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Chairman: Mr. MENDOZA (Philippines)

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The meeting was called to order at 3.25 p.m.

AGENDA ITEM 106: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS TWENTY-EIGHTH SESSION (A/31/10) (continued)

1. Mr. SIAGE (Syrian Arab Republic) said that the substantial and detailed report of the International Law Commission was a most valuable legal document which reflected great progress in the elaboration of durable legal principles capable of guaranteeing international peace and security. The Commission's task was not only to codify existing rules, which were often obsolete, but also to establish new legal norms which could translate basic contemporary trends in international law. His delegation, which would limit itself to making a few comments, reserved the right to submit at a later time a more complete appraisal of the report as a whole.

2. Regarding the form of the report, he said that it was difficult for many delegations to give proper consideration to such a voluminous document, which, moreover, had been submitted late. He hoped that, at its next session, the Commission would be able to state explicitly, in a general introduction, which new aspects of the questions under consideration had been the main focus of its work.

3. Regarding the most-favoured-nation clause, his delegation was convinced that the starting point of the Commission's work, namely, the principle of non-discrimination set forth in General Assembly resolution 2625 (XXV), was a valid valid legal basis. It none the less remained true that, in relations between developed and developing countries, the most-favoured-nation clause was more to the benefit of the developed countries. As indicated in the UNCTAD memorandum, quoted in paragraph 41 of the report, "to apply the most-favoured-nation clause to all countries regardless of their level of development would satisfy the conditions of formal equality, but would in fact involve implicit discrimination against the weaker members of the international community". Under those circumstances, in applying the clause, due consideration must be given to the interests of the developing countries, and must be made for special measures on their behalf to enable the gap between developing and developed countries to be closed. In that connexion, article 21, which provided for exceptions on behalf of developing countries, was not satisfactory in its present form. It did not reflect the new principles which had been laid down in various United Nations instruments in recent years, particularly those set forth in the Charter of the Economic Rights and Duties of States and in the resolutions concerning the New International Economic Order. It also failed to reflect the provisions adopted by UNCTAD, in particular at its second session in 1968, and those adopted at the GATT Ministerial Conference held at Tokyo in 1974.

4. His delegation agreed with the principle embodied in article 27 and believed that it should be taken as a basis for developing international legislation and granting exceptional preferential treatment to developing countries. It nevertheless nevertheless felt that it was possible to improve the wording of that article and to supplement it by guarantees in favour of developing countries.

(Mr. Siage, Syrian Arab Republic)

5. With regard to State responsibility, his delegation agreed with article 19 in which aggression, colonization, racial discrimination, genocide and apartheid were treated as international crimes. It supported the distinction between international crimes and international delicts and felt that the Commission should now contemplate economic, political and military measures which could be adopted as sanctions against international crimes and delicts.

6. In conclusion, he wished to point out that it was questionable to put aggression and pollution on the same footing. Pollution was basically a technical problem which was well outside of the scope of contemporary international law.

7. Mr. LAUTERPACHT (Australia) said that in stating its opinion on the ILC report, his delegation found itself in a dilemma. While welcoming the undeniable scientific value of the report, which reflected the serious work carried out by members of the Commission and which was an important reference document, one should not lose sight of the fact that it was above all a document to be submitted to the General Assembly and that its main function was to serve as a link between the Commission and the Assembly and, as such, it was being submitted for a specific purpose. It should enable members of the Sixth Committee to scrutinize the Commission's work from the point of view of their Governments and to give the Commission some idea of the likely reaction of Governments to proposals in the report. That was a worthwhile task which the Committee could only carry out if it was in a position to deal in a serious and detailed manner with substantive points. The Committee should bear in mind that mere general expressions of approval could, under certain circumstances, give rise to misunderstanding and that if its deliberations were too vague, the Commission might assume that certain proposals were receiving more support than was the case.

8. That led to two preliminary conclusions. First, the ILC report was too long. Despite the pleas made at the previous session by the Sixth Committee, it was more voluminous than that of the previous year. If nothing was done to combat that trend towards "inflation", it might grow to such dimensions that it would cease to be a subject for debate and, consequently, no longer serve as a link between the Commission and the Assembly. It was therefore necessary, once again, to urge the Commission to limit the length of its report. It went without saying that the Commission could not reduce the number of topics which it had to examine, but it could restrict the length of some of its commentaries, particularly by not repeating academic commentary which appeared in special reports - published as an integral part of the ILC Yearbook - and by limiting itself to cross-referencing.

9. With regard to the length of commentaries, he did not share the opinion of the Commission's Chairman that if a selection was to be made, the commentaries on the preliminary draft articles should be more substantial than those on the final drafts, since the first better reflected the preparatory work and were more useful for the interpretation of treaties. On the contrary, experience seemed to show that the commentaries on the later drafts were more useful: for example, rarely was reference made to commentaries prior to those of the 1956 draft articles on the law of the sea.

(Mr. Lauterpacht, Australia)

10. Secondly, while it was true that the discussions in the Sixth Committee should be more specific, it was important, in order to gain time, that representatives should limit their remarks to the most controversial items and to those on which the Commission and its Special Rapporteurs needed to obtain, as early as possible, the opinions of Governments.

11. In that sense, he would concentrate his remarks on State responsibility - an item which had been on the Commission's agenda for 13 years. In view of the pace at which the work was proceeding, consideration of the initial survey of the whole subject was still some years away. Under those circumstances, there was reason to wonder whether a distinction should not be made between the essential and less essential provisions. In that connexion, his delegation wondered whether the articles adopted by the Commission at its most recent session - articles 16-19 - were essential for the codification and progressive development of the law relating to State responsibility, and, whether in going into too much detail, there was not a possibility of introducing into the final instrument elements so controversial that the chances of gaining general acceptance might be compromised.

12. Article 16, which declared that the breach of an obligation consisted of conduct which was not in conformity with that obligation, was obvious. Furthermore, the Commission acknowledged the essentially formal nature of that provision in paragraph (2) of the commentary on article 16, and nothing in the commentary led to the conclusion that the inclusion of that article was necessary. Yet, three pages of the report were devoted to it.

13. Article 17, which established the irrelevance of the origin of the international obligation breached, also dealt with a non-question which the Commission had again acknowledged in paragraph (8) of its commentary by pointing out that international jurisprudence had not often had occasion to consider that question explicitly. Yet, 18 pages of the report were devoted to that point.

14. Article 18, which dealt with the temporal element, posed a principle which needed no restatement in the draft articles. It might, perhaps, be conceded that there was room for debate on the content of paragraph 2, which dealt with the effect of subsequent peremptory norms of international law. But the effect of jus cogens in that connexion did not, as yet, form part of State experience, and the prospects of its doing so in the future were slight. As for the treatment in paragraphs 3, 4 and 5 of continuing acts, composite acts and complex acts, they related precisely to the area in which States and the judiciary could be relied upon to use their powers of logic and common sense. Yet 19 pages of the report were devoted to those paragraphs.

(Mr. Lauterpacht, Australia)

15. Article 19 developed the distinction between international delicts and international crimes. It seemed inappropriate at the present time to devote as much attention to that distinction as the Commission had done. The examination of the subject was necessarily incomplete, and the 60-odd pages of the report devoted to it had the effect of diverting the attention of the Commission and States from more urgent aspects of State responsibility.

16. In evaluating the Commission's proposals on the subject, a number of basic questions must be asked: What was the purpose of establishing the distinction between crime and delict in the terms which the Commission was seeking to impose? What was the consequence of identifying a particular act or omission as an international crime rather than as an international delict? What social purpose was achieved by treating an act as a crime rather than as a delict?

17. In the sphere of national law it was clear that criminal law, while existing to protect the fundamental interests of the community, also reflected to a large degree the prevailing moral views of the society in which it operated. Moreover, its sanction was markedly different from the sanction for a delict. Crime carried with it the notion of punishment, while delict carried that of reparation. Lastly, the concept of crime covered a wide range of human behaviour.

18. Translating those elements into the international sphere was far from easy. First of all, there was the difficulty of identifying objectively those acts which most offended the moral sense of the international society. That was what the Commission had sought to do in article 19, paragraph 3, by making a list of violations which might constitute international crimes. It had mentioned aggression, denial of the right to self-determination, slavery, genocide, apartheid and massive pollution of the atmosphere or of the seas. But were those really the most morally offensive acts in the present world community? It could be argued that from a practical point of view it would have been preferable to refer, for example, to the violation of the standards of humanitarian conduct in time of hostilities or to failure to comply with the standards of conduct prescribed in the fundamental conventions on human rights. Moreover, every time it was concluded that a particular line of conduct, though prohibited, was not criminal, the value of the prohibition might be weakened.

19. He further recalled that the ILC study dealt only with State responsibility, leaving aside the responsibility of individuals for the commission of crimes. In the case of individuals, personal sanctions, whether corporal punishment, imprisonment or even execution was a familiar concept. But such punishment could not be applied to States; they could be subjected only to pecuniary payment or to internationally controlled sanctions of an economic nature. In so far as the Commission's proposals carried with them the idea that a State might attract international reaction for significant violation of domestic human rights, the limitation thus placed upon absolute concepts of sovereignty was to be welcomed. But in practice, it was difficult to see what moral or social purpose was achieved by fining a State for committing genocide or practising apartheid.

(Mr. Lauterpacht, Australia)

20. Furthermore, while in the national sphere criminal law was applied by the judiciary with every guarantee of objectivity, in the scheme envisaged by the Commission criminal sanctions applicable to States would, to a large extent, be in the hands of political organs of the United Nations, where legal considerations often played a secondary role.

21. If his delegation's reaction to the Commission's proposals seemed rather negative, it was mainly because the study of the matter was as yet incomplete. As the Commission had stated in paragraph 53 of the Commentary on article 19, the distinction which it was drawing between international crimes and international delicts did not imply that it would conclude that a uniform régime of responsibility existed for the more serious internationally wrongful acts and another uniform régime for the others.

22. That prompted the question whether in draft article 19 the Commission was not tackling a subject which should not have been presented for scrutiny to the Sixth Committee and Governments until such time as the Commission was in a position to propose an integrated set of articles.

23. The Commission could have reserved the possibility of establishing a distinction between the concept of delict and that of crime by adding a few words of reservation to an uncontroversial article and a page or two of commentary. As it was, the Commission seemed to be inviting the Sixth Committee to approve a basic distinction without being privy to the whole of the Commission's thought on the subject; such approval would be premature. Moreover, his delegation had strong reservations about the method of argument which the Committee had adopted. It appeared to have placed one thin argument upon another on the assumption that propositions which were individually unconvincing might, if sufficiently repeated, assume the dimension of law.

24. He urged the Commission to concentrate its attention on such essential problems as the exhaustion of local remedies, State responsibility for breach of contract and considerations of force majeure or national security which limited responsibility, and to leave until a later date the comprehensive exposition of the distinction between international delicts and international crimes.

25. He had dwelt at length on the chapter concerning State responsibility, and in particular on article 19, because he believed that in order to make a useful contribution to the consideration of the Commission's report, members of the Committee should focus on a particular issue which raised questions of method and approach. That concentration should not be seen as suggesting lack of interest on his part in the chapters on the most-favoured-nation clause, the succession of States in respect of matters other than treaties or the non-navigational uses of international watercourses. His criticism of article 19 and of the Commentary on it had been made in a constructive spirit and stemmed from a profound concern with the Commission's work and with the future of the international legislative process. His delegation wished the Commission's work to proceed rapidly and to deal with matters where specific and identifiable effects could be achieved, leaving aside the pursuit of the unattainable. It was conscious of the delicacy of the choice which the Commission must make between restatement of established principles and the search for new trails.

(Mr. Lauterpacht, Australia)

26. With regard to the organization of the work of the Commission, his delegation welcomed the establishment of the planning group and the proposal to create a review committee. It also approved the suggestion that members of the Commission should be enabled to submit written comments in advance of the oral debate on draft articles. Such comments should be published in due course in the Yearbook of the Commission.

27. Mr. GAVIRIA (Colombia) said that it was particularly necessary to regulate the most-favoured-nation clause on the legal level now that its application was no longer limited to commercial treaties but extended to such diverse fields as transport, the establishment of aliens, diplomatic and consular immunity, the administration of justice and intellectual property.

28. His delegation was pleased with the set of draft articles on the most-favoured-nation clause but felt that the Commission should seek to elaborate a more comprehensive text with regard to the exceptions to its application. In particular, it would like the draft articles to provide for an exception to the application of the most-favoured-nation clause in the case of customs unions or free-trade areas. The exception provided for in article 22, in the case of frontier traffic, seemed entirely justified.

29. Article 23, which excluded the rights and facilities granted to land-locked States from the application of the most-favoured-nation clause, reflected a new trend which had found practical expression in such important documents as the "revised single negotiating text" (A/CONF.62/WP.8/Rev.1, part II) adopted at the fifth session of the Third United Nations Conference on the Law of the Sea. Article 58 of that document granted preferential treatment to land-locked States for the purposes of exploiting natural resources situated in the waters of the exclusive economic zone of neighbouring States. In view of the disadvantages suffered by land-locked countries as a result of their geographical situation, his delegation strongly favoured the granting of special treatment to those States and hoped that the Commission would retain article 23 in the revised version of the draft convention without changing its spirit.

30. With regard to article 21 of the draft articles, the principle of which he endorsed, he recalled that while a number of States had been able in the past to apply the generalized system of preferences in isolation, the system as it now functioned was relatively recent. It was only in 1971 that the GATT contracting parties had agreed to suspend application of the most-favoured-nation clause for 10 years in order to enable the industrialized countries to apply preferential tariffs to articles imported from developing countries or territories.

31. However, that practice had been applied and interpreted in different ways. Recently, for instance, restrictions had been introduced which ran counter to the aims of the system in that they prevented some countries from increasing their foreign-currency earnings by exporting certain products and thus from improving the standard of living of their population.

(Mr. Gaviria, Colombia)

32. He therefore unreservedly supported article 21, which provided that the treatment accorded within the framework of a generalized system of preferences should be excluded from application of the most-favoured-nation clause, always provided that the system was not applied in a discriminatory or limited fashion.

33. Like the representative of the European Economic Community, he feared that article 15 might be interpreted as binding States parties to a customs union or free-trade area to extend the advantages which they accorded one another to third countries when a most-favoured-nation clause existed. Colombia was party to two major international integration instruments, the Treaty of Montevideo and the Andean Pact, and his delegation hoped that the Commission would continue its work on that question and would adopt a provision which ensured that an express exception was made to the application of the most-favoured-nation clause in the case of customs unions and free-trade areas.

34. In addition, it hoped that the question of settlement of disputes relating to the application of the most-favoured-nation clause, which was barely touched upon in the draft convention, would be examined in greater depth by the Commission, particularly since there were major precedents in the field of economic relations between the countries of Latin America. For instance, the Protocol to the Treaty of Montevideo, which Colombia had ratified, provided effective machinery for the settlement of disputes. Such machinery included not only direct settlement, negotiation and mediation but also an International Court of Arbitration with compulsory jurisdiction.

35. With regard to the law of the non-navigational uses of international watercourses, which was dealt with in chapter V of the report, he felt it would be desirable to use the traditional concept of an international river, which the Final Act of the Congress of Vienna of 1815 defined as a river which crossed or separated the territory of two or more States, thus making a distinction between successive international rivers and contiguous international rivers, in other words, between rivers which might cross the territory of two or more States and those which separated States or served as a frontier between them.

36. Such a distinction would inevitably have major repercussions in the field of sovereignty over river waters. In the case of successive rivers sovereignty was not shared and all riparian States must therefore use their waters in a way which was not detrimental to third countries whose territories were also crossed by the same watercourse, while in the case of contiguous rivers sovereignty was shared, at least in respect of the portion of river which served as a frontier between the States, and in such cases legal regulation of the contiguous river was achieved by agreements concluded between the parties concerned.

37. With regard to question C in the Commission's questionnaire, which asked Governments whether they believed that the geographical concept of an international drainage basin was the appropriate basis for a study of the legal aspects of the pollution of international watercourses, his delegation could accept the definition of drainage basin, given in article II of Title I of the Helsinki Rules

(Mr. Gaviria, Colombia)

However, it felt that that geographical concept could, in certain cases, be given a broader meaning in the integration and development projects or agreements elaborated between the States concerned.

38. His delegation believed that, given its essentially static nature, the concept of an international drainage basin was not the most appropriate basis for serious consideration of the legal aspects of fresh-water use, particularly of fresh-water pollution. In its view, provision should be made for effective legal machinery to settle disputes and thus preserve harmonious relations between peoples.

39. With regard to the legal aspects of fresh-water use, he endorsed the plan of work proposed by ILC, whereby only the agricultural (irrigation, drainage and waste disposal), economic and commercial (energy production, manufacturing, transportation other than navigation, construction etc.), and domestic and social (drinking-water consumption, waste disposal and recreation) uses of water would be considered.

40. Lastly, his delegation believed it would be useful to request experts and technicians to draft a report, within a reasonable time, on the law relating to the non-navigational uses of international watercourses.

41. Mr. MARTINEZ MORENO (El Salvador) said that article 21 of the draft articles relating to the most-favoured-nation clause represented a considerable advance from the point of view both of legal theory and of trade practice, since it took into account the considerable differences which existed between developed and poor countries. He therefore fully endorsed that article; however, he believed that its wording should be amended to reflect not only the principles adopted by UNCTAD but also the economic realities of the contemporary world.

42. Article 27 was entirely appropriate, since it would make possible the adoption of new measures to help reduce the imbalance between developed and developing countries in the field of international trade. However, he favoured the adoption, at its second reading, of a new article which gave legal expression to the principle that developing countries were in no way obliged to extend to industrialized countries the preferential treatment which they granted one another, particularly when they formed part of a free-trade area, a common market, a customs or monetary union or an economic union.

43. With regard to article 22, he particularly welcomed the provision that a beneficiary State other than a contiguous State was not entitled under the most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State to facilitate frontier traffic. Long before the process of economic integration had begun, the States of Central America had provided for special treatment to facilitate frontier traffic. His delegation was also glad to note that the Commission had used the expression "frontier traffic" rather than the traditional "frontier trade". Application of the most-favoured-nation clause should be excluded in respect of the treatment extended to facilitate all frontier activities, not only trading activities.

(Mr. Martinez Moreno, El Salvador)

44. Article 23 also showed the efforts made by the Commission to ensure greater equity in international relations. He therefore supported it without reservation.

45. Although it had not originally been convinced of the necessity for article 24, which confirmed a principle already stated elsewhere, his delegation was not opposed to its inclusion in the draft. It also welcomed the adoption of article 25, which provided evidence of the consistency and uniformity of the Commission's work.

46. As to State responsibility, which presented problems of vital interest to all mankind, and whose rules were evolving very rapidly, he was pleased to see that the Commission's report reflected the new awareness of the international community.

47. His delegation fully approved of articles 16 and 17. It considered article 18 debatable as to form but entirely satisfactory as to substance, since it set forth the indisputable principle of the "temporal element" in breaches of international obligations. Paragraph 2 of that article, which made an exception to the rule set out in the other paragraphs, had been the subject of much criticism. He was aware of the problems that could arise from its application but felt that the paragraph in question was none the less useful and pertinent and should not be deleted. He therefore approved of article 18 as a whole while recognizing, however, that, as suggested by the Netherlands delegation, consideration could be given to the inclusion of safety clauses to ensure respect for the rule of pacta sunt servanda and to enable disputes resulting from the application of paragraph 2 to be adjudicated by the International Court of Justice.

48. Article 19, which had been negatively described as a revolutionary provision, was indeed a significant innovation but its purpose was to protect the vital interests of mankind. There were some who thought it debatable that an article should be based on a terminological distinction between international crimes and international delicts since some languages, particularly Spanish, did not make a very clear distinction between delicts and crimes. It was hard to find more appropriate words, however, and the terminology used in article 19 had the merit of being based on the famous tripartite distinction in classical criminal law between "offences, delicts and crimes". On the other hand, his delegation regretted that article 19, paragraph 3 (a), concerning aggression, did not mention the exception of self-defence, which was provided for in the United Nations Charter.

49. Succession of States in respect of matters other than treaties was a particularly difficult problem since some of its aspects had never been studied in such depth. The articles approved by the Commission at its last session, which dealt with the different types of State succession, and particularly the transfer of part of the territory of a State, the uniting of States, the separation of part or parts of the territory of a State and the dissolution of a State, represented a significant step forward. Moreover, the very clear distinction established between movable property and immovable property was a very constructive new element.

(Mr. Martinez Moreno, El Salvador)

50. Some members of the Commission might have wondered whether there was any point in considering the case of newly independent States since the process of decolonization had practically been completed, but his delegation naturally believed that some peoples were still fighting for their independence and that there was no way whatsoever of predicting the circumstances that would result from their self-determination, as the Special Rapporteur had quite rightly pointed out. If the opposite view were taken, the work of the Trusteeship Council and the Fourth Committee would have to be abolished. For its part, his delegation supported article 13, and particularly the last paragraph, concerning devolution agreements, which stipulated that such agreements should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

51. With regard to the transfer of movable property in the context of State succession, he thought that the distinction between "equity" and "equitable principles", which the Court of Justice had established in the North Sea Continental Shelf cases, was useful and relevant. On the whole, it approved of the Commission's report on succession of States in respect of matters other than treaties, as regards both substance and form.

52. His delegation welcomed the ties of co-operation which the Commission maintained with other international legal bodies such as the Inter-American Juridical Committee, the Asian-African Legal Consultative Committee and the European Committee on Legal Co-operation and it supported the proposal that a new revised edition of the handbook on The Work of the International Law Commission should be published. It was pleased that the Brazilian Government continued to honour the memory of the great international jurist Gilberto Amado and paid a tribute to the efforts made by the Director of the International Law Seminar.

53. Mrs. de PEREYRA (Venezuela) noted with satisfaction that the Commission continued to maintain fruitful relations with the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Inter-American Juridical Committee which would prove extremely useful for the formulation of standards acceptable to the international community as a whole.

54. On the subject of chapter V of the report, concerning the law of the non-navigational uses of international watercourses, to which particular attention should be paid, her delegation regretted that only 20 States, including Venezuela, had replied to the questionnaire sent to them by the Secretary-General (A/CN.4/294), because it was on the basis of government replies that the Commission would draw up the plan for its future work on the question.

55. As to the first question, the scope of the term "international watercourse" for the purposes of a study of the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand, her delegation felt that it would be wrong to attempt a too precise definition. Definitions could change and were restrictive. It would therefore be better to establish generally acceptable, but amendable, criteria, as her delegation had stated at the fourth session of UNEP at Nairobi.

(Mrs. de Pereyra, Venezuela)

56. Generally speaking, it could be said that the definition of an international watercourse should differ expressly from that of a national watercourse which travelled through the territory of a single State.

57. As to the legal criteria for determining whether a watercourse should be considered an international one, there were two possibilities: first, for the purposes of a mere preliminary study not involving an attempt to establish rights and obligations, watercourses which met geopolitical and socio-economic criteria could be considered to belong within the same international framework. Recognition by the States concerned of the international nature of watercourses dealt with in such a study would, in that case, have declaratory force. Secondly, when defining such watercourses with a view to elaborating an international legal régime, legal criteria would have to be applied as well as objective criteria. Those criteria would be based on the common will of the States concerned expressly to recognize a particular situation and to establish a specific régime with a view to safeguarding, harmonizing and equitably serving a set of common interests. The instrument chosen to achieve that purpose would be the internationalization of such watercourses by means of agreements and bilateral and multilateral conventions having constituent value. In that case, the scope of the definition of international watercourses could be much narrower. The notion of an international watercourse might, for example, not apply to a hydrographic basin in its entirety.

58. There was a fundamental distinction between the declaratory and the constituent significance of internationalization. Venezuela could recognize the international nature of a watercourse for the purpose of carrying out a preliminary study if the watercourse met certain requirements, but such recognition only had declaratory force and did not imply the establishment of legal standards and obligations. On the other hand, when the law on international watercourses was to be codified, State recognition of the international nature of a watercourse should be reflected in the elaboration and adoption of specific treaties.

59. Regarding the question whether the Commission should begin its study with the problem of the pollution of international watercourses, she felt that pollution was not a priority issue, since, firstly, it affected mainly the developed countries, which represented only a minority of the international community, and, secondly, consideration of that problem could not be separated from consideration of the social and economic uses of water. Pollution did not exist *per se* but resulted from the misuse or abuse of resources. Emphasis should therefore be placed primarily on harmonizing and regulating the social and economic uses of international watercourses, and that would automatically lead to consideration of pollution of such watercourses at a later stage.

(Mrs. de Pereyra, Venezuela)

60. At the current stage of the Commission's work, general principles must therefore be formulated in order to arrive at an equitable use of water resources. As water had become an essential economic resource, it would be a mistake to formulate restrictive norms which, if applied, could prove detrimental to the well-being of countries.

61. Urgent consideration should be given to the problem raised by international watercourses in relation to international economic co-operation, and formulas should be sought which eliminated the drawbacks created by uncontrolled use of international watercourses.

62. In the specific field of international watercourses, a State should exercise what sovereignty it had over a watercourse without preventing one or more other States from exercising whatever sovereignty they might have over the same watercourse.

63. As the President of Venezuela had observed at the opening meeting of the Second Conference on the International Association for Water Law, held at Caracas in February 1976, interdependence dominated the hydrographic field. The way in which renewable natural resources were managed in other parts of the world had inevitable repercussions on renewable natural resources in Venezuela. The problem was in fact a global one, and therefore it was essential that all countries should co-ordinate the management of their resources. The President of Venezuela had also stressed the need to draft legislation and conclude international agreements for the conservation of natural resources.

64. In conclusion, she hoped that the Commission would remain in contact with all international organizations, in particular with the United Nations Environment Programme, which was also considering that problem, and would continue its work in the vital field of international law.

65. Mr. SCOTLAND (Guyana) said that the draft articles on the most-favoured-nation clause represented a monumental contribution by the International Law Commission to the codification and the progressive development of international law. At a time when international economic relations between States were undergoing critical scrutiny and some modest attempts at restructuring were being made, the draft articles were of special significance and, in his delegation's view, constituted a generally acceptable basic text around which a convention on the most-favoured-nation clause could be elaborated at a future date.

66. The most-favoured-nation clause had evolved from the most favourable treatment accorded by one State to another in certain specific fields to the more generalized meaning which it now had: treatment no less favourable than the treatment accorded by the granting State to a third State. Article 5 confirmed that meaning, while article 7 defined the scope of most-favoured-nation treatment, taking as its point

(Mr. Scotland, Guyana)

of reference either the third State or persons or things "in a determined relationship" with that third State. Thus, the granting State, the beneficiary State and the third State were linked, on the one hand, by the existence of a relationship between the granting State and the third State under any arrangement, not necessarily arising out of a treaty obligation, and, on the other hand, by the presence of a most-favoured-nation clause in a treaty concluded between the granting State and the new beneficiary State.

67. Articles 5 and 7 rightly pointed out that most-favoured-nation treatment could be granted only to persons or things that were in a determined relationship with the beneficiary State. Those articles were faithful to the legal orthodoxy which had accompanied the development of the most-favoured-nation clause and to the theory of selectivity which had always been a part of it. They took the most-favoured-nation clause as a starting point and ignored the relationship between the granting State and the first beneficiary State, which would become the third State under the most-favoured-nation clause and would serve as a reference point for measuring the benefits to which the beneficiary State could claim to be entitled

68. However, in some cases most-favoured-nation treatment represented only one of a complex of several devices which governed relations between two or more States. The relationship existing, on the one hand, between the granting State and the beneficiary State and, on the other, between the granting State and the third State - which was the point of reference - should be more or less equivalent or similar, since the third State provided the measure of the benefits to which the beneficiary State could claim to be entitled. If the scope of most-favoured-nation treatment was tied to that requirement, negotiations on economic relations between States would be simplified.

69. The draft articles omitted the fact that there could be a special relationship between the granting State and the third State which made the granting of special privileges to that third State in a particular field more than an act of commerce. The International Law Commission should therefore be invited to consider that point in the context of article 5.

70. The developing countries tended increasingly to form close relationships with certain other countries, which might or might not be their ideological partners, outside the framework of a common market or a customs union, and very often the privileges which each State enjoyed within the territory of the other were a product as much of that close relationship as of any most-favoured-nation clause which existed between them.

71. It seemed that the beneficiary State should not automatically be entitled, under the most-favoured-nation clause, to all the privileges enjoyed by the third State when that third State had not become entitled to those privileges by virtue of a purely commercial relationship. In that respect, article 7 would also bear re-examination.

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72. In paragraph (24) of its commentary on articles 8, 9 and 10, the Commission acknowledged the possibility of attaining equivalence by stating that "an agreement by which, e.g., unconditional most-favoured-nation treatment is promised to the beneficiary State on condition that the latter will accord certain economic (e.g. a long-term loan) or political advantages to the granting State is perfectly feasible", adding that "obviously such or other conditions have to be inserted in the clause, or in the treaty containing it, or be otherwise agreed between the granting and the beneficiary States". By acknowledging the necessity of establishing such equivalence, the draft articles would offer the most disadvantaged countries an invaluable asset in their negotiations with their more developed counterparts.

73. In paragraph (25) of the same commentary, the Commission observed that the articles adopted did not deal explicitly with the so-called American form of the conditional clause, which had become obsolete, nor with other "independent" conditions which were separate from the favoured interest and related only to something the other party must do or not do to qualify as the most-favoured nation. He felt that in reality those "independent" conditions were not independent, since they must form an integral part of the discussion of the proposed most-favoured-nation relationship and served to determine the magnitude of the benefits to be enjoyed. It would seem, therefore, that consideration ought to be given to that reality in any treaty.

74. Those observations also applied to article 16, according to which the standard of national treatment and the standard of most-favoured-nation treatment had been assimilated. He pointed out in that regard that the standard of national treatment in a State was invariably the highest order of treatment granted by that State and that the most-favoured-nation standard was always a low standard of treatment. It therefore seemed paradoxical that most-favoured-nation treatment, which was the low standard, should be interpreted to encompass national treatment, which carried the maximum number of rights, contrary to the intention of both parties. In his opinion, the standards of preferential treatment, most-favoured-nation treatment and national treatment remained separate standards, although the standard of national treatment invariably incorporated the other two standards.

75. His delegation therefore believed that article 16 gave much too broad a scope to the most-favoured-nation clause and would not, in its present form, be in the interest of the vast majority of developing countries. In contract language, it could not be the intention of the parties to incorporate the standard of national treatment within the most-favoured-nation clause without reference to that standard in the contract. A granting State would not, as a rule, employ the most-favoured-nation clause when it intended to accord the standard of national treatment to the beneficiary State.

76. His delegation would welcome as an addition to the draft a reference to customs unions and other similar associations as exceptions to the most-favoured-nation clause. The decisive role which the establishment of customs unions and other similar associations had played in international trade relations during the

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past two decades showed that it was no mere practice of convenience that treaties provided for exceptions in their favour. Developing countries had increasingly used that device to accelerate their economic development, and, while it was true that State practice and doctrine did not do much to facilitate codification, the extensive use of such exemptions in commercial treaties indicated that the parties to those treaties had not overlooked the possible effect of customs unions or other associations on any most-favoured-nation treatment previously granted. It also indicated that there was need for an explicit recognition of that exception in any set of draft articles on the most-favoured-nation clause. It was still possible to include such an exception and yet enable those States which desired to ignore it to do so.

77. His delegation welcomed the adoption of article 21, since the objective of the system of generalized non-reciprocal non-discriminatory preferences was to give developing countries access to markets of developed countries for their manufactured and semi-manufactured products, thus helping developing countries to improve their trade capabilities. It felt, however, that the Commission should take account of the trend towards broadening the concept of the special treatment given to developing countries in matters of trade by including in article 21 the concept of differentiated or more favourable treatment, as proposed by the representative of Brazil.

78. The generalized system of preferences, though a useful shceme for trade liberalization, needed substantial improvement, mainly because of its temporary nature and its limited coverage, particularly in respect of products of export interest to developing countries and especially to the least developed countries.

79. Intensification of economic co-operation among developing countries was now the order of the day, and article 21 of the Charter of Economic Rights and Duties of States provided that "developing countries should endeavour to promote the expansion of their mutual trade and to that end may ... grant trade preferences to other developing countries without being obliged to extend such preferences to developed countries ... ". All the recent conferences which had concerned themselves with economic issues (the Group of 77 meeting at Manila, the fourth session of UNCTAD at Nairobi, the Conference of Heads of State or Government of Non-Aligned Countries at Colombo and the Conference on Economic Co-Operation among Developing Countries recently held at Mexico City) had echoed that call for increasing co-operation among developing countries. Article 21 should therefore be expanded so as to reflect present international economic relations, by making an exception to the operation of the most-favoured-nation clause for the preferences which developing States granted to one another.

80. Most-favoured-nation treatment had evolved in response to the needs of the main trading nations and of international trade. The Commission's comments on the abandonment by the United States of America of the conditional clause revealed that instead of coherent development, there had been a series of oscillations in the positions of the main trading nations as a result of fluctuations in international trade and in the commercial strength of the States concerned. Thus

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the evolution of the clause had been a response to considerations other than strictly legal ones. The Commission had recognized that reality but had emphasized the legal character of the clause and the legal conditions governing its application. Nevertheless, those meta-legal realities did exist and, to a large extent, determined the shape and content of any legal principles which were the subject of efforts at codification, since neither the evolution nor the progressive development of international law could take place in isolation from the international, social, economic and political realities governing the relaticns between States. Although the Commission had been aware of those meta-legal influences, it had not considered them.

81. Given the Commission's desire to base its study on the broadest possible foundations and in view of its Chairman's observations at the preceding meeting, his delegation felt that it would be highly beneficial to submit the draft articles, prior to their adoption, to the competent United Nations bodies which dealt with meta-legal issues that might impinge on the operation of the most-favoured-nation clause. It believed that UNCTAD could make invaluable comments on the draft articles and could express the points of view of both the developing and the developed countries.

82. With regard to the new draft articles on State responsibility, draft articles 16 and 17 needed no comment from his delegation, since they accurately reflected the state of international law on the point in question. He emphasized that the term "an act of that State" in article 16 referred both to action on the part of the State and to failure to act.

83. Article 18, paragraph 2, acknowledged the need to provide for the effect on State conduct of the emergence of a peremptory norm of general international law, and to offer protection to a State which had acted contrary to what was required of it by an obligation incumbent upon it at the time when the act was committed but whose act had subsequently become compulsory under a rule of jus cogens.

84. Article 19 represented an important contribution to the progressive development of international law. He endorsed the distinction made between international crimes and international delicts which would probably occasion the application of different régimes of responsibility. It would appear that in using the words "by force" in paragraph 3 (b), the Commission had envisaged the use of armed force. However, the variety of forms of force in use at the present time made it possible for colonial domination to be established or maintained without the use of force of arms. His delegation therefore favoured deletion of the words "by force". It would also prefer to have the words "the human being" in paragraph 3 (c) deleted and replaced with the words "human rights", which it regarded as more accurate. Subject to those minor amendments, his delegation was in general agreement with the draft articles on State responsibility.

85. He welcomed the five new draft articles on succession of States in respect of matters other than treaties. However, he believed that in article 13, which dealt with the case of newly independent States, movable property might be more precisely defined. For example, did movable property include national treasures and works of

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art? The article was also not very clear as to whether the predecessor State was obliged to return to the successor State movable property removed from the territory before independence. He therefore felt that article 13 might benefit from re-examination in the light of those comments.

86. The chapter of the report dealing with non-navigational uses of international watercourses held exciting prospects for the future study of that subject by the Commission. In that connexion, he commended the Special Rapporteur on his incisive approach to the question. In his view, the study should not be based on the concept of the international drainage basin as set out in the Helsinki Rules in 1966 by the International Law Association. It should recognize the role of the doctrine of permanent sovereignty of States over natural resources coupled with their obligation to co-operate in ensuring the harmonious use and protection of international watercourses.

87. His delegation shared the view expressed by the Commission that in drafting legal norms to govern the use of water, concepts such as abuse of rights, good faith, neighbourly co-operation and humanitarian treatment should be explored together with the requirement of reparation for responsibility. It also believed that the Commission should have recourse to technical and scientific advice when the study on the subject had progressed to the point where such advice was warranted.

88. With regard to the considerable length of the Commission's report, his delegation continued to believe that the aim of the report should be to provide the most complete account possible of discussions in the Commission.

The meeting rose at 6.05 p.m.