United Nations
GENERAL ASSEMBLY
THIRTY-THIRD SESSION
Official Records *

SIXTH COMMITTEE
42nd meeting
held on
Thursday, 9 November 1978
at 3 p.m.
New York

SUMMARY RECORD OF THE 42nd MEETING

Chairman: Mr. FERRARI-BRAVO (Italy)

CONTENTS

78-58337

Distr. GENERAL
A/C.6/33/SR.42
14 November 1978

ORIGINAL: ENGLISH

The meeting was called to order at 3.15 p.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. McKENZIE (Trinidad and Tobago) said the essence of the most-favoured-nation clause was the legal guarantee of non-discrimination among States in a determined sphere of relations agreed upon by States parties to the treaty concerned. Various international legal instruments of a multilateral character as well as national constitutions provided that treatment to non-nationals. In some spheres of relations, however, such as the regulation of trade and the question of intellectual property, the strict application of the most-favoured-nation clause would meet the requirements for formal equality but would result in fact in discrimination against the developing countries. His delegation appreciated the efforts which the Commission had made to reflect in the articles the emerging rules of international trade law in favour of developing countries and to leave open the possibility of further rules of that nature, such as rules on "differential measures", being elaborated without prejudice to the existing articles. The efforts of the developing countries to secure a more equitable régime in the field of intellectual property, i.e. the transfer of technology, must in no way be prejudiced by the elaboration of those articles. He hoped that at the plenipotentiary conference further consideration would be given to the customs union exception to the most-favoured-nation clause, particularly 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 economies and to free trade among themselves. His delegation felt that the concept of the most-favoured-nation clause as expounded in the Commission's report (A/33/10) was a valuable contribution to the universal quest for a more equitable international economic régime. The draft articles on the most-favoured-nation clause reflected the state of the law on the subject and were an entirely satisfactory basis for the drafting of an international convention.

2. With regard to State responsibility, his delegation considered that article 23 effectively codified the law on the breach of an international obligation to prevent a given event and supported its adoption. The importance of determining the moment when it could be concluded that a breach of an international obligation had occurred and the duration of acts or omissions constituting the breach could not be overstressed. The principles for determining such breaches as stated by the Commission in articles 24, 25 and 26 went a long way toward settling those issues. The formulation in article 27 of the rule concerning participation by one State in the internationally wrongful act of another State in the form of aid or assistance was acceptable. The stress placed, inter alia, on the element of intent guarantee that only the real forms of participation by a State in the internationally wrongful acts of another State would constitute a breach of a given international obligation.

3. With regard to succession of States in respect of matters other than treaties, his delegation approved of the new draft articles 23, 24 and 25 which, viewed

(Mr. McKenzie, Trinidad and Tobago)

either by themselves or in the context of the full set of articles, represented plausible approaches to the question of succession to State debts. The overriding provision of article 22 ensured that the new draft articles would apply only to situations other than that of the attainment of independence by former colonial or other dependent territories.

4. With regard to the question of treaties concluded between States and international organizations or between two or more international organizations, his delegation endorsed the new articles 34 and 35. Article 36 bis, however, constituted an exception to that general rule that a treaty did not create obligations and/or rights for a third State without its consent; it should be redrafted so as to incorporate that general rule.

5. His delegation would not comment at the current stage on the other topics considered by the Commission, except to state that in the case of the topic "Jurisdictional immunities of States and their property" it would have preferred to see higher priority given to the questions of service of process and the execution of judgements against foreign States.

6. Mr. GAWLEY (Ireland) said the main achievement of the Commission at its thirtieth session had been the elaboration of a final set of draft articles on the most-favoured-nation clause. His delegation fully endorsed the statement made by the observer for the European Economic Community and by the representative of the Federal Republic of Germany as spokesman for the Presidency of the Council of Ministers of the Community. Ireland, as a member State of the European Community, felt that a major short-coming in the draft articles as currently formulated was that they failed to take account of customs unions and free trade areas. In their existing form the draft articles obliged States members of such a union to extend to third countries the benefits of their membership in such a union. That failure to take account of customs unions and free trade areas was all the more surprising, not only in the light of the major role such associations played in trade, but also in the light of facts recalled in paragraph 56 of the report. At its thirtieth session the Commission had had before it a draft article intended to deal with that situation, namely article 23 bis. However, the Commission had decided not to include such a draft article, for the reasons given in paragraph 58 of the report. His delegation felt that the draft articles on the most-favoured-nation clause would remain incomplete until they made provision for customs unions and similar associations. The draft articles should be submitted to Governments for their observations, in the light of which a decision could be taken as to how best to proceed.

7. Mr. MUSEUX (France), referring to the programme of work of the Commission, said that in view of the range of the topics dealt with, his delegation welcomed the fact that the Commission had set up a Planning Group to consider its future programme and methods of work. He hoped that the Commission would not dissipate its efforts by taking up too many topics. While recognizing the importance and complexity of the various topics concerned, which required research and thorough

(Mr. Museux, France)

study, his delegation did not think they were all equally urgent. It was also difficult to deal with two extremely important topics simultaneously, for example State responsibility for wrongful acts, on the one hand, and for acts not prohibited by international law, on the other. Therefore, work on the latter should not go beyond the preliminary stage until work on the former had been completed, and consequently his delegation agreed with the priorities adopted by the Planning Group for the work of the following year.

8. In his delegation's view, two other topics were ready for codification in the near future, namely the jurisdictional immunities of States and their property - because of recent changes in relevant international practice - and the diplomatic courier and diplomatic bag - because of the difficulties experienced with regard to its day-to-day applications.

9. The question of the status of international organizations did not present many problems because of the numerous headquarters agreements in force, and his delegation hesitated to advocate at the current stage a codification effort involving organizations of such unequal size and diverse functions. Therefore, with the exception of the two topics mentioned earlier, other questions pertaining to privileges and immunities could be set aside for the time being, taking into account the disappointing results of the latest codification efforts in that area.

10. He expressed his delegation's appreciation for the inclusion in the Commission's Yearbook of the survey of State practice, international judicial decisions and doctrine on force majeure and "fortuitous event".

11. He then referred to specific aspects of the report (A/33/10) with regard to the draft articles on the most-favoured-nation clause, he inquired why the word "clause" had been used in the plural in the title and in article 1. His country, a member of the European Economic Community, fully supported the statements made by the Community representatives.

12. In matters other than trade, his delegation considered the draft articles as satisfactory; they reflected national and international practice and judicial decisions, although generally speaking those decisions were not very recent. Referring in particular to article 18, which provided that a most-favoured-nation clause would, where appropriate, confer national treatment, he said his delegation felt somewhat diffident about calling in question the soundness of such a rule, which was supported by French judicial practice and the official interpretation mentioned in paragraph (4) of the commentary on 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 Level, mentioned in paragraph (7) of the commentary, which had also been upheld by Niboyet, 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

(Mr. Museux, France)

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.

13. Those considerations led his delegation to query the philosophy behind the most-favoured-nation clause. The aim of the clause was to establish machinery to equalize the situation of States, which in fact enabled them to compete under equal conditions. However, as the Commission had shown, formal juridical equality could easily lead to unfavourable treatment of the weakest countries. The question therefore 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. Such considerations had obviously prompted the Commission to introduce articles 23, 24 and 30. As the Commission observed in paragraph (3) of its commentary on article 30, the international community had turned toward the quest for "differential measures", which, in his delegation's view, 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. His delegation therefore believed that the draft articles on that topic must be examined very carefully by Governments before any decision was taken on them. The organizations which had commented on the articles after the first reading could likewise be asked to make further observations. Only after the Sixth Committee had proceeded to a thorough exchange of views would it be able to make the best decision on that question, which was of considerable practical importance but had new aspects to be taken into consideration.

14. As for the question of State responsibility, he welcomed the fact that Member States would be given an opportunity to comment on chapters I, II and III of part 1 of the draft articles, given the complexity and importance of the topic. His delegation had stated the previous year that it had many reservations about article 23 because it was based on a distinction between obligations "of conduct" and obligations "of result", although many obligations could be seen as mixed at the international level. In paragraph (3) of its commentary on the article, the Commission listed a number of obligations which it considered as obligations "of result", but his Government's practice did not seem to correspond to that concept and in his delegation's opinion, very few of the examples cited constituted an obligation whose character was as clear-cut as was implied. It was true that the sharp distinction between the two types of obligation had been attenuated in articles 23 and 21 by the use of the words "if, by the conduct adopted" and by paragraph (6) of the commentary on article 23, which his delegation noted with satisfaction and which showed that in practice obligations "of result" could not be distinguished from obligations "of conduct".

(Mr. Museux, France)

15. In previous years his delegation had stressed the importance it attached to the notion of damage as a condition for international responsibility and the problems posed by article 23 seemed to support the position. His delegation believed that the 1930 Preparatory Committee mentioned in paragraph (8) of the commentary had considered that the existence of damage, and not the occurence of an event as such, constituted the source of international responsibility. His delegation was not convinced by the example given in paragraph (5) of the commentary and found it 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. His delegation therefore felt that there was no need for a special rule concerning the obligation to prevent a given event; the cases covered by such a rule could be covered by other articles, in particular article 21. Even if his delegation were to agree to the principles underlying article 23 it would still have difficulties with the wording, relating to the problem of attributability. The wording which was appropriate in article 11 seemed inappropriate in article 23, which did not appear to apply to the situations covered in articles 7, 8, 9 and 10.

16. He had no objections in principle to articles 24, 25 and 26 regarding the tempus commissi delicti like the representative of the Netherlands, but he questioned whether in view of different factors involved it would be possible to find a priori a definition that would apply in all circumstances and also 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.

17. His delegation also questioned the fact that the Commission had introduced article 27 as pertaining to the development rather than the codification of international law. More importantly, it did not think that that article had any place in the draft articles because it had been decided that the Commission would not attempt to establish or codify the primary rules of responsibility. That decision had already been infringed in article 19 but had been departed from even more markedly in the case of article 23, which, moreover, presented a number of delicate problems. The Commission should therefore delete that article.

18. Regarding the question of succession of States in respect of matters other than treaties, it was difficult to comment on articles 23, 24 and 25 in isolation, especially since certain provisions of preceding articles had been left in square brackets and it was therefore unclear whether the articles in question applied only to debts owed to other States or to other debts as well. With that reservation, his delegation considered that the rule embodied in article 23 reflected fairly well-established practice. His delegation had no difficulties with article 24, since it retained equity as a legal rule, as advocated consistently by his Government. However, it might be appropriate to explain what was meant by the expression "relevant circumstances" in paragraph 1 of that article. Furthermore, according to article 2 the draft articles applied only to a succession of States occurring in conformity with international law and in particular with the Charter of the United Nations. Consequently, the separation

(Mr. Museux, France)

of parts of the territory of a State could only take place when peoples had a right to self-determination in accordance with the Charter. His delegation therefore did not see the purpose of the distinction between articles 21 and 24.

19. With regard to the question of treaties concluded between States and international organizations or between two or more international organizations, his delegation considered that the Commission should pattern its draft after the Vienna Convention on the Law of Treaties, deviating from it when its provisions were questionable or ill-suited to the specific case of international organizations. His delegation therefore agreed with the method used and was satisfied with the speed of the Commission's work on that topic. It hoped that by giving the topic priority the Commission would be able to complete its work in the near future. Among the draft articles on the topic adopted by the Commission at its thirtieth session, the most controversial was article 36 bis, which raised many delicate issues that his delegation had not yet had time to study. At the current stage it would therefore confine itself to observing that the article dealt with a problem which was of great importance in the contemporary world and the Commission must therefore solve that problem explicitly. His delegation therefore urged the Commission to include article 36 bis in the draft.

20. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that his Government had always advocated the progressive development and codification of international law and attached great importance to the work of the Commission, especially in light of the new Soviet Constitution, 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.

21. In formulating the draft articles on the most-favoured-nation clause, the Commission had accomplished much valuable work in an area of international law lacking established rules of practice. His delegation joined many others in commending the draft articles, which dealt with a very important area of international economic relations and were designed to abolish discrimination in various areas. They took account of the present international situation, particularly the increasing role of the developing countries. The Commission had elaborated the draft articles on the basis of a profound analysis of the practice of States in respect of treaties, taking into account the views communicated to it by States or expressed at earlier sessions of the General Assembly. In codifying the existing rules of international law on the subject, the Commission had been able to formulate them more clearly and had continued the progressive development of international law in that area, making use of the diverse concepts and practices of different legal systems. The draft articles fully reflected the rules governing the current practice of States with respect to treaties. The Commission had acted rightly in limiting its work to the study of clauses contained in treaties as defined in article 2, paragraph 1 (a). His delegation also agreed with the Commission's decision to study the effect of the clause in the largest possible number of areas. The Commission had established four areas of

(Mr. Khlestov, USSR)

international relations in which exceptions to the most-favoured-nation clause were possible and was fully justified in refusing to regard as legitimate any other exceptions, such as the case of customs unions.

22. Regarding the further consideration of the draft articles, he agreed with the view of numerous other delegations that States would need time to study the draft articles before formulating their position on concluding a convention. At the present session, a decision could be taken to make the question of elaborating a convention an agenda item of the thirty-fourth session of the General Assembly. In the discussion of that question, agreement on the further steps to be taken towards concluding the convention could be reached, and the Sixth Committee could become the forum for elaborating that convention.

23. Some progress had been made in the area of State responsibility, but the preparation of the draft articles was proceeding slowly; the Commission had been working on that topic for more than 10 years. He hoped that at its thirty-first session the Commission could begin the first reading of chapters IV and V of the first part of the draft articles.

24. His delegation agreed with the favourable comments of other delegations concerning the work of the Commission on succession of States in respect of matters other than treaties. Articles 23 to 25 concluded the part of the draft on succession to State property and State debts; that part could serve as the subject of an independent convention. The main unresolved question was the provision of article 18 defining the concept of State debt. Regulation under international law could apply only to the responsibility of States for debts or financial obligations in respect of other States or other subjects of international law, not to obligations under civil law. Succession to a State debt was possible only if it was in accordance with international law, i.e. consistent with the principles of the Charter of the United Nations. His delegation agreed with numerous others that the word "international" should be retained in article 18. It hoped that at its thirty-first session the Commission could conclude the first reading of the draft articles on succession to State property and State debts.

25. With regard to the question of treaties concluded between States and international organizations or between two or more international organizations, difficulties arose because of attempts to include article 36 bis, which contained provisions designed to defend the interests of supranational organizations. His delegation shared the opinion of a number of delegations, including in particular the Hungarian delegation, that article 36 bis should be excluded from the draft. He expressed confidence that at its thirty-first session the Commission would achieve further progress in preparing the draft on treaties between States and international organizations or between two or more international organizations, so that the first reading of that draft could be finished as soon as possible.

(Mr. Khlestov, USSR)

26. At its thirtieth session, the Commission had accomplished important work on the study of the proposal for a protocol on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Its work clearly showed that the legal status of diplomatic couriers and the diplomatic bag were still not fully regulated. The Commission should therefore continue its work on the elaboration of a draft protocol.

27. His delegation felt that the proposals on the programme and methods of work of the Commission in Chapter VIII should be approved, since they were appropriate to the tasks entrusted to the Commission by the General Assembly. At the same time, his delegation wished to stress that the Sixth Committee and the Commission itself should give more attention to the need for elaborating draft conventions on problems which were of practical interest to States. The Commission was not an academic body. The drafts which it prepared were ultimately considered by States, which naturally were interested in drafts that regulated the practical activities of States.

28. Mr. SIRCAR (Bangladesh) said that the Commission's report on the work of its thirtieth session was a commendable step in the progressive development and harmonization of international law. Without prejudice to further comments on that subject, he wished to make some observations on the report.

29. The articles on the most-favoured-nation clause were indeed an important contribution to the codification and progressive development of international law and were an amalgam of material derived from history, treaties, State practice, legal doctrines, and decisions of municipal courts and international tribunals.

30. Reviewing the scope and content of the draft articles in general, he said that in article 24 the words "in conformity with the relevant rules and procedures of a competent international organization of which the States are members" were, in the view of his delegation, restrictive in scope and effect and 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 article should therefore be reviewed, so that the developing States might reap the benefit of quick economic growth in close co-operation with one another.

31. Article 30, which provided that the draft articles were without prejudice to the establishment of new rules of international law in favour of developing countries, needed further development to promote the interests and economic development of those countries. In view of the legal complexity of the most-favoured-nation clause, his delegation believed that careful consideration of the articles by Governments was absolutely necessary and that reasonable time should be given for careful scrutiny before a conference for the adoption of a convention was convened.

32. With regard to the draft articles on State responsibility, he said that while under article 20, a State's failure to adopt a particular course of conduct gave

(Mr. Sircar, Bangladesh)

rise to State responsibility, under article 21 that responsibility arose from the failure of a State's conduct to achieve a specified result. A State incurred no responsibility for an injury suffered by an alien unless some fault either of commission or of omission could be attributed to that State; a State was not responsible for an injury resulting from the act of a private individual or a public servant acting without authority or intentionally exceeding his authority. But it was necessary to determine whether in such a case the State should have prevented the injurious act and whether it had taken the remedial steps required of it by law. State responsibility could arise by breach of treaty, by breach of contract, by expropriation, by tort or by denial of justice; in any case, an international claim was always subject to exhaustion of local remedies and to a test of nationality. With regard to the former, the absence of a period of limitation for international claims meant that the precise time of the breach of obligation, whether before or after the exhaustion of local remedies, might have no effect upon the claim.

33. Under article 22, it was necessary for the aliens to exhaust the remedies which, though theoretically available, would be ineffective or insufficient to redress the injury of which they complained; there might therefore be exceptions to the rule of exhaustion of local remedies when there was no justice to exhaust, as in the Robert E. Brown case and the Interhandel case. A significant question was when local remedies would be deemed to have been exhausted - whether it would be sufficient that every contention advanced in the claim had been examined by the municipal courts and that there was no further right of appeal or that such right as existed was illusory or so insubstantial as to excuse its not being exercised, or that the application of the remedies was unreasonably prolonged. Consideration of that aspect of the rule and of the possible exception might be necessary for the progressive development of international law in respect of State responsibility.

34. With regard to the rule of nationality, there should be a bond of nationality between the claimant State and the injured person, which not only should exist at the date of the original injury but also should continue until the date of the judgement or award; further, there should be genuine and effective links between the person injured and the claimant State. The inhabitants of a protected State or aliens serving on the merchant ships or in the armed forces of a claimant State might form an exception to the rule of nationality. Under article 23, a breach of obligation occurred only if the State concerned failed to prevent a given event by the conduct adopted; the obligation was one of result and not of conduct.

35. Article 25 needed further scrutiny, in view of the importance of the moment of the breach for the purpose of jurisdiction of the court, limitation, compensation and nationality of claim. Article 26 provided that the breach of an international obligation requiring a State to prevent a given event occurred when the event began and that the time of commission of the breach extended over the entire period during which the event continued. The occurrence of the event which the State should have prevented was the sine qua non of the existence of a breach of the obligation and consequently would also be the decisive factor in determining the moment and the duration of the breach. Article 27 introduced the element of mens rea

(Mr. Sircar, Bangladesh)

in respect of the commission of an internationally wrongful act and would deter States from participating, even by means of lawful acts, in the internationally wrongful act of another State.

36. With regard to the draft articles on succession of States in respect of matters other than treaties, he suggested that the brackets around the word "international" should be removed in article 18, since it was to international financial obligations that the provisions referred. Many States had become independent during the past 33 years; no State debt of predecessor States should pass to the newly independent States, including emergent States or States becoming independent by means other than the voluntary transfer of part of the territory of a State. Further, in the case of passing of debts by agreement, if such agreement was obtained from the newly independent State involuntarily, that State should have the right to repudiate it.

37. Mr. IHAMA (Nigeria) emphasized the importance of the most-favoured-nation clause to the developing countries' economies and to their trade with developed countries; the draft articles had taken account of the interests of the developing countries in that area and were therefore acceptable as a basis for negotiation and for the conclusion of a future convention. With regard to articles 4 and 5, his delegation believed that the scope of the most-favoured-nation clause was sufficiently broad to cover the concept of national or preferential treatment; therefore, in the case of most-favoured-nation treatment, a beneficiary State was in a position to opt for either kind of treatment. His delegation was aware that, given the economic inequality existing between States, the general application of the most-favoured-nation clause, mutatis mutandis, would cause greater hardship to developing countries than was intended, and he therefore commended the Commission's inclusion of draft articles 23 to 26. With regard to article 25, he agreed that an advantage accorded by a contracting party to adjacent countries in order to facilitate frontier traffic was justified, as was the exception in relation to rights and facilities extended to a land-locked third State. The article was in accordance with the stipulation in articles 21 and 23 of the Charter of the Economic Rights and Duties of States, calling on developing countries to endeavour to promote the expansion of their mutual trade by granting trade preferences to other developing countries; thus, the Commission had translated into legal norms UNCTAD's aims and recommendations on the subject, and the Commission's work should therefore be viewed as contributing to the progressive development of international law.

38. He noted with regret the view expressed by some representatives in the course of the debate that international trade practice had not yet reached a stage that would warrant the inclusion of articles 23 and 24. UNCTAD's 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 a generalized, non-discriminatory and non-reciprocal

(Mr. Ihama, Nigeria)

preference in favour of developing countries. The inclusion of articles 23 and 24 was therefore clearly justified.

39. He expressed concern at the fact that the position of customs unions and free-trade areas had been specifically omitted from the draft. That question merited consideration within articles 23 to 26; it involved not so much the progressive development of international law as the codification of rules which had already been accepted in GATT. However, within the provisions of article 29, 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. His delegation therefore believed that article 29 was one of a residuary nature within which the question of customs unions and free-trade areas could be accommodated.

40. His delegation saw no legal justification for the inclusion of article 27, which merely reproduced in substance the text of article 73 of the Vienna Convention on the Law of Treaties and had no relevance in a convention on the most-favoured-nation clause. It was to be presumed that the general rules set out in the 1978 Vienna Convention on Succession of States in respect of Treaties would apply. Similarly he found no necessity for the inclusion of article 28; if the purpose was the same as in the Vienna Convention, the provision should be brought into line with article 7 of that Convention, which allowed for some degree of retroactivity. Although ILC had indicated that the States bound by the draft articles would not necessarily be parties to the Vienna Convention of 1969, his delegation believed that 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. His delegation would welcome a provision on the settlement of disputes along the lines proposed by the Commission in its report, inasmuch as the draft articles in their present form would not provide an automatic solution to all questions which might arise from the interpretation of the most-favoured-nation clause.

41. With regard to State responsibility, his delegation had noted the progress made by the Commission in its work on the topic. However, article 25 presented certain "choice of law" problems for an international lawyer, in the absence of a Convention on the "choice of law" rule applicable to tortious acts. In the case of a continuing act or of an act having a continuous character, 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 wrongful by the law of the place where the action was instituted and by the law of the place where the act was committed. In connexion with the formulation of article 27, his delegation endorsed the Commission's decision to discard the concepts of "complicity" and "accessory", as concepts pertaining to the field of municipal law.

(Mr. Ihama, Nigeria)

42. With regard to succession of States in respect of matters other than treaties, he suggested that the Commission should attempt to follow, in so far as was practicable, the form and structure of its work on succession of States in respect of treaties.

43. Mr. CABADA BARRIOS (Peru) emphasized that it was vital to the interests of developing countries that special and preferential systems should be excluded from automatic application of the most-favoured-nation clause. The Andean Pact and the Latin American Free Trade Association, for example, would encounter difficulties if the clause was applied to States which were not members of those associations. His country was therefore in favour of making exceptions in the case of those systems which benefited developing countries and in the case of the treatment accorded to such countries within customs unions and other integration systems. As it was legally difficult to demonstrate the existence of a customary rule establishing an implicit exception in those cases, such a rule should be adopted by a political decision at a plenipotentiary conference or in the General Assembly, in the final stage of codification. With regard to the proposals drawing the attention of the General Assembly to the most-favoured-nation clause and treatment extended in accordance with the Charter of Economic Rights and Duties of States and treatment extended under commodity agreements (A/33/10, para. 55) and the most-favoured-nation clause in relation to treatment extended by one member of a customs union to another member (A/33/10, para. 57), his delegation considered that similar provisions referring to regional and subregional integration systems should be included in the codification text adopted. His delegation attributed special importance to and was fully in support of article 24, which had been 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.

44. With regard to succession of States in matters other than treaties, articles 23, 24 and 25 were simple and clearly worded and gave rise to no major problems. With regard to the question of treaties concluded between States and international organizations, or between two or more international organizations, the 34 articles adopted by the Commission up to 1977 were generally in conformity with the rules laid down in the Vienna Convention on the Law of Treaties. With regard to the articles adopted in 1978, article 2 (h) and articles 35, 36, 37 and 38 dealt with the problem of third States and closely followed the corresponding provisions of the Vienna Convention. However, that Convention dealt only with treaties between States, and in view of the essential difference between States and international organizations, articles 35, 36 and 37 required that in the case of third organizations there should be express acceptance of obligations and assent (which was not presumed) to rights, and that both acceptance and assent should be governed by the relevant rules of the organization. His delegation approved of that system and therefore supported the articles in question, which it considered technically and legally satisfactory.

(Mr. Cabada Barrios, Peru)

45. With regard to article 36 bis, he observed that States could delegate treaty-making capacity to an 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 EEC or the Andean Pact. Member States could always control the scope of the obligations to be entered into by the organization. His delegation therefore felt that the rule embodied in article 36 bis would be useful to small countries in collective negotiations conducted through or by virtue of organizations representing their interests. Consequently, it felt that article 36 bis was necessary.

46. With regard to State responsibility, his delegation approved of articles 23 to 26, which were in keeping with the articles previously approved, particularly with articles 18, 20 and 21.

47. Mr. KOROMA (Sierra Leone) said the most-favoured-nation clause, which still governed a large part of world trade had as its object the attainment of equality of treatment between nationals of different States in normal legal relations and the elimination of discrimination in inter-State relationships. The International Law Commission, by formulating a final text of the draft articles on the clause, had succeeded in relating international law to problems connected with the new international economic order and global economic development. That was very important for the emerging principles of international economic relations. Two such emerging principles which the Commission had attempted progressively to develop could be found in the General Agreement on Tariffs and Trade (GATT) and in the Charter of Economic Rights and Duties of States. However, 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 GATT and in the current work of UNCTAD. Articles 18 and 19 of the Charter of Economic Rights and Duties of States 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. Against that background, his delegation welcomed the inclusion of articles 23, 24 and 30 in the draft articles on the most-favoured-nation clause.

48. Turning to the draft articles themselves, he remarked that articles 4, 5, 6 and 8 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 in virtue of their own treaties containing such clauses. He noted with interest that articles 8, 9 and 10 in the 1976 draft dealing with unconditionality and its effect and material reciprocity had been substantially reworked in the light of the criticism that they were too abstract and offered

(Mr. Koroma, Sierra Leone)

only nominal equality to the developing countries. Articles 11, 12 and 13 of the current draft represented an improvement over the 1976 draft, but did not sufficiently emphasize their unconditionality vis-à-vis the developing countries. His delegation endorsed the comments made by the representative of Bolivia in that regard. GATT, UNCTAD and the Charter of Economic Rights and Duties of States granted developing countries the right to develop trade among themselves and to enter into such mutual trading relationships without being expected to grant similar treatment to third States. The current article 12 did not represent a substantial improvement over article 9 in the 1976 draft, which reflected the ejusdem generis rule and depended on the interpretation of concrete clauses. At first sight, the rule might appear straightforward enough, but when applied to the relevant articles, it became more difficult to interpret. The clause might simply state that a beneficiary might be granted most-favoured-nation treatment in respect of customs duties without stating who was to benefit directly. Under article 9, paragraph 1, the scope of the subject-matter might mean diplomatic, consular or any other relationship. Article 9, paragraph 2, limited the acquisition of rights to the persons and things specified in paragraph 1. Such persons or things would benefit only if they belonged to the same category as those of the third State. With regard to articles 13 and 20, it could be seen that while article 13 was based on reciprocal treatment, article 20 was based on the communication of consent. Furthermore, article 20 appeared to be a better draft. In any case, it was difficult to determine what reciprocal treatment was in the case of international trade.

49. It was significant that articles 15, 16, 17 and 18 reflected the unconditional most-favoured-nation clause. Under those articles, the beneficiary State acquired for itself the right of most-favoured-nation treatment independent of gratuity or compensation. There could be two categories of most-favoured-nation clause - conditional or unconditional - but the clause could not be half conditional and half unconditional. Moreover, the relationship between the granting and the beneficiary State under which treatment was granted to a third State could not be transferred. If the treatment was gratuitous it could not take away what had been accorded by a granting State. That was in keeping with modern practice.

50. Article 23 was very important for the developing countries as it took into account preferences that developing countries accorded each other to promote mutual economic development. The article depended on the existence of the generalized system of preferences and was juridically well-founded. Even if it did not completely meet the test set up by UNCTAD, it was nevertheless a step in the right direction. His delegation also welcomed the inclusion of article 24. Article 23 bis would discriminate against developing countries, as they could not ask for the terms which developed States granted to each other within a customs union. Its inclusion in the proposed convention would be in disregard of article 23. The inclusion of article 30 was most appropriate and represented another attempt by the Commission to place a legal imprimatur on an emerging principle of international law. In the view of his delegation, the Commission's work on the most-favoured-nation clause was a commendable effort to codify and

(Mr. Koroma, Sierra Leone)

progressively develop international law, particularly in the field of international trade.

51. His delegation attached great importance to the subject of State responsibility, particularly with regard to the circumstances in which and the principles whereby an injured State became entitled to redress for damage suffered. The importance of the subject stemmed from the fact that it was basic to international law and complemented all its basic principles, including the non-use of force. He noted the close connexion between articles 23, 24, 25 and 26, adopted in 1978, and articles 20, 21 and 22, adopted in 1977. His delegation still held the view, expressed in 1977, that the Commission should emphasize the regulation of the conduct of States rather than judicial practice of doctrine.

52. With regard to succession of States in respect of matters other than treaties, his delegation had no difficulty with the new provisions on State debts and would await the completion of the remaining draft articles before making more detailed comments.

53. On the question of treaties between States and international organizations or between two or more international organizations, he recalled that the Vienna Convention on the Law of Treaties did not cover international organizations. Moreover, there was no law of international organizations and in any case no two international organizations were alike, whereas States were alike. One outstanding feature of international organizations was that they were detached from their members. They had a capacity to undertake acts of a relative character within several juridical systems or within their own individual legal systems. They could undertake acts as from one international organization to another. A supra-national organization could perform all those acts but it was still not the same thing as an international organization. According to article 2 (1) (f) of the Vienna Convention, an international organization was an interdepartmental organization. Those considerations were of relevance to article 36 bis.

54. His delegation looked forward to the report by the Special Rapporteur on the non-navigational uses of international watercourses. The existing principles were too general to regulate the topic, particularly with regard to international pollution. There was a need not merely to codify existing rules and practices, but to define and concretize the relevant principles. The economic aspect of the problem must be considered and so a multidisciplinary approach would appear to be the best method. Of course, no two watercourses were the same and in that respect it would be difficult to say whether the Commission would be able to elicit principles of universal import and application. The problem had become urgent with ever-increasing industrialization and urbanization, population increase and the demand for cleaner water.

55. In conclusion, he said that, while his delegation realized that the Commission's current report was perhaps exceptionally long because of the important matters with which it dealt, the practice of submitting such a voluminous report during the session should be discontinued, as it did not

(Mr. Koroma, Sierra Leone)

allow States enough time to make a constructive contribution to the debate. That was particularly important to those members of the Sixth Committee who were not members of the International Law Commission.

56. Mr. HILGER (Federal Republic of Germany) said that his Government had followed with great interest the progress of the Commission's work on the draft articles on State responsibility. The new articles 23-27 were intended to establish a complete set of rules devoid of any loop-holes. His delegation supported all endeavours to avoid legal uncertainties wherever possible. It felt, however, that there was a danger in establishing provisions that were too abstract, since it was difficult to anticipate their scope of application. Such provisions, instead of establishing greater legal certainty, 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 legal European tradition, because they did not easily lend themselves to the pragmatic approach that prevailed in international law. There was a risk, therefore, that those draft provisions might not be ratified by the required number of States.

57. His delegation also had some objections regarding the substance of the draft provisions. It questioned whether an obligation under article 23 could always be separated from an obligation under article 20. The draft articles were mute on the question of whether an obligation under article 20 might conflict with an obligation under article 23. He wondered whether the minute differentiation in articles 20 and 23 were really necessary.

58. His delegation had doubts about article 27, not only from the perspective of legal systematization, but also because it wondered whether the draft provision was really in accord with applicable customary international law. Many of the situations quoted as examples of aid and 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 and assistance into international law. He warned that actions which were admissible under current rules of neutrality might give rise to counter-measures or claims because they constituted acts of aid and assistance. A more marked restraint and regard for existing international law would seem to be in order. He also wondered whether the general orientation of the draft provisions, 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 had been contributory 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. In the view of his delegation, such notions were inappropriate as the basis for a general rule on wrongful acts under international law.

(Mr. Hilger, Federal Republic of Germany)

59. His delegation hoped that in its future work on the topic of State responsibility, the Commission would refrain from making excessively subtle distinctions. It hoped, in particuler, that it would not yield to the temptation to establish a parallel with domestic penal law relating to individuals where there was no room for such a parallel under international law. His delegation also trusted that the Commission would keep its task fully in mind in drawing its legal conclusions from the distinction between crimes and delicts in respect of internationally wrongful acts under article 19. The Commission's task was to prepare provisions on the responsibilities 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. In his delegation's view, that concept should not lead to the conclusion that any kind of counter-measure was admissible. The prohibition of the use of force under international law within the meaning of the United Nations Charter 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 prohibition of the use of force under international law. Apart from that, any other counter-measures must likewise be in proportion to the crime or delict concerned. In order that its work might have the largest possible impact on international law, the Commission should realize that international law could be developed further only through realistic steps and with due regard to its already existing rules.

60. The results of the recently concluded Vienna Conference on Succession of States in Respect of Treaties would have an immediate impact on the Commission's future work on the draft articles on succession of States in respect of matters other than treaties. The provisions which were of equal importance for both texts should be drafted along the lines of the new Vienna Convention so as to ensure that both had the same scope. That had not been fully achieved so far. Article 22, paragraph 2, for instance, deviated form the wording of article 13 adopted by the Vienna Conference. In Vienna, a number of States, including his own had been unable to endorse the substantive contents of article 13. Despite those reservations, which it had to uphold, his delegation felt the Commission should review as soon as possible the relevant parts of its draft on succession of States in respect of matters other than treaties in order to adjust them to the new Vienna Convention.

61. With regard to the articles adopted at the Commission's thirtieth session, article 23, paragraph 1, seemed appropriate. In the view of his delegation, however, the attribution of the debt burden of the predecessor States to the component parts of the successor State, as provided for in article 23, paragraph 2, did not change the liability of a united or reunited State as a whole. The distribution of debts under the internal law of a State had no bearing on the legal status of the criditors of that State. His delegation had certain doubts whether that situation was reflected with sufficient clarity in article 23, paragraph 2. It therefore suggested the following wording for that paragraph:

(Mr. Hilger, Federal Republic of Germany)

"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 States to its component parts."

62. Articles 24 and 25 provided broad guidelines for the settlement of debts in the event of separation of part or parts of the territory of a State or the dissolution of a State. Both articles contained only references to a division of debt which, in practice, would probably always have to be settled by agreement. The question of who was liable prior to such a contractual distribution of the debts was not settled in those articles. That, in his view, was a very serious problem in terms of the application of those rules in practice. Articles 24 and 25 would presumably become practicable only after dispute settlement machinery had been introduced 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. Yet it was very unsatisfactory if a creditor had no debtor to turn to prior to distribution of the debt, since, in that event, a lack of agreement between the successor States on debt distribution was, in fact, rewarded.

63. Articles 24 and 25 seemed to make it clear, as far as could be seen, that the proposed convention needed effective dispute settlement machinery. Working out more precise criteria for debt distribution would not suffice to cover the great variety of possible circumstances and interests involved in the case of secession or dissolution of a State. His delegation therefore endorsed articles 24 and 25, but believed that the Commission should try in the meantime to define more clearly the position of the creditors.

64. Turning to the draft articles on treaties concluded between States and international organizations or between two or more international organizations, he remarked that although the Vienna Convention on the Law of Treaties had not so far entered into force, it was an important source of reference for States on questions of the law of treaties which exercised considerable authority. He hoped 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. 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 would it be possible to establish an adequate basis for the further development of those rules. His delegation therefore regretted that a tendency had emerged in the Commission to ignore certain legal developments during the post-war period. It was difficult to understand why an attempt had been made in the Commission to question the legal system that accorded a favourable legal standing above all to third world countries. Under that system, States which had concluded a treaty with the European Economic Community (EEC) were entitled to make direct claims under that treaty against any of the member States of the Community. The arguments advanced for certain political reasons against article 36 bis of the draft seemed to lack legal validity. 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. EEC implemented a policy of world-wide economic and development co-operation. A direct commitment of member States of organizations like EEC did

(Mr. Hilger, Federal Republic of Germany)

not run counter to the principle that treaties obligating third parties, namely the members of the organization concerned, might be concluded under international law only with the consent of the third party. Such consent was implied in the accession to an organization, if that organization was entitled under the statutes to bind member States directly. In the view of his Government, new legal developments must be taken into account in any codification of international law and should not be excluded from it. Moreover, irrelevant criteria would not be permitted to influence the work of the Commission on the draft before the Committee, all the more so since that might lead to legal uncertainties detrimental to third world countries.

The meeting rose at 6 p.m.