasor", "accessory" and "accomplice" constituted substantive rules. That decision had already been infringed in article 19 but had been departed from even more markedly in the case of article 27. One of those representatives suggested the deletion of the article. Others expressed reservations on the substance of the provision and considered that, in any event, the present drafting of the article was much too sweeping in its formulation and required further careful study by the Commission.

187. It was considered to be doubtful that article 27 was really in accordance with applicable international law. Many of the situations quoted as examples of aid or assistance referred to breaches of independent obligations under international law. The Commission had rightly emphasized that it was not the objective of the draft articles to establish new obligations. That, however, could be brought about indirectly through the introduction of the notion of aid or assistance into

international law. Thus, for instance, actions which were admissible under current rules of neutrality might give rise, under a provision such as the one provided for in article 27, to counter-measures or claims because they constituted acts of aid or assistance. In addition, it was doubtful whether the general orientation of article 27, which contained a largely subjective element, could serve as a valid criterion for determining the responsibility of States. Moreover, article 27 was not concerned with whether or not an act of assistance hdd been contributing to the internationally wrongful act. In elaborating that article, the Commission had apparently transferred notions of internal penal law to the field of international law. Such notions were, however, inappropriate as the basis for rules on wrongful acts under international law.

188. A question was raised whether it was possible, or even advisable, to deal with the variety of situations embraced by the notion of "aid or assistance for the commission of an internationally wrongful act" in one single abstract rule. As it stood, article 27 provided that an act which taken alone did not constitute the breach of an international obligation became an internationally wrongful act if connected with an act by another State which, in turn, was an internationally wrongful act. The connexion required was that the aid or assistance should be rendered for the commission of the latter act. In other words, there should be an element of intent. However, that element of intent in itself gave rise to a series of queries. It would seem that a correct answer to some of these queries presupposed that either the aid and assistance in itself of the internationally wrongful act of the State receiving the aid or assistance, or both, were of a particular important character. Indeed, the very concept underlying article 27 seemed to presuppose that the legal relationship between the State committing or contemplating an act and the State towards which such an act would be wrongful affected the international obligations of a third State. There were, of course, international obligations of the first State towards the second State which were at the same time obligations towards the international community as a whole, but in general the relationship between the two States, and in particular any primary rules applicable only between them by virtue of a treaty, were res inter alios acta for the third State. One was therefore inclined to establish a relationship between article 27 and the "international crimes" defined in article 19, paragraph 2, of the draft. However, the commentary to article 27 expressly rejected the limitation of the applicability of its provisions to the internationally wrongful acts which constituted such "international crimes". The applicability of article 27 could also be envisaged in cases where the aid or assistance itself bore a sufficiently extraordinary character, even if the conduct of the State receiving the aid or assistance was not an "international crime". However, even then, it would seem that the gravity of the act committed by the State receiving the aid or assistance should be an essential element in assessing, under article 27, the responsibility of the State providing the aid or assistance.

189. It was stated that, although there might be cases in which the giving of aid or assistance by one State to another could engage the responsibility of the former if rendered for the commission of an internationally wrongful act by the latter, the formulation of any rule in the matter should be carefully circumscribed. The granting State must know that the aid or assistance being given was being used or

would be used by the receiving State to commit an internationally wrongful act, and the granting State must intend to facilitate that act by giving the aid or assistance. The Commission apparently acknowledged the need for those two key elements, but the wording of article 27 did not seem to give enough emphasis to them. The phrase "rendered for the commission of an internationally wrongful act" was too imprecise and could lend itself to varying interpretations in concrete cases.

190. The representatives who expressed support for article 27 welcomed that the approach taken by the Commission of the subject-matter of article 27 from the standpoint of "participation" of a State by "aid or assistance" in the internationally wrongful act of another State, discarding such concepts pertaining to the field of municipal law as "complicity" and "accessory". It was also noted with approval that the Commission had also discarded the concept of "incitement". The inclusion of the element of "intent" in the formulation adopted for article 27 was welcomed by several of these representatives. The stress placed on that element by the Commission was an additional guarantee that only real forms of "participation" by a State in the internationally wrongful act of another State would constitute themselves an internationally wrongful act of the State giving the aid or assistance. Some representatives considered, however, that the element of "intent", rendered in the present wording of the article only by the word "for", should be made more explicit. The article should develop that element further by providing that the aid or assistance should be accorded by one State to another State "with the intention of permitting or facilitating the commission of an internationally wrongful act". It was also asked how and by what means the intentional element should be established. Regarding the difficulties inherent in the establishment of the intentional element and with reference to the example of the sale of arms and military equipment, it was said that such a sale need not be a breach of an international obligation unless otherwise prohibited by a convention, but that restrictive conditions in the contract of sale could not preclude the responsibility of the State exporting the weapons, if there were no apparent means of enforcing such restrictions. Another aspect of article 27 mentioned as requiring a clearer rendition related to the relationship between the provision contained in the article and the distinction between wrongful acts directed only against another State and wrongful acts directed against several States or the international community as a whole.

191. Some representatives disagreed with the suggestion made in the course of the debate that article 27 should be limited to cases of aid or assistance rendered for the commission of internationally wrongful acts which in accordance with paragraph 2 of article 19 would constitute "international crimes". Such a limitation, it was said, would mean questioning the notion of intent embodied in the article. It was also noted that the Commission had held that the act of aid or assistance envisaged in article 27 should be considered a wrongful act "separate" from the wrongful act of the State receiving such aid or assistance and should be classified differently. However, as the Commission itself recognized, a different conclusion could properly be drawn from article 3 (f) of the 1974 Definition of Aggression. In this connexion one representative stated that in the case of the "international crimes" enumerated in article 19, paragraph 3, it was important to classify the act of aid or

assistance and the principal act in the same manner. It would be possible to specify in article 27 that the gravity of the principal act also affected the classification of the act of assistance. The view was also expressed that if the present wording of the article would be retained there might not be many cases in which article 27 would apply. Some of the cases referred to in the commentary might in themselves constitute an internationally wrongful act rather than coming within the scope of article 27.

192. Lastly, some representatives welcomed expressly the intention of the Commission to supplement chapter IV of part I of the draft with another article concerning cases of "indirect" or "vicarious" State responsibility, namely cases where because of the existence of a de jure or de facto relationship of dependence between the States concerned there were grounds for a disassociation between the attribution to a State of the wrongful act and the attribution of the responsibility caused by that act to another State.

D. Succession of States in respect of matters other than treaties

193. Many representatives welcomed the progress the Commission had made in its consideration of the topic of succession of States in respect of matters other than treaties. The outstanding contribution of the Special Rapporteur for the topic to the elaboration of the three additional draft articles was noted. A number of representatives hoped that the Commission would be able to complete the first reading of the draft articles on succession of States in respect of State property and State debt at its thirty-first session in 1979 and to send them to Governments for their views and comments. It was suggested that the draft articles thus completed could serve as the subject of an independent convention.

194. Certain representatives said that the draft articles on succession of States in respect of matters other than treaties were of paramount importance in view of the fact that in instances of States succession controversies regarding State property and State debts were bound to arise. It was also pointed out that the far-reaching ramification of that subject on many other provisions governing current international relations deserved thorough study. One representative, however, seriously wondered to what the draft articles in question were intended to apply. In his view, the main problems of State succession that had arisen since the end of the Second World War had been solved by political agreements and it did not appear that the new draft articles applied to any case of State succession that had occurred in the post-war period. There was a real risk that the articles, like the Vienna Convention on Succession of States in Respect of Treaties, would remain an academic exercise of a high intellectual level but of little or no practical significance.

195. It was noted that the new volume in the United Nations Legislative Series entitled "Materials on succession of States in respect of matters other than treaties", prepared by the Codification Division of the United Nations Office of Legal Affairs, was a useful work and the Commission should make full use of it.

1. Comments on the draft articles as a whole

(a) General comments

196. Many representatives who spoke on the subject supported or found no major difficulty in the draft articles relating to State debts (articles 23-25) adopted by the Commission at its thirtieth session. It was pointed out that they were simple, clearly worded and represented a fair balance of the interests of the creditors and those of the successor State.

197. Other representatives, however, found that the question of protection of creditors was not sufficiently examined, not merely in the articles adopted at the last session but in other articles, and thus welcomed the decision of the Commission to give further consideration to it, especially in conjunction with articles 18, 19 and 20, at their second reading.

198. Certain representatives stated that the draft articles adopted by the Commission at its thirtieth session could not be properly understood unless other

draft articles were clarified or the square brackets removed from them. It was unclear, for example, whether the articles in question applied only to debts owed to other States or to other debts as well. Nor was the legal meaning of the term "pass to" in draft articles 23, 24 and 25 certain. The view was expressed that in considering the legal meaning of the word "pass to" it was necessary to make a clear distinction between three separate, though interlinked, questions arising in connexion with a succession of States, namely the question of substitution of one debtor for another, the question of distribution of financial burdens between predecessor and successor States, and the question of international responsibility of a State for the payment of the debt. Various questions arose out of the use of such terminology in those articles as well as in other articles of the draft, and their full examination by the Commission was needed before its presentation of a complete set of articles on the subject.

199. The view was expressed that it was necessary constantly to bear in mind that the question involved was that of defining the international legal rules which governed the substitution of one State for another in relation to property or debts owed at domestic law. According to this view, international legal obligations, if divorced from domestic law, must fall within the general sphere of succession of States in respect of treaties.

(b) Structure of the draft

200. Certain representatives commented favourably on the Commission's basic approach of keeping a broad parallel between the articles forming Part I of the draft (succession to State property) and those comprising Part II (succession to State debts), each containing provisions relating to the same categories of succession of States. The view was expressed, however, that, though perfectly easy to define in theory, categorization was not so clearly evident in practice. The birth of a State or the separation of part or parts of the territory of a State was a painful process often accompanied by heated emotion based on political motivations, and therefore the determination of different consequences for each type of succession might be totally lacking in practical utility if certain legal criteria defining that categorization had not been previously established.

201. Representatives also welcomed the intention of the Commission to consider at its next session the procedure for the peaceful settlement of disputes arising out of the application or interpretation of the draft articles. It was pointed out in this connexion that the provisions of articles 24 and 25 especially would necessitate such a procedure because they contained only references to a division of debt which would probably have to be settled by agreement and would not solve the problem of who was liable prior to such a contractual distribution of the debt. Such a dispute settlement machinery was also needed to define in each case the meaning of an "equitable proportion" of the State debt and of the "relevant circumstances" which had to be taken into account under articles 24 and 25.

(c) Relationship between the present draft and the 1978 Vienna Convention on Succession of States in Respect of Treaties

202. Several representatives stated that the draft articles on succession of States in respect of matters other than treaties should be viewed as supplementing the Vienna Convention on Succession of States in Respect of Treaties adopted in August 1978 and should follow as far as practicable the form, structure and terminology of the latter. It was thus suggested that the Commission should review the relevant parts of its draft on succession in respect of matters other than treaties in order to adjust them to the new Vienna Convention. As an example, deviation of the wording of article 22, paragraph 2 from that of article 13 of that Convention was pointed out.

2. Comments on the various draft articles

Article 18

203. Many representatives expressed the view that the word "international" between square brackets in article 18 should be retained to make it clear that the words "State debt" in the draft meant only international financial obligations owed to another State or other subjects of international law and thus precluded financial obligations indebted to private juridical or physical persons. Inclusion of the debts owed to private persons within the scope of the draft articles would, it was feared, constitute an interference in the internal competence of successor States. Some representatives further stressed that succession to State debts should take place only if they were compatible with contemporary international law, in particular with the principles embodied in the Charter of the United Nations.

204. On the other hand, several representatives thought that the word "international" should be deleted so that the scope of application of the draft articles would be broad enough to encompass all types of financial obligations chargeable to the State. It was pointed out that restriction of State debts to international ones would be contrary to State practice. In the opinion of one representative, the confinement of State debts to international obligations appeared self-contradictory and self-defeating. He added that, for example, certain crimes against humanity and violations of fundamental human rights and of the rules of international law by the predecessor State with regard to its nationals would give rise to obligations under international law which became of great relevance in the relations of the successor State with other States. Claims of that nature, originating in events occurring between the years 1933 and 1945, were still outstanding, though quite a number of them had been met.

Article 21

205. Certain representatives expressed doubts about the principle underlying draft article 21, which might prove particularly controversial, because it did not take the views of the population of the ceded territory into consideration. It was said that such transfer would be contrary to the purposes and principles of the Charter of the United Nations if it was made without the consent of the population

concerned. The difficulty would also arise if the transfer of part of the territory of a State was defined differently by the ceding State and by the receiving State.

206. Commenting on the distinction between article 21 and article 24, the question was raised as to the purpose of such distinction since, according to article 2 which required a succession to occur in conformity with the international law and in particular the United Nations Charter, the separation of parts of the territory of a State could only take place when peoples had the right to self-determination.

Article 22

207. Some representatives underlined the importance of the tabula rasa, or the clean slate, principle which formed the basis of article 22. The principle was particularly significant, it was stated, in view of the situation that States would face during the early years of their existence if they were required to pay all the debts of the predecessor State. That principle offered the people of the newly independent State concerned favourable conditions for the implementation of their right to self-determination.

208. The view was expressed that although under article 22 agreement could be concluded between the newly independent State and the predecessor State for the passing of a debt, the former State should have the right to repudiate any such agreement if it was obtained from that State involuntarily.

Article 23

209. Several representatives supported the rule embodied in article 23. It was considered to reflect fairly well-established practice of States. Paragraph 1, in particular, was thought to have been accepted generally in the doctrine.

210. Commenting on paragraph 2, it was stated that the attribution of State debts to the component parts might be viewed as providing for debt collection rather than a reservation of obligations in respect of the passage of State debts. The arrangements were internal within the new successor State and could be designed to facilitate performance of obligations or repayment of existing State debts.

211. Some representatives, however, entertained doubts as to the justification for including paragraph 2, which in their views concerned the internal aspects of the problem of succession to State debts. It was pointed out that the distribution of debts under internal law of a State had no bearing on the legal status of the creditors of that State. The provision of paragraph 2 might give rise to erroneous interpretations which were contrary to the generally accepted principles of law regarding financial transactions. It was suggested therefore that the Commission should redraft that paragraph in clearer terms. It was suggested that the new wording might read as follows: "The successor State may, without prejudice to the foregoing provision, attribute, in accordance with its internal law, the whole or any part of the State debt of the predecessor State to its component parts."

Articles 24 and 25

212. Although some representatives supported articles 24 and 25, which were based on a common concept of equity, several representatives expressed opposition or reservation regarding that concept as embodied in those articles. Most of these latter representatives stated that the expression "an equitable proportion" was too vague and the phrase "taking into account all relevant circumstances" was not clear. It was suggested that an effort should be made to find more precise wordings, or an illustrative and non-exhaustive list of elements which would constitute "relevant circumstances" could be included to help determine what was an "equitable proportion". In this connexion, the capacity to pay the debt was mentioned as one of such elements. Alternatively, it was suggested that the Commission should revert to the formulation adopted for article 21, which would require taking into account, inter alia, the property, rights and interests which pass to the successor State in relation to that State debt.

213. Emphasizing another basic element embodied in these two articles, namely that of the passing of the State debt through an agreement between the predecessor and the successor States, some representatives considered that such an agreement would provide the most favourable solution, would offer maximum legal security and would protect the lawful interests of all parties concerned. It was at the same time pointed out that such an agreement could not take away the interests of the creditor without the consent of the latter. It was hoped, in any case, that the position of creditors should be defined more clearly in these articles.

214. The view was expressed that article 24, paragraph 1, as it was drafted, could be interpreted to enable the predecessor and the successor States to enter into an agreement contrary to the concept of equity. It was further suggested that the drafting problem in articles 24 and 25 might be solved by stressing initially the requirement for the predecessor and the successor States in the case of article 24, and the two or more successor States in the case of article 25, to agree on the just apportionment of the State debt, and by establishing the residual rule that in the absence of agreement an equitable proportion would pass to the successor State or States.

215. It was also stated that the question of the dissolution of a country under foreign domination into several independent States could present many problems, particularly if debts or property were passed to new States by a unilateral act of the metropolitan country and were therefore probably divided unequally. However, if they were passed to new States under an agreement among the new States, there was a greater chance of equal distribution. A fair distribution of debts should, moreover, take into account the distribution of property. If the geographical distribution of immovable State property referred to in article 16, paragraph 1 (a) was unequal and unfair originally, the new State which suffered thereby should receive a compensation or a reduced percentage of debt, even if the debt had no direct relation with the immovable property.

E. Questions of treaties concluded between States and international organizations or between two or more international organizations

216. A number of representatives welcomed the substantial progress that the Commission had achieved at its last session with regard to the question of treaties concluded between States and international organizations or between two or more international organizations. The outstanding contribution of the Special Rapporteur for the topic was also noted. Certain representatives stressed the importance of the topic and the usefulness of the work of the Commission in view of the increasing role played by international organizations in international legal life and the expanding participation of such organizations in international treaties. It was stated that the codification of the questions relating to treaties concluded by international organizations would cover a significant section of the law of treaties which had still remained untouched since the 1969 Vienna Convention on the Law of Treaties dealt only with treaties between States.

217. It was hoped that the Commission would achieve further progress in preparing the draft on this topic, so that the first reading of that draft could be finished as soon as possible. It was further hoped that the Commission would succeed in preparing draft articles which could form the basis of a convention commanding at least the same authority as the Vienna Convention on the Law of Treaties. Such a convention should take into account, as far as possible, the rules of international law applicable in the field of international organizations. Only thus, it was believed, would it be possible to establish an adequate basis for the further development of those rules.

1. Method of work and scope of the draft

218. Most of the representatives who spoke on the subject endorsed the method followed by the Commission of keeping as close a parallel as possible between the Vienna Convention on the Law of Treaties and the draft articles under preparation. The general approach of the Commission to examine the articles of the Vienna Convention one by one before it could reach viable conclusions on the subject-matter of the present topic was also supported, though it was not considered to be necessary for the final text to deal explicitly with every single article of that Convention.

219. While subscribing generally to the Commission's basic method, some representatives stressed that the intrinsic link between the Vienna Convention on the Law of Treaties and the rules on treaties concluded between States and international organizations or between two or more international organizations should not be transformed into a mere analogy, which might be misleading. It was thought to be desirable to take due account of the major differences between a State and an international organization when establishing general rules and preparing further draft articles. The need was stressed to distinguish those two types of entities - one sovereign and the other not - especially from the viewpoint of their legal personality under international law. It was considered to be most important to prevent any possible impairment of the substantial interests of sovereign States as a result of action on the part of international organizations.

220. The regret was expressed that the Commission was still reluctant to accept international organizations as increasingly important participants in world affairs, possessing legal personality similar to that of a State and capable of entering into treaties in much the same way as States. International organizations could be responsible for their acts and could be victims of breaches of obligation.

221. With regard to the scope to be covered by the draft articles, one representative was of the view that codification was really needed only for the procedures through which an international organization might become party to a bilateral or multilateral treaty with States, and that treaties concluded only between international organizations could for the moment be left aside, as they presented very little juridical interest.

2. Comments on the draft articles as a whole

222. Most of the representatives who commented on the topic found generally acceptable articles 35, 36, 37 and 38 adopted by the Commission at its last session, since they were based on the texts of the Vienna Convention on the Law of Treaties with certain variations necessitated by the essential differences between States and international organizations. As a most important variation, references were made to the requirement under articles 35, 36 and 37 that third organizations must expressly accept an obligation and assent to a right and that such acceptance and assent must be governed by the relevant rules of the organization concerned. A warning was expressed, however, that in emphasizing that international organizations should act in conformity with their own rules the Commission should not allow the basic rule of article 46 of the Vienna Convention on the Law of Treaties, relating to internal law provisions regarding competence to conclude treaties, to be undermined.

223. The view was expressed that, in dealing with the effect of treaties concluded by international organizations vis-à-vis third States, the Commission seemed to be confronted by the premise that all the activities of all international organizations were governed exclusively by legal considerations. Many of the actions of many international organizations were dictated by the shifting composition of a mathematical majority, guided by real or assumed self-interest, rather than by strictly legal considerations. The question was raised as to how it was possible, under such circumstances, to construct a legal edifice based on rights and obligations, as legal concepts, in which the assent of the international organization in question must be governed by the relevant rules of the organization, as stated in articles 35, 36 and 37. For example, if a mathematical majority instructed the chief administrative officer of an international organization to take action in relation to an international treaty of which he was the depositary, how was that officer to act if he had doubts as to the legal validity of the act he was being requested to perform on the basis of a decision governed by the relevant rules of the organization?

224. It was said that the draft articles on the topic were becoming too lengthy, and the hope was expressed that the Commission would be able to simplify and shorten them.

3. Comments on the various draft articles

Article 2, paragraph 1 (i)

225. It was stated that the definition of "international organization" in article 2, paragraph 1 (i), simply as "intergovernmental organization" left much to be desired, since many intergovernmental organizations did not currently and probably never would possess the power to enter into treaties. He hoped that the definition could be amended in such a way as to cover only those intergovernmental organizations which had the capacity to assume rights and obligations under intergovernmental law and, hence, to enter into treaties.

Article 6

226. One representative expressed full agreement with the provisions of article 6. As an example supporting the rule embodied therein, he referred to the treaty-making powers of the European Economic Community, which not only extended to matters covered by express provisions of the Treaty of Rome but also embraced the power to conclude treaties whenever the Community had laid down common rules to give effect to common policies.

Article 7

227. One representative wondered why the Commission had not specified in article 7 that the executive head of an international organization, in virtue of his functions and without having to produce powers, was considered to represent that organization for the purpose of performing all acts relating to the conclusion of a treaty. He suggested that an analogy could be drawn with article 7, paragraph 2, of the Vienna Convention on the Law of Treaties, which considered certain persons as representing their State in virtue of their functions and without having to produce full powers.

Articles 19 bis, 19 ter and 20 bis

228. It was maintained that the provisions of the draft relating to reservations and objections were too strict compared with those of the Vienna Convention on the Law of Treaties, since the possibility of an international organization making reservations or entering objections to reservations in treaties involving States and international organizations was, in most instances, limited to situations in which the participation of an international organization was not essential to the object and purpose of a treaty. Essentially envisaged in those provisions was the case in which a multilateral treaty was open to participation by all States and to certain international organizations on a footing similar to that of States. It should therefore be possible to find some alternative wording to express that concept in order to avoid controversy in cases in which the participation of an international organization was not "essential to the object and purpose of the treaty".

Article 34

229. Some representatives specifically endorsed the general rule contained in article 34.

Articles 35 and 36

230. Certain representatives wondered whether articles 35 and 36 had taken sufficient account of the current practice. A reference was made to a frequent practice of States to include in a treaty between them a specific procedure to be followed with respect to situations arising with regard to the implementation of that treaty. The negotiating States could either set up, by the treaty, an international institution with the specific task of taking decisions regarding the implementation of the treaty or entrust that task to an existing international organization. In the latter case, both article 35, paragraph 2 and article 36, paragraph 2 of the draft would presumably apply, and thus such agreement would not be legally effective without "acceptance in writing" by the organization concerned and only to the extent that the function fell "in the sphere of its activities". In this view, however, such a rule was not always applied in current international practice, and its introduction would create unnecessary rigidity. The representative was not aware, for example, of acceptance in writing by a United Nations organ in all cases where treaties between States entrusted tasks to the President of the International Court of Justice or the Secretary-General of the United Nations with respect to the designation of arbitrators or conciliators under a dispute settlement clause. Since the practice of entrusting functions to an existing organization rather than creating a separate ad hoc organization was commendable, articles 35 and 36 should not be interpreted as allowing a State party to a treaty of the type under discussion to invoke the lack of acceptance in writing by the organization, the non-application or misapplication of the relevant rules of the organization, or the fact that the function in question did not fall within the sphere of its activities, as grounds for refusing to accept the results of an actual exercise of the function by the organization under the treaty.

Article 35

231. Certain representatives supported the rules embodied in article 35. However, the view was expressed that the formulation of paragraph 2, referring to "the sphere of the organization's activities", was too flexible; a clear reference should be made to the competence of the organization in question as stipulated by the rules of the organization.

Article 36

232. The slight deviation from the Vienna Convention on the Law of Treaties which the Commission had adopted in article 36, paragraph 2, to the effect that the assent of an international organization to the acquisition of a right could never be presumed, was noted with approval. That formula was in keeping with the relative rigidity of the internal law of international organizations, compared to the flexibility of the constitutional law of States. Another view, while accepting the content of the provision of paragraph 2, was expressed to the effect that a clear reference should be made to the competence of the organization in question as stipulated by the rules of the organization.

Article 36 bis

233. The representatives who commented on article 36 bis were divided into three groups, namely those who were against the inclusion of the article in the draft, those who were in favour of the article, and those who considered further careful study by the Commission was necessary.

234. First of all, many representatives expressed serious objections to or doubts about the desirability of including article 36 bis and suggested it be deleted from the draft or redrafted entirely. The belief was expressed that the questions dealt with by article 36 bis could be answered only by taking into account the respective rules of each specific international organization, which could vary considerably in content. It was also said that the establishment of a particular category of third States members of an international organization in regard to treaties concluded by that organization but to which those States were not themselves parties was not justified. According to another view, it might easily happen under article 36 bis that an international organization would be empowered to conclude a treaty in the absence of a consensus among its States members, so that some would not observe the treaty. The question was also raised as to whether the situations envisaged in that article might not be covered by the provisions of articles 35 and 36.

235. Several representatives pointed out that the provisions of article 36 bis were in contradiction with articles 34 and 35 and the generally accepted rule of international law that treaties could not create rights or obligations for third States without their explicit consent. Article 36 bis was thus considered to be applicable only to "supranational" organizations, which alone were empowered to

bind their States members by the treaties they concluded. This point was stressed especially with regard to subparagraph (a) of the article; no member of an international organization, as distinct from a "supranational" organization, could be imposed of obligations by treaties which were concluded by the organization without their explicit consent. The opinion was expressed that if article 36 bis was retained, it should be limited to subparagraph (a), which should be amended to read "the relevant rules of the organization applicable at the moment of the conclusion of the treaty provide expressly that the States members of the organization are bound by the treaties concluded by it".

236. With respect to subparagraph (b), most of the representatives who objected to article 36 bis questioned the appropriateness of the word "acknowledge" because it was too vague and susceptible to too many interpretations. It was noted that the term "acknowledge" was clearly not the same as the express consent required under articles 35 and 36. A further question was raised as to the basis by which the States members of an organization, under subparagraph (b), could participate in the negotiation of a treaty which concerned only the organization to which they belonged. Moreover it was pointed out that if the organization was not empowered under subparagraph (b) to undertake international commitments on behalf of its member States the situation would be identical to that covered by articles 35 and 36 and there was no reason to apply separate rules to it. The view was also expressed that subparagraph (b) would seek to establish procedures for concluding treaties which might not correspond to the provisions of the internal law of States and might thus run counter to article 46 of the Vienna Convention on the Law of Treaties, which, in certain cases, permitted internal law to prevail. Lastly subparagraph (b) was regarded as undesirable because it did not specify clearly in what manner and, particularly, by what procedure the States members of an organization should agree to be bound by a treaty concluded by the latter, and also because in the case of a large organization the solution of having some of the member States bound by an agreement concluded by the organization, while others were not, did not seem effective in view of certain recent examples. As an alternative formula which could resolve the question raised by subparagraph (b), it was suggested to return to the text submitted by the Special Rapporteur to the Commission at its last session.

237. Secondly, several representatives advocated the retention of article 36 bis in the draft for various reasons. It was stated that the general rule embodied in that article was entirely justified by the growing practice of States. There was no doubt, it was said, that States could become members of an international organization whose constituent instrument enabled it to enter into international agreements with third States that were binding not only on the organization but also on its member States. In other words, the member States accepted in advance that the organization could enter into agreements with third States which could confer rights or impose obligations on its members. According to this view, the problem was not confined to treaties entered into by "supranational" organizations; there was also the case of a headquarters agreement concluded by an international organization with one of its member States providing for immunities and privileges for other member States. It was not so much a question of granting a new status to members of an international organization as of ensuring that the draft articles corresponded to the realities of everyday international life.

238. According to another opinion States could delegate treaty-making capacity to an international organization, so that they could be bound individually by virtue of the fact that the organization was a party to a treaty, as in the case of the European Economic Community or the Andean Pact. Member States could always control the scope of the obligations to be entered into by the organization. It was therefore felt that the rule contained in article 36 bis would be useful to small countries in collective negotiations conducted through or by virtue of organizations representing their interests. It was similarly noted that although under article 36 bis member States of international organizations acquired obligations and rights under a treaty not formally concluded by them or on their behalf, there existed a double safeguard for such States. First, the provisions of the treaty itself must be such that its implementation necessarily entailed certain conduct on the part of and vis-à-vis such member States, and secondly, the treaty must have been validly concluded by the international organization, which implied that in some way or another the member States had empowered it to conclude treaties entailing effects regarding their rights and obligations.

239. With reference to the criticism of article 36 bis as serving the purposes and interests of some particular existing organizations and their members, it was said that the rule formulated in that article served to protect the State or other entity which entered into a treaty with an international organization, just like the unchallenged rule of international law embodied in article 27 of the Vienna Convention on the Law of Treaties. Such a system, according to another view, would accord a favourable legal standing above all to third world countries. States which had concluded a treaty with the European Economic Community (EEC), for example, were entitled to make direct claims against any of the member States of the Community on the basis of article 228 of the Treaty of Rome which stated that such treaties were binding on its institutions and on the member States. Even though EEC might currently be the only organization which in concluding treaties bound its members directly, the question was certainly not only of regional relevance since EEC implemented a policy of world-wide economic and development co-operation. The view was also expressed that although "supranational" organizations were a special type of organization because they were more highly developed, they were nevertheless international organizations in every sense within the meaning of article 2 of the draft.

240. While subscribing to the principle contained in article 36 bis, certain representatives felt that the use of the expression "third States members" was not satisfactory and could be improved. It was said that the misinterpretation of the article by some representatives had been based on the erroneous assumption that States members of an international organization were third parties in the sense of pacta tertius nec nocent nec procent.

241. Some doubts were expressed about the words "for them", because at least in the case covered by subparagraph (a), it was the constituent instrument of the organization, rather than a subsequent treaty concluded by it, which was generally the primary source of the rule that rights and obligations could arise for member States from such a treaty.

242. Supporting subparagraph (a), one representative considered that it was logical and an accurate reflection of current treaty practice. Another representative noted that the subparagraph would protect the other party of a treaty concluded by an international organization by obliging the member States of the organization which were not parties to the treaty to perform the obligations they undertook through the treaty.

243. With respect to subparagraph (b), it was said that it reflected the current practice, adopted in particular by the Lomé Convention between EEC and the African, Caribbean and Pacific States. Certain other representatives also supported the subparagraph, though one of them felt the wording was not satisfactory.

244. It was further stated that, though the basic rules of article 36 bis were acceptable the statement in paragraph (7) of the commentary to that article to the effect that the article "would respect the right of each member State to refuse to agree to the organization's simultaneously creating obligations and rights in its regard" was not appropriate. In his view, on becoming a member of an international organization, a State accepted the internal rules of that organization, whether contained in its constituent instrument or validly adopted later. Those rules alone determined the power of the organization to enter into treaties. In many cases the constituent instrument or other internal rule required the unanimous consent of the member States in order that an organization might validly conclude such a treaty; in other cases the relevant rules might provide for other ways of taking the decision. The decision was taken either at the moment the organization was established and expressed in its constituent instrument or at some later stage. The decision was necessarily a collective one, since it could hardly be imagined that a treaty concluded by the organization would entail rights and obligations for some of its members but not for all. Thus it was pointed out that the view was justified as expressed by certain members of the Commission, and reflected in paragraph (7) of the commentary to the effect that "the acknowledgment of the States members of an organization was a collective one and its expression dependent on the rules of the organization". Similarly, a State which became a member of an existing international organization was bound to accept that treaties validly concluded by that organization before its entry had the effects described in article 36 bis, with respect to itself as a new member. There again, the general rule of the equality of member States of an international organization admitted of no other solution, unless both the original member States and the other party or parties to the treaty concluded by the organization expressly agreed otherwise.

245. Lastly, many representatives found that article 36 bis had raised some delicate, complex and difficult questions which could not easily be solved by the formula proposed in that article and therefore felt that the Commission should give further careful consideration to it. It was hoped that the Commission take into account not only dogmatic views but also the realities of the modern world.

246. The view was expressed that the question dealt with by article 36 bis was one of the basic issues involved in a better understanding of the legal nature of international organizations. The solution did not lie in simply making a treaty concluded by the organization binding on its States members, but rather in the general attitude which the organization actually adopted with regard to two basic

problems, namely the participation of member States in the decisions of the organization and the value of those decisions with regard to member States. Both problems would have a distinct repercussion on the treaties, according to the degree of the member States' integration in the organization. It would, in the final analysis, depend on the extent to which member States participated in the organization and granted powers to it, and the problem might also vary not only according to the specific type of organization in question but also according to different points in time or different geographical regions.

247. It was also pointed out that, while the issue posed by article 36 bis might currently concern only EEC, many countries had already entered into complex treaty relations with that Community and those treaties sometimes took the place of, or supplemented, bilateral treaties with individual members of the Community. It was necessary, according to this view, to find a proper equilibrium between the relativity of the supranationalism of such an organization with regard to its own members, and the obsoluteness of such an organization's character in relation to non-members contracting with it. That was a real problem which could not be brushed aside merely because there was as yet apparently only one international organization possessing those dual characteristics at the same time. The need was therefore stressed for much fuller information on the issue to which article 36 bis addressed itself, at both the bilateral and multilateral levels.

248. The view was further expressed that for two reasons the arguments advanced in support of article 36 bis were not very logical. Firstly, the question of the rights and obligations of member States of an international organization pursuant to the terms of a treaty between the organization and another State was a different matter from their entitlement to that status under a general rule of international law. Secondly, so long as member States of an international organization retained their capacity as sovereign States it would be preferable for their status to be regulated by the general provisions of articles 35 and 36 rather than by according them a new status as third States members of an international organization. It was not desirable to have the rights and obligations of States inter se negotiated through an international organization. In that case, those States could no longer be regarded as third States and the system would no longer work. Even in the case of EEC, member States and the Community itself were always represented separately in international forums. It was felt that the International Law Commission had not yet considered that aspect of the question and it was urged that the entire question should be examined comprehensively rather than on a piecemeal basis.

F. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier

249. The present section of the report summarizes exclusively the comments on the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier made in the course of the consideration by the Sixth Committee of the report of the International Law Commission on the work done at its thirtieth session. It should be noted, however, that several representatives refrained from commenting on that chapter of the Commission's report and merely referred to the statements made in this respect by their

respective delegations during the consideration by the Committee of item 116 of the current session of the General Assembly entitled "Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961: report of the Secretary-General".

250. Several representatives welcomed the work done by the Commission and its Working Group on the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. They expressed the view that the Commission's work had shown that on most of the questions identified by the Commission written legal rules on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier were either non-existent or quite inadequate. They further considered that such a work constituted a solid basis for the future efforts that the Commission should make concerning the study of the subject. A number of representatives who spoke on this question emphasized that the work should be continued with a view to elaborating a protocol on the subject and that the Commission itself should undertake that task. It was believed that such a protocol would contribute to the further promotion of international law and advance friendly relations among States. It was also stated that such a protocol should be based on the 1961 Vienna Convention on Diplomatic Relations and develop it by strengthening and complementing that Convention. Referring to possible elements to be included in a future protocol, some of the representatives mentioned above suggested that it should clearly define the terms "diplomatic courier" and "diplomatic bag". It was also stated that the protocol should provide for the personal inviolability of the courier and for the obligations of the receiving and transit States to take all necessary measures for his protection. It should also provide for the complete immunity of the diplomatic courier from the jurisdiction of the State in whose territory he travelled, for his exemption from inspection of personal baggage, for the inviolability of his residence both in the receiving State and in the transit State, and for all the privileges and immunities granted to diplomatic representatives. It was further considered to be necessary to determine in the protocol the status of the diplomatic courier ad hoc, and the status of the diplomatic bag, whether accompanied or not accompanied by diplomatic courier, emphasizing the inviolability of the diplomatic bag and the obligation of both the receiving and the transit States to take all necessary measures to ensure its inviolability. The protocol should also contain provisions concerning the obligations of the third State in cases of force majeure and provide for the appropriate rights of the receiving State in respect of the diplomatic courier. Further, the protocol should stipulate the duty of the diplomatic courier to observe the laws and regulations of the receiving State. The opinion was also expressed that the status of the diplomatic courier and the diplomatic bag, as would be defined in a future protocol, should also apply in an analogous manner to the couriers and bags referred to in the 1963 Vienna Convention on Consular Relations, in the 1969 Convention on Special Missions and in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

251. Other representatives believed that the provisions of the four relevant Conventions covered the problem adequately and wondered whether there was any necessity of classifying and further interpreting the specific provisions of the

relevant Conventions. It appeared also that a sufficient corpus of practice existed already resulting from the application of the relevant provisions of the four Conventions. In the view of those representatives, the Commission should not spend more time on the study of the topic.

252. One representative stated that in view of the increasing evidence that certain Governments were abusing diplomatic bag privileges in clear violation of the Vienna Convention on Diplomatic Relations, any eventual further work on that subject should take into account the growing disquiet about such abuse.

253. Finally, another representative underlined the strictly functional character that should govern the status of the diplomatic courier; the essentially mechanical activity of transporting the diplomatic bag automatically placed restrictions on the amplification of the status of the diplomatic courier beyond the provisions of article 27 of the Vienna Convention. Any granting of new privileges, in his view, should preferably be studied in relation to the protection which should be accorded to the diplomatic bag, since that principle was the sole justification for the protection of the courier.

G. Second part of the topic "Relations between States and international organizations"

254. Several representatives welcomed the progress made in regard to the second part of the topic "Relations between States and international organizations" and encouraged the Commission to continue its work on this subject with a view to elaborating in the future a general international instrument. There was a genuine need, both on the part of the States and international organizations, for such a convention which would unify, in matters not covered by the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, existing relevant rules of international law, taking into account proven norms, as well as new developments in the field. It was further noted that the Commission's work should centre on the immunities and privileges of international organizations and international civil servants in view of their special importance for ensuring the effective and independent implementation of the objectives and principles of international organizations. According to this view, future work should not aim at the elaboration of a unified concept of what an international organization was, at defining it as a legal entity, or at determining its contractual capacity, since those matters could be considered by the Commission in a different context. Regarding the scope of the study of the topic it was considered that at the present stage the Commission should seek to deal with all intergovernmental organizations, leaving to the bodies which would be in charge of the final stage of the codification of the topic the task of limiting the scope, if they so wished, to universal organizations. According to another view, however, it was important to limit the study of the topic to international organizations of a universal character.

255. Other representatives questioned the need and urgency for the Commission to continue its study of the topic. The status of the international organizations and of the international civil servants were already properly covered in numerous headquarters and other agreements in force. The questions that did arise concerning the interpretation and application of agreements relating to privileges and immunities of international organizations were normally questions of detail rather than principle. Furthermore, it seemed doubtful that the codification of the law governing that matter would be of much assistance to Governments, given the wide variety of international organizations and the differing functions they were required to perform.

H. Other decisions and conclusions of the International Law Commission

1. The law of the non-navigational uses of international watercourses

256. Several representatives attached great importance to the question of the non-navigational uses of international watercourses and hoped that the Special Rapporteur on the subject would be able to prepare his report in the near future. In the opinion of certain representatives there existed very few customary rules of international law on the non-navigational uses of international watercourses and the principles underlying such rules were too general for a proper regulation of the topic, particularly with regard to pollution. On the other hand, there were certainly a considerable number of relevant multilateral and bilateral agreements, but none of those agreements was or was intended to be of a general and comprehensive application. It was also stressed that there was a need not merely to codify existing rules and practices, but to define and concretize the relevant principles. At the same time, it was also stated that no two watercourses were the same and therefore it would be difficult for the Commission to elicit universal principles of general application.

257. It was pointed out that the problem was to reconcile the sovereign right of a State over that part of an international watercourse which flowed in its territory with the need to find a formula for sharing the waters with other riparian States, taking into account a series of principles such as the principle of respect for territorial integrity, the principle of good neighbourly relations and the principle of national sovereignty over natural resources. Secondly, there must be recognition of the common interests of all riparian States in the resources of an international watercourse and a renunciation of monopolistic positions.

258. It was further suggested that the economic aspects of the problem must also be taken into account and that, consequently, a multidisciplinary approach would appear to be the best method for studying the topic.

2. Review of the multilateral treaty-making process

259. Several representatives noted favourably the preliminary observations which the Commission had submitted on the review of the multilateral treaty-making process. The hope was expressed that as the Commission itself expected serious attention would be paid to this question during its next session in order to facilitate discussion on that topic at the thirty-fourth session of the General Assembly.

260. Certain representatives stressed the utmost importance of the role which the Commission had played and would play in the progressive development of international law and its codification. The view was expressed that in its self-evaluation of the treaty-making procedure, the Commission would no doubt wish to consider the degree to which it performed or should perform its functions in the international law-making process, bearing in mind that the codification process could no longer be viewed as a function exclusively devoted to finding legal solutions based on precedents, and that it should also conform to the realities of international life. As progressive development of the law came more and more to the fore, the drafters of treaties could not be indifferent to the purpose to be served by the legal régimes

they were preparing. It was necessary to test legal norms against the needs of the international community, searching for rules to reflect universal aspirations, many of which were as yet incompletely understood and only partly articulated. Reference was made in this connexion to the long list of multilateral treaties that had not come into force for want of a minimum level of support. Mention was also made to the fact that there were treaties currently being drafted, the elaboration of which had been entrusted to non-legal organs of the United Nations.

3. International liability for injurious consequences arising out of acts not prohibited by international law

261. Several representatives noted with satisfaction that the Commission, through the creation of a working group, had initiated preparatory work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. It was said that the report prepared by the working group provided a good basis for further study. Representatives also welcomed the appointment of a Special Rapporteur on the subject. It was stated that the risks created by activities resulting from modern sophisticated technology had made it particularly timely to study that subject. But the view was also expressed that before proceeding to the study in depth of the topic of international liability for acts not prohibited by international law the Commission should make further progress in the study of State responsibility for internationally wrongful acts.

262. Regarding the nature of the rules to be codified in the context of this new topic it was stated that the Commission should elaborate primary rules. It would not suffice to apply the approach adopted for the study of State responsibility for internationally wrongul acts.

4. Jurisdictional immunites of States and their property

263. Several representatives noted with satisfaction that the Commission, through the creation of a working group, had initiated preparatory work on the topic of jurisdictional immunities of States and their property and welcomed the appointment of a Special Rapporteur for the topic. Some representatives believed that the Commission should start preparing a set of draft articles on the topic as soon as circumstances permitted in view of its practical importance for States and its appropriateness for codification. A codification of the topic would be particularly important in facilitating the settlement of disputes to which the question of the immunity of States and their property could give rise in economic or other relations in which States are more and more involved. In the opinion of other representatives, the question of the jurisdictional immunities of States and their property was a very delicate and, to a certain extent, controversial one, because apart from dogmatic considerations the only proof of existing rules was internal State practice. The Commission should pursue its work on this topic with the utmost care since the matter of sovereignty was immediately involved. It was pointed out that the controversy arose not so much with regard to the principle of such immunities as with regard to their extent.

264. Certain representatives referred to the report of the Working Group on jurisdictional immunities of States and their property established by the Commission during its last session. While concurring with many of the points made in the report, one representative stated that, although the Working Group report referred to the relationship of the topic with other categories of immunities, such as diplomatic immunities, the similarity and differences between the two had not been defined. The 1961 Vienna Convention on Diplomatic Relations did not regulate the immunity of the diplomatic mission as such because that immunity had been considered part of the more general immunity of the State. In his view, an approach which would place both kinds of immunity on the same footing would require detailed consideration, inasmuch as the treatment of those aspects of State immunity that were not directly linked to diplomatic relations must be differentiated from the treatment of those applying within the context of diplomatic relations. Acceptance of the so-called "restrictive" theories of State immunities came up against a major limitation with regard to the immunity of diplomatic missions, and, accordingly, if practice tended towards more generalized acceptance, it would come closer to the old theories of absolute immunity with regard to that form of State activity abroad which required the greatest protection, namely the activities of diplomatic missions. Agreement was expressed with the view of the Working Group that a working distinction might eventually have to be drawn between activities of States performed in the exercise of sovereign authority which were covered by immunities and other activities in which States were engaged like private persons. At the same time, the need for special prudence was stressed in establishing such a distinction between acta jure imperii and acta jure gestionis because of the particular features of different legal systems and of the differing practice of States, all of which should be taken into account in codifying international law rules governing the matter. Reference was also made to the need of studying questions such as the service of process and the execution of judgements against foreign States.

5. Programme and methods of work of the Commission

265. Representatives generally agreed with the conclusions that the Commission reached, on the basis of recommendations of the Enlarged Bureau and its Planning Group, regarding its programme and methods of work contained in section E of chapter VIII of the Commission's report.

266. Several representatives expressed the hope that the Commission would be able at its 1979 session to complete the first reading of the draft articles on succession of States in respect of State property and State debts, as well as to make further substantial progress in the preparation of drafts relating to other topics already accorded priority by the General Assembly, namely State responsibility for internationally wrongful acts and treaties concluded between States and international organizations or between international organizations. It was also recalled that at that session the Commission should formulate its observations on the question entitled "Review of the multilateral treaty-making process" as requested by the General Assembly in its resolution 32/48 of 8 December 1977.

267. The progress already achieved in the preparation of the draft articles on succession of States in respect of State property and States debts was viewed by several representatives as justifying the stated aim of completing the first

reading of that draft at the next session of the Commission. Regarding State responsibility for internationally wrongful acts, several representatives recalled that the General Assembly had repeatedly recommended that the Commission should continue with the preparation of the draft articles on the highest priority basis, in view of the outstanding importance of an early codification of the rules governing the subject matter for the consolidation of the international legal order. Those representatives emphasized the need of completing, at the earliest possible date, the first reading of part I of the draft articles on State responsibility for internationally wrongful acts. With respect to the question of treaties concluded between States and international organizations or between two or more international organizations, several representatives expressed the hope that the Commission, at its next session, would be able to achieve further progress in the preparation of the corresponding draft articles so that the first reading could be finished at an early date.

268. Many representatives expressed the view that chapter VI of the Commission's report, on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, convincingly demonstrated the need for elaborating an international instrument on the topic. The Commission should, therefore, as from its next session, begin the preparation of a draft protocol on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier with the assistance of the Working Group established for that purpose within the Commission. In the opinion of those representatives, the resolution to be adopted by the General Assembly on the report of the Commission should contain clear instructions concerning the preparation by the Commission of an appropriate draft protocol on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. This view was not shared by other representatives who recalled the statements made in this respect by their respective delegations during the consideration of the item entitled "Implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961". In the opinion of those latter representatives, there was no real need to justify the request that the International Law Commission prepare a draft protocol on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

269. Different views were also expressed with regard to the study of the second part of the topic "relations between States and international organizations". According to some representatives that part of the topic was ready for codification and there was a genuine need for a general convention on the subject, and therefore the Commission should be encouraged to continue its work. Other representatives, however, seriously doubted the advisability of asking the Commission to continue its work on the subject in view of the existence of numerous relevant agreements covering the subject and suggested that such a work should be set aside for the time being. It was suggested that, since the departure of the current Special Rapporteur from the Commission would oblige it to re-examine the method of work, it should review the mandate of the Special Rapporteur or, still better, postpone its work on the subject.

270. Concerning the law of non-navigational uses of international watercourses some representatives expressed the hope that the Commission would be able at its next session to devote part of its time to the study of the topic on the basis of the report to be submitted by the Special Rapporteur concerned. For some of those representatives, the study by the Commission of the law of non-navigational uses of international watercourses should enjoy a certain priority, taking into account the importance of the subject for the development of co-operation and friendly relations between neighbouring States, the development of water technology, the transformation of the physical environment and the prevention of water pollution.

271. Some representatives pointed out that the topic of jurisdictional immunities of States and their property was currently ripe for codification since it was relatively finite and in view of the recent developments in State practice and the growing State involvement in commercial, trading and industrial activities. Those representatives hoped that the Commission would be able to give the topic some degree of priority as soon as circumstances permitted and proceed with the preparation of a draft on the basis of the reports to be submitted by the newly appointed Special Rapporteur.

272. Some representatives expressed the hope that the Commission would soon be in a position to report some progress concerning the topics of international liability for injurious consequences arising out of acts not prohibited by international law. A certain priority, if possible, could be accorded in their view to the study of the topic on the basis of the reports to be submitted by the newly appointed Special Rapporteur. Other representatives underlined, however, the existing relationship between the topic of international liability for injurious consequences arising out of acts not prohibited by international law and the topic of State responsibility for internationally wrongful acts. They considered that the Commission should first complete its draft articles on the latter topic before proceeding with the preparation of draft articles on the international liability topic.

273. Noting the number and complexity of the new topics recently included in the current programme of work of the Commission, which required thorough research and study, some representatives considered that the Commission should not dissipate its efforts by taking up too many topics at once. It was always difficult to deal in depth with various topics simultaneously. Moreover, the study of each topic concerned did not present the same degree of urgency, and it was also necessary to bear in mind the relationship which might exist between some of those new topics and other priority topics, the consideration of which had not yet been completed by the Commission. For those representatives, the Commission should, as a general rule, endeavour to complete the work in progress on topics accorded priority by the General Assembly before undertaking the systematic study of new topics.

274. In this connexion, it was stated that there was a danger that too heavy a burden would be imposed on the Commission and the danger point might have already been reached. A cursory glance at the Commission's report revealed that the

Commission was currently engaged in the study of some nine substantive topics. It was true that it had completed the second reading of its draft articles on the most-favoured-nation clause and was still at a very preliminary stage in the consideration of the status of the diplomatic courier and the diplomatic bag not accompanied diplomatic courier, the second part of the topic concerning relations between States and international organizations, the law of the non-navigational uses of international watercourses, international liability for injurious consequences arising out of acts not prohibited by international law, and jurisdictional immunities of States and their property. But it was precisely because the study of those five topics was still at a formative stage that an attempt could be made to influence the Commission's future work programme, having regard to the need to preserve the quality of its work and, at the same time, to maintain steady progress.

275. The suggestion was made that the draft resolution to be submitted by the Sixth Committee to the General Assembly at its current session should refrain from making any more determinations regarding priorities, so as to leave the Commission a completely free hand to reorganize itself. The carefully graduated scheme of priorities set forth in General Assembly resolution 32/151 of 19 December 1977 was presumably out of date following the election of two of the Special Rapporteurs concerned to the International Court of Justice, entailing their eventual resignation from the Commission. Accordingly, the Commission's proposals for its thirty-first session would have to be revised, as would the Assembly's own conceptions of the time-table for codification in the immediate future. In any case, the Assembly's views on the question of priority and scope of the various topics were adequately recorded in resolution 32/151, and it would be sufficient to recall that fact in the preamble of the resolution to be adopted by the Assembly at the current session.

276. Other representatives recalled that the Commission and the Sixth Committee had always been confronted with the dilemma of how to reconcile the plurality of topics emerging from the development of international relations and the need for concentration on a limited number of topics with a view to completing the elaboration of draft articles in due time. The Sixth Committee should assess the Commission's workload and its capacity of action in a realistic way with a fair sense of priority, bearing in mind the more urgent needs of the international community.

277. Representatives supported in general the Commission's intention to keep its methods of work continuously under review in an effort to find appropriate and effective ways of dealing with the various topics included in its programme, including those which the General Assembly might consider urgent. There was a need for the Commission to be keen to be abreast of the rapid pace of international affairs generally and more particularly to respond to the insistent demand for a broadening of the régime of law regulating relations between States. The setting up of the Planning Group on a virtually continuous basis was expressly welcomed by some representatives. The increased use of working groups and the resort to other working methods, particularly for the preliminary discussion of new topics and questions was noted by representatives with interest

and approval. It was also said, however, that it was too early to judge whether the use of working groups would have the effect of speeding up the work of the Commission. With regard to the methods of work of the Special Rapporteurs, it was pointed out that there was some unevenness in the length and timeliness of the reports and that the Special Rapporteurs should be encouraged to produce their reports in advance of the session at which they would be discussed. Lastly, some representatives emphasized the need for care and due deliberation in the course of the Commission's work. The quality or acceptability of the final product should not be jeopardized as a result of haste. There was probably room for further improvement of the Commission's methods of work, but the Commission should never sacrifice quality for speed.

278. The inclusion of detailed commentaries to the draft articles in the report of the Commission was welcomed by some representatives. They stated that the commentaries helped Governments form a definitive opinion on the provisions contained in the draft articles with which they dealt and enhanced the ability of Foreign Ministries to follow the work of the Commission, particularly in the case of States which had only limited research facilities. Some representatives stressed, however, the need of an earlier circulation of the report of the Commission so that the Governments represented at the Sixth Committee might have enough time to study in greater depth the important and far-reaching results of the work done by the Commission and be able to make a constructive contribution to the debate. The practice of circulating a voluminous report during the session of the General Assembly should be discontinued.

279. With reference to the conclusions of the Commission concerning the need to define better its juridical status at the place of its permanent seat, including immunities, privileges and facilities to which it and its members are entitled, recorded in paragraph 199 of the report of the Commission, the observation was made that in the light of the terms of Articles 104 and 105 of the United Nations Charter and of the relevant agreements made in implementation thereof, only the General Assembly could make appropriate recommendations on the matter. In this connexion, it was explained that the Commission had not wished to trespass on the competence of the General Assembly and had abstained from making any concrete suggestions on the current status of its members. It had merely requested the Secretary-General to study the matter and to take appropriate measures in consultation with the Swiss authorities, exploring the possibilities for a constructive interpretation of existing rules.

280. Reference was also made during the debate to the continual inactivity in the matter of honoraria to which the members of the International Law Commission are entitled under the Commission's Statute, honoraria which had remained unchanged for almost 30 years.

281. The International Law Commission's reasoning and conclusion concerning the urgency of implementing the recommendation for the strengthening of the Codification Division of the Office of Legal Affairs made by the General Assembly in its resolution 32/151 of 19 December 1977 were generally endorsed by representatives in the Sixth Committee. No objection was raised to the Commission's request that the

Secretariat services concerned, in consultation with the Office of Legal Affairs, should inform the Commission at its 1979 session of the steps taken pursuant to Assembly resolution 32/151 to strengthen the Codification Division. Many representatives stressed the need of increasing promptly the number of staff and other resources of the Commission and the services that, simultaneously and at an ever-increasing rate, the Codification Division was required to provide to the Sixth Committee, codification conferences and several special or ad hoc committees. Unless adequate remedy was found to put an end to the present situation, the Codification Division would be unable to continue to provide the International Law Commission with the research projects, studies and compilation required for the study of the various complex and sometimes new topics on its current programme, with the consequential detrimental effects on the quality of the work of the Commission and on the timely conclusion of the tasks assigned to it by the General Assembly. In the light of such considerations, and apparently contrary trends reflected in recent reports on the organizational nomenclature in the Secretariat (A/C.5/33/6) and on post descriptions (A/C.5/33/78 and Corr.1, those representatives considered that the draft resolution to be recommended to the Assembly on the report of the International Law Commission, at the current session, should reiterate the recommendation made by the Assembly in resolution 32/151 referred to above, in order that it be duly taken into account by the services concerned in programming the activities of the Secretariat and recommdning to the General Assembly the allocation of the resources necessary to implement the said resolution.

6. Survey on "force majeure" and "fortuitous event" as circumstances precluding wrongfulness

282. Some representatives expressed appreciation for the decision of the Commission concerning the inclusion in its Yearbook of the "Survey" on State practice, international judicial decisions and doctrines on "force majeure" and "fortuitous event" as circumstances precluding wrongfulness, prepared by the Codification Division of the Office of Legal Affairs.

7. Co-operation with other bodies

283. The Commission's continued practice, as provided for in article 26 of its Statute, of co-operating with regional legal bodies, such as the Asian-African Legal Consultative Committee, the Inter-American Juridical Committee and the European Committee on Legal Co-operation was welcomed. Certain representatives also noted with satisfaction the decision adopted by the Commission at its thirtieth session concerning the establishment of permanent relations of co-operation with the newly created Arab Commission for International Law.

8. Gilberto Amado Memorial Lecture

284. Satisfaction was expressed at the organization during the Commission's thirtieth session of the Gilberto Amado Memorial Lecture.

9. International Law Seminar

285. Gratification was expressed at the success of the fourteenth session of the International Law Seminar organized by the United Nations Office at Geneva, during the Commission's thirtieth session, with several Commission members volunteering their services as lecturers. The hope was expressed that such seminars would continue to be organized during future sessions of the Commission, so as to promote the dissemination and teaching of international law. The hope was further expressed that Governments would make available scholarships enabling junior Government officials and advanced students to attend future sessions of the Seminar. Representatives thanked those Governments which had made financial contributions to the Seminar.

286. Several representatives announced that as in previous years their Governments would make scholarships available to enable persons from developing countries to participate in the seminar, which would be held in conjunction with the next session of the Commission.

IV. DECISION

287. At its 67th meeting, on 8 December, the Committee adopted draft resolution A/C.6/33/L.16 by consensus (see para. 288 below).

V. RECOMMENDATION OF THE SIXTH COMMITTEE

288. The Sixth Committee recommends to the General Assembly the adoption of the following draft resolution:

Report of the International Law Commission

The General Assembly,

Having considered the report of the International Law Commission on the work of its thirtieth session, 5/

Emphasizing the need for the progressive development of international law and its codification in order to make it a more effective means of implementing the purposes and principles set forth in the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 6/ and to give increased importance to its role in relations among States,

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

6/ General Assembly resolution 2625 (XXV), annex.

Noting with appreciation that at its thirtieth session the International Law Commission, pursuant to General Assembly resolution 32/151 of 19 December 1977, completed, in the light of the observations and comments of Member States, of organs of the United Nations, specialized agencies and interested intergovernmental organizations, the second reading of its draft articles on most-favoured-nation clauses,

Noting further with appreciation the work done by the International Law Commission on State responsibility, succession of States in respect of matters other than treaties, treaties concluded between States and international organizations, as well as the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier,

Taking note of the preliminary work done by the International Law Commission regarding the study of the law of the non-navigational uses of international watercourses, the second part of the topic "Relations between States and international organizations", international liability for injurious consequences arising out of acts not prohibited by international law and jurisdictional immunities of States and their property.

Welcoming the considerations and recommendations contained in the report of the International Law Commission regarding the programme and methods of work of the Commission with a view to the timely and effective fulfilment of the tasks entrusted to it,

I

1. Takes note of the report of the International Law Commission on the work of its thirtieth session;

2. Expresses its appreciation to the International Law Commission for the work accomplished at that session;

3. Approves the programme of work planned by the International Law Commission for 1979;

4. Recommends that the International Law Commission should:

(a) Continue its work on State responsibility with the aim of completing at least the first reading of the set of articles constituting part 1 of the draft on responsibility of States for internationally wrongful acts, within the present term of office of the members of the International Law Commission, taking into account the views expressed in debates in the General Assembly and the observations of Governments;

(b) Continuing its work on succession of States in respect of matters other than treaties with the aim of completing, at its thirty-first session, the first reading of the draft articles on succession of States in respect of State property and State debts;

(c) Proceed with the preparation of draft articles on treaties concluded between States and international organizations or between international organizations with the aim of completing, as soon as possible, the first reading of these draft articles;

(d) Continue its work on the law of the non-navigational uses of international watercourses;

5. (a) Recommends further that the International Law Commission should continue the study, including those issues it has already identified, concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier in the light of comments made during the debate on this item in the Sixth Committee at the thirty-third session of the General Assembly and comments to be submitted by Member States, with a view to the possible elaboration of an appropriate legal instrument;

(b) Invites all States to submit their written comments on the preliminary study carried out by the Commission concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier for their inclusion in the report of the Commission on the work of its thirty-first session;

6. Also recommends that the International Law Commission should continue its work on the remaining topics in its current programme;

7. Expresses confidence that the International Law Commission will continue to keep the progress of its work under review and to adopt the methods of work best suited to the speedy completion of the tasks entrusted to it;

8. Endorses the decision of the International Law Commission to request Governments to transmit their observations and comments on the provisions of chapters I, II and III of part I of the draft articles on State responsibility for internationally wrongful acts;

9. Expresses its concern for the necessity of the strengthening of the Codification Division of the Office of Legal Affairs of the Secretariat and, therefore, strongly reiterates its recommendation made in resolution 32/151;

10. Expresses the wish that seminars continue to be held in conjunction with sessions of the International Law Commission and that an increasing number of participants from developing countries be given the opportunity to attend these seminars;

11. Requests the Secretary-General to forward to the International Law Commission for its attention the records of the discussion on the report of the Commission at the thirty-third session of the General Assembly;

II

1. Expresses its appreciation to the International Law Commission for its valuable work on the most-favoured-nation clause and to the Special Rapporteur on the topic for their contribution to this work;

2. Invites all States, organs of the United Nations which have 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;

and 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;

3. Requests the Secretary-General to circulate, before the thirty-fifth session of the General Assembly, the comments and observations submitted in accordance with paragraph 2 above;

4. Decides to include in the provisional agenda of its thirty-fifth session, an item entitled "Consideration of the draft articles on most-favoured-nation clauses".
