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SUMMARY RECORD OF THE 39th MEETING

Chairman: Mr. BAVAND (Iran)

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The meeting was called to order at 11 a.m.

AGENDA ITEM 114: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTIETH SESSION (continued) (A/33/10, A/33/192; A/C.6/33/L.4)

1. Mr. BROMS (Finland) said that, in spite of its heavy agenda, the International Law Commission had completed the second reading of the draft articles on the most-favoured-nation clause. Both the substance and the form of the draft had been considerably improved, taking account of the observations of interested Governments and organizations. One Government had expressed the view that several articles were superfluous. The commentaries on those articles showed, however, that the topics they dealt with 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.

2. It would be desirable for any future convention on the most-favoured-nation clause also to contain provisions for the settlement of any disputes which might arise from the interpretation and application of its provisions, but his delegation agreed with the Commission that that matter should be left to a conference of plenipotentiaries. He also noted that the draft did not provide any exceptions for customs unions and free trade zones. Although the Commission had stated that its silence on that question should not be interpreted as a recognition of the existence or non-existence of a rule on the subject (A/33/10, para. 58), there was evidence to the contrary in article 17, which dealt explicitly with the link between the clause and multilateral treaties. His delegation nevertheless felt that the draft articles were satisfactory on the whole and provided a sound basis for the adoption of a convention.

3. Articles 4, 7, 9, 11, 12 and 13, which might appear superfluous, constituted a logical whole when taken together with the other articles and should be preserved in their present wording. Article 10, paragraph 2, contained several vague phrases, but the text of the article could not be made more precise; the Commission's commentary should facilitate its interpretation. Article 14 and article 29 were acceptable, but article 29 should not be interpreted in such a way as to prejudice the rights of third parties. His delegation was in favour of article 15, even though the practice of States was at variance with the solution adopted by the Commission, and it also supported articles 18 and 22. With regard to the latter article, he stressed the importance of the second sentence, which contained a necessary restriction on the competence of the granting State in the exercise of its rights. His delegation supported draft articles 23 and 24, which sufficiently covered the topic in question for the present. On the other hand, his delegation was not convinced that article 27, which reproduced the wording of the corresponding article of the Vienna Convention on the Law of Treaties, was either necessary or useful.

(Mr. Broms, Finland)

4. It was a matter for concern that the work of the Commission on the priority question of State responsibility was proceeding so slowly. In the view of his delegation, it was premature to communicate the first three chapters of the draft to Governments for their observations, as it would be difficult for them to formulate their attitudes on certain of the questions without being aware of all their legal implications and knowing how the problem of the content, form and various degrees of international responsibility was to be settled. The wording of the new articles was acceptable on the whole, subject to a few minor amendments. For example, in article 23, the phrase "by the conduct adopted" could be deleted, since cases could well be conceived of where the State in question was obliged to have recourse to a particular method, which might be the only possible one. The three articles concerning the moment and duration of the breach of an international obligation could be combined into a single article, as originally suggested by the Special Rapporteur. His delegation was in favour of articles 25, 26 and 27, but suggested that the word "Nevertheless" at the beginning of the second sentence of article 26 could be deleted, as that sentence was merely a corollary of the preceding sentence.

5. The draft articles on treaties concluded between States and international organizations or between international organizations, were becoming too lengthy, and it was to be hoped that the Commission would be able to simplify and shorten them. His delegation favoured the new articles adopted by the Commission on the basis of the corresponding articles of the Vienna Convention on the Law of Treaties.

6. He was pleased to note that the Commission had begun its preparatory work on the new items on its agenda, and he hoped that the study of such a large number of subjects would not impede the progress of the Commission's work on priority subjects. If the Special Rapporteur on the question of the non-navigational uses of international watercourses was able to prepare his first report in time, the Commission could begin consideration of it at its thirty-first session.

7. He was pleased to note that the Commission had decided to extend its relations with other international bodies concerned with international law and to establish relations of co-operation with the recently established Arab Commission for International Law.

8. With regard to the next International Law Seminar, he would like to announce that his Government intended to offer a scholarship of $3,000 for a national of a developing country.

9. Mr. ECONOMIDES (Greece) said that the most-favoured-nation clause was one of the soundest institutions of international treaty law, since its aim was to combat discrimination and to establish equality of treatment among States, extending to both persons and things in a determined relationship with them. The main accomplishment of the Commission was that it had embodied in legal principles a treaty practice which was both ancient and widespread. With the exception of

(Mr. Economides, Greece)

certain isolated rules which seemed to be of a customary nature, such as those set out in articles 9 and 10, the provisions of the draft were purely those of a treaty and sought to establish the meaning of the clause, the conditions for its application, and its effects.

10. The second accomplishment of the Commission was that it had adopted, for the benefit of the developing countries, new rules concerned with the progressive development of law, which were contained in draft articles 23, 24 and 30. In the present stage of development of international trade law, the general orientation of those rules was of greater value than their actual content. However, there was a significant gap in the draft. While providing for a series of exceptions to the clause, it made no mention of the classic exception relating to customs unions and similar associations of States. Yet, that exception had long been accepted by jurists and had been sanctioned by international practice in the same way as the exception that was intended to facilitate frontier traffic. That omission was all the more incomprehensible in that such associations could also serve to promote the economic interests of developing countries.

11. Moreover, 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, that between the granting State and the third State was made clear only in paragraph 6 of the commentary on article 5. It was regrettable that such a useful definition was not included in the actual wording of article 5. As the draft articles were to be studied in depth by States and international organizations, it would not be advisable to take any decision at the present time concerning the elaboration of an international convention.

12. Considerable progress had been achieved during the Commission's thirtieth session concerning State responsibility. With regard to article 23, he wondered whether there was any legal distinction between that article, dealing with obligations of result of a specific kind, and article 21, which covered all obligations of result. Article 23 seemed, in respect of responsibility, to lie somewhere between objective responsibility and classic responsibility based on fault.

13. He had some misgivings about article 25, paragraphs 2 and 3, which were of unusual complexity. From a legal point of view, it seemed difficult to take the position that breaches through composite acts and complex acts could be retroactive, relating to a period which pre-dated the commission stricto sensu. Those provisions, which were of a quasi-penal nature, should instead be strictly applied and should follow the rule laid down in article 25, paragraph 1. Otherwise, his delegation fully approved of the principle of tempus commissi delicti and of article 27.

14. The only comment his delegation had for the present on the draft articles on

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succession of States in respect of matters other than treaties was that the notion of "equitable proportion" in articles 24 and 25 was not clear. Indeed, that question should be left to the courts. On the other hand, the meaning of the expression "taking into account all relevant circumstances" in article 25 should be clarified. An indicative listing might be made, which would also help to clarify to some extent the notion of equitable proportion.

15. With regard to the question of treaties concluded between States and international organizations or between international organizations, the five new articles adopted by the Commission did not require any special comment. However, his delegation wished to make two observations of a general nature. In the first place, supranational organizations should not be disregarded; although they 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. Secondly, with regard to third States, a distinction should be made between States that were members of an organization party to a treaty and States which were not members and were therefore truly third States. His delegation therefore supported article 36 bis, even though it realized that the present wording of subparagraph (b) of that article was not satisfactory.

16. With reference to the Commission's programme of work, his delegation regarded as most important the question of the law of the non-navigational uses of international watercourses, followed by that of the jurisdictional immunities of States.

17. Mr. CHAUDHRI (Pakistan) expressed his satisfaction at the fact that, since the Afro-Asian States had regained their independence, their increased participation in the work of the Commission had caused international law to lose its exclusively European character and had enabled it once again to encompass the community of nations.

18. In elaborating the draft articles on the most-favoured-nation clause, the Commission had been guided by the principle of equality of States but had also realized that there were a number of important qualifications to the application of that principle. The draft articles were based on careful study of existing treaties, State practice, decisions of national and international courts and contemporary developments in the field of international trade, and they had the merit of taking into account the interests of the developing countries. Conscious of the inequalities resulting from different levels of economic development, the Commission had considered the various documents in that area, particularly those relating to the new international economic order and those prepared by UNCTAD and GATT. It had also taken into account 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. Consequently, article 23 of the draft provided for exceptions in favour of the developing countries pertaining to treatment under a generalized system of preferences.

19. According to article 30, the 29 preceding articles were without prejudice to the establishment of new rules of international law in favour of developing

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countries. That was a reflection of the Commission's realization that it was not in a position to enter fields outside its functions and that it should allow others to regulate international trade. His delegation supported the Commission's decision to send the draft articles to Governments for their consideration before deciding whether it would be appropriate to prepare a convention on the subject.

20. Turning to the question of State responsibility, he noted that the progress made by the Commission during its thirtieth session had been modest. Article 23 provided that there was a breach of an international obligation if the conduct adopted by a State did not achieve the prevention of a given event. That could be interpreted to mean that the obligation of a State was not in respect of a breach of an obligation under international law but in respect of the result of the occurrence of a given event. Furthermore, the article providing that there was no breach of international obligation when the State failed to adopt measures to prevent an act which did not occur. Conversely, however, a State was held responsible for failure to prevent an act which caused injury to another State. Those provisions appeared to be somewhat imprecise. Perhaps the Commission could give some more thought to the issue at its next session.

21. Articles 24, 25 and 26, which related to the time element with respect to the breach of international obligations, should be considered in conjunction with article 18. They were based on the idea that a breach of international obligation, which occurred when the illicit act began, extended over the whole period during which the act took place. The determination of the time period might have some practical value, but it might prove to be difficult to determine the exact point in time when the breach of a certain international obligation occurred. Moreover, an action might have retroactive effect or it might produce consequences reaching far into the future or occurring long after a particular action had been terminated. He wondered whether the scope of articles 25 and 26 extended to those areas.

22. With regard to the other questions studied by the Commission, his delegation believed that it would not be possible to consider individually the various articles which had been adopted up to the present time. It would be advisable to wait until the Commission completed its work on those various subjects. As to the question of succession of States in respect of matters other than treaties, he was pleased to note that the Commission intended to consider a procedure for the settlement of disputes at its next session. With regard to article 36 bis of the draft articles on treaties concluded between States and international organizations or between international organizations, his delegation concurred with the view expressed by others that it was difficult to agree with the principle embodied in that article. The principle that an international organization could create obligations for its members by entering into treaty relations with a third State needed to be reconsidered most carefully. His delegation attached great importance to the question of the law on the non-navigational uses of international watercourses and hoped that a report on the subject would be prepared soon.

(Mr. Chaudhri, Pakistan)

23. Finally, his delegation wished to point out that the codification of international law was one of the major objectives of the United Nations. It was therefore essential to strengthen the Codification Division of the Office of Legal Affairs.

24. Mr. DUCHENE (Belgium) said that his comments would be limited to the draft articles on the most-favoured-nation clause. His delegation fully endorsed the views expressed recently in the Sixth Committee by the observer for the European Economic Community (A/C.6/33/SR.32, paras. 1-17). In its written comments, which were reproduced in the annex to the report under consideration (A/33/10), the Community had inter alia suggested that the exception envisaged in article 23 should be extended to cover not only the advantages granted to developing countries under a generalized system of preferences but also the advantages envisaged in preferential agreements concluded with those countries; it had also suggested introducing in the draft an exception in favour of customs unions and free-trade zones and the addition of provisions on the application of the clause in relations between countries having different socio-economic systems. As a member of the Community, Belgium regretted that none of those suggestions had been adopted by the International Law Commission in its final draft articles.

25. It was particularly unfortunate that no exception had been envisaged for customs unions and free-trade zones. The regional integration process was a new aspect of economic relations between States and was exemplified by such arrangements as the European Economic Community and several other customs unions, such as the West African Customs Union, the Arab Common Market and the Andean Group. Those customs unions, which brought together both developed and developing countries, had been established pursuant to article XXIV of GATT, which replaced the most favoured-nation clause. If States members of customs unions or free-trade zones were required, because of a most-favoured-nation clause, to extend to non-member countries the treatment they granted each other, there would be no point to their entering into regional integration arrangements.

26. Furthermore, draft articles 23 and 24, which provided for exceptions in respect of treatment under a generalized system of preferences and in respect of arrangements between developing States, respectively, should be extended to include preferential schemes established by international agreements between developed States or entities and developing States, to the benefit of the latter.

27. 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

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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 2.1 (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. If such a definition was possible, the draft should provide for the problem of the application of the clause between countries with different socio-economic systems.

28. In spite of the exceptions it had suggested, his delegation remained convinced of the importance of proper implementation of the clause, which was fundamental to international economic relations. His country's policy on international trade was in accordance with the preamble of GATT, which provided that the elimination of discriminatory treatment and the reduction of customs tariffs were essential to the development of international trade. In the opinion of his delegation, the most-favoured-nation clause remained the best means of attaining those objectives. Clearly, the number of exceptions was growing; the Community had abolished customs tariffs between its member States and granted unequalled tariff preferences, but it was nevertheless true that exceptions could be made only in accordance with the rule. While assigning great importance to that rule, his delegation believed that it was essential to make express provision for exceptions to it in the draft articles. It would be premature to submit the draft articles, in their current form, to the General Assembly, and even more so to an international conference for the purposes of adopting an international convention. Without the signature of the Community, which was the world's greatest trading Power, such a convention would be of little value. He therefore appealed to the States Members of the United Nations to reconsider the matters raised by his delegation.

29. Mr. BUBEN (Byelorussian Soviet Socialist Republic) emphasized the usefulness of the work done by the ILC at its thirtieth session and recalled that his Government had submitted written observations on the most-favoured-nation clause which were contained in the annex to the report before the Committee (A/33/10). If ILC had included in the final draft on article 6 concerning clauses in international agreements between States to which other subjects of international law were also parties, it was because the term "treaty" was defined in article 2 as meaning an international agreement concluded between States in written form and governed by international law. Thus, the ILC had extended the scope of the draft as a whole. The new article 14 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.

30. ILC had rightly come to the conclusion that the most-favoured-nation clause could be considered as a technique or means for promoting the equality of States or non-discrimination, but that the close relationship between the clause and the general principle of non-discrimination should not blur the differences between the two nations. In fact, the granting of most-favoured-nation treatment

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was still subject to unacceptable conditions, which was not favourable to good relations between States. ICL had also concluded that both doctrine and State practice currently favoured the presumption of the unconditionality of the clause.

31. His delegation was in favour of draft articles 23, 24 and 30, concerning the effects of the clause on relations between States at different levels of development. Article 30, which contained a general reservation concerning the establishment of new rules of international law in favour of developing countries, had been adopted by the ILC, in the expectation of future developments in the field. In that respect, he stressed the need to define the notions of developed and developing countries in relation to trade.

32. Having examined the question of the relationship between the most-favoured-nation clause and the treatment extended by one member of a customs union to another, the Commission had decided not to include an article on a customs union exception in the draft articles. In fact, any exception to the application of the clause, other than those exceptions provided for in articles 23 to 26, would not be in accordance with the law and would deprive the clause of much of its value. His delegation agreed with the decision taken by the ILC not to define the scope of the clause in the draft, to avoid restricting it. It was for parties to agreements containing a most-favoured-nation clause to define its scope. Finally, the ILC had been quite right not to include in the draft articles any provision concerning the settlement of disputes. As it was for the States concerned to define the scope of the clause in each case, it was normal that each treaty should prescribe its own procedure for the settlement of disputes.

33. In general, the draft articles were quite satisfactory and would form a sound basis for the preparation of an international convention, a task which could be entrusted to the Sixth Committee in order to strengthen its role in the codification and progressive development of international law.

34. At its thirtieth session, the ILC had also made progress in its first reading of the draft articles on State responsibility. Article 23 concerned the breach of an international obligation to prevent a given event, while articles 24 to 26 concerned the moment and duration of the breach of certain international obligations. Those two elements of such a breach determined not only the commencement of State responsibility, but also the consequences of that responsibility, particularly with regard to the amount of compensation, the competent jurisdiction and the time-limit for proceedings. Article 27 was the first article of the chapter concerning the implication of a State in the internationally wrongful act of another State and defined the conditions in which the participation of a State in the internationally wrongful act of another State would itself constitute an internationally wrongful act and would engage the responsibility of the participating State. With reference to the ILC's decision to submit to Governments, for observation and comments, chapters I, II and III of the first part of its draft articles on State responsibility, he emphasized that those observations and comments could be only preliminary,

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since Governments would not have an over-all view of the draft and, in particular, of the relationships between its various provisions. His delegation believed that it was important to complete the reading of the first part of the draft articles as soon as possible.

35. Draft articles 23 to 25 on succession of States in respect of matters other than treaties were the last articles in part II of the draft concerning succession to State debts. Each of those three articles dealt with a different type of succession of States: uniting of States, separation of part or parts of the territory of a State, and dissolution of a State. The ILC should also indicate that the expression "State debt" referred to an international financial obligation, as opposed to an internal State debt. For the sake of uniformity, it should also use, as far as possible, the terminology employed in the Convention on Succession of States in Respect of Treaties.

36. With regard to the four new articles adopted by the ILC on the question of treaties concluded between States and international organizations or between international organizations, he stressed the need to distinguish States from international organizations from the viewpoint of their legal personality under international law. That difference had led to the drafting of article 34, whereby treaties to which international organizations were party created neither obligations nor rights for a third State or a third organization without the consent of that State or organization. His delegation could not accept article 36 bis relating to the effects of a treaty to which an international organization was party with respect to third States members of that organization. The article could only be understood to apply to supranational organizations, which alone were empowered to bind their States members by the treaties they concluded. According to article 36 bis, third States who were members of an international organization could require other parties to discharge certain obligations against their will. Moreover, on what basis could the States members of an organization, under article 36 bis (b), participate in the negotiation of a treaty which concerned only the organization to which they belonged? States members would thus be enjoying a kind of right of veto over the participation of an organization in a treaty.

37. As to the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the 19 questions identified by the ILC Working Group showed the need to work out a protocol on that topic. It was therefore important to continue work in that area.

38. At its thirtieth session, the ILC had also considered the second report of the Special Rapporteur on the second part of the topic "Relations between States and international organizations" and had adopted the conclusions and recommendations set forth therein. To arrive at concrete results, it would be important to limit consideration to international organizations of a universal character.

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39. Finally, his delegation approved of the programme of work the ILC had adopted for its thirty-first session, as set out in paragraph 194 of the report. The ILC should always endeavour to complete work already in progress and not dissipate its energies on less urgent questions.

40. Mr. GAVIRIA (Colombia) said that the draft articles on the most-favoured-nation clause, which should be submitted to a plenipotentiary conference, embodied a set of rules which complemented the expression of the will of the granting State and the beneficiary State, thus making an important addition to the Vienna Convention on the Law of Treaties.

41. In article 4, the draft defined the most-favoured-nation clause as a treaty provision, but it did not restrict its sphere of application to the treaty obligations of States, since article 6 of the draft also dealt with clauses granted to other subjects of international law. In that regard, the draft went considerably beyond the Vienna Convention on the Law of Treaties. It was none the less true that, under article 4, the clause, applied only to an agreed sphere of relations, and that its scope of application was limited under article 9 to the subject-matter it referred to.

42. Draft articles 11 and 13 took into account the conditions to which the most-favoured-nation clause was made subject in practice. Although the ILC 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 of the Treaty of Montevideo establishing the Latin American Free Trade Association.

43. 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.

44. According to article 20 of the draft, rights deriving from a most-favoured-nation clause arose at the moment when the relevant treatment was extended to a third State, if the clause was unconditional. If the clause was made subject to a condition of compensation or reciprocal treatment, those rights arose only at the moment when the agreed compensation or reciprocal treatment was in fact extended. Similarly, article 21 provided that the rights of the beneficiary State were terminated or suspended at the moment when the relevant treatment extended by the granting State to a third State, or to persons or things in the same relationship with that third State, were terminated or suspended. If the clause was made subject to a condition of compensation or reciprocal treatment, the rights of the

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beneficiary State were terminated or suspended at the moment when the beneficiary State terminated or suspended the agreed compensation or treatment. Those provisions were logical and flowed from the very nature of the clause. However, they 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.

45. The exception to the application of the clause provided for under article 23 reflected the progressive development of international trade law. The article took into account a mechanism which other international authorities had considered and which tied the application of the clause to the level of economic development of States, in order not to bring about implicit discrimination against the weakest members of the international community. The developing countries depended heavily on primary commodity exports and must, to be competitive on world markets, benefit from a non-discriminatory and non-reciprocal generalized system of preferences. That had been recommended by UNCTAD at its second session. The GATT had, accordingly, been adapted to the needs of developing countries, and the developed members of GATT had been authorized to grant preferential treatment to products originating in developing countries.

46. Although his delegation approved the general spirit of article 23, it had reservations as to its wording. It did not share the view expressed in paragraph 21 of the commentary on article 23 that the rule stated in that article applied to any State beneficiary of a most-favoured-nation clause, irrespective of whether it belonged to the developed or developing category because the principle of self-selection could otherwise be circumvented. His delegation felt that the principle of self-selection should be used with moderation. Otherwise, the generalized system of preferences could lose all effectiveness for the developing countries and lead to non-reciprocal and inequitable advantages. His delegation would therefore have preferred article 23 clearly to exclude only the developed countries from application of the clause in the context of a generalized system of preferences.

47. The draft contained only two other exceptions to the clause. They concerned, respectively, land-locked countries and frontier traffic, and were entirely justified.

48. However, the ILC draft did not take into account the case of free trade associations and customs unions. That omission was contrary to the general spirit of the draft, in which the ILC had endeavoured to codify and reflect the progressive development of international trade law. Free trade associations and customs unions, an invaluable instrument of economic integration, were already excluded from application of the clause by virtue of GATT. That omission in the draft could lead to grave difficulties for a country such as Colombia, which was a member of a free trade association under the Treaty of Montevideo and of a customs union under the Cartagena Agreement. Although the ILC had decided that inclusion of article 23 bis, as proposed by one of its members, depended ultimately on the

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political will of States, his delegation would have welcomed with satisfaction its inclusion in the draft.

49. With regard to the question of State responsibility, his delegation welcomed the significant progress which ILC had made.

50. With regard to the law of the non-navigational uses of international watercourses, he recalled that he had explained his country's position at the thirtieth session of the General Assembly. He had also presented his delegation's views on the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier during discussion of agenda item 116 at the current session.

The meeting rose at 1.10 p.m.